

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-016



FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receipt of the applicant's completed application on November 28, 2013, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 5, 2014, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a lieutenant (LT) serving on active duty, asked the Board to remove from his record his non-selection for promotion by the lieutenant commander (LCDR) selection board that convened on August 5, 2013. He alleged that his military record was incomplete when it was reviewed by the selection board because it did not include a CG-4082, Record of Professional Development, documenting his acceptance into a graduate school program leading to a Master's Degree in Emergency Services Management. Therefore, he argued, the selection board did not have his complete military record to review, and he was not selected for promotion.

In support of his allegations, the applicant submitted a copy of the CG-4082 (see attached), which shows that he had been accepted into the graduate program in February 2012 and had received an A in a one-credit-hour course called "Graduate School Orientation" and a B in a three-credit-hour course called "Emergency Management" by February 2013. The applicant's electronic signature shows that he signed the form on March 12, 2013, and his commanding officer (CO) signed it on March 26, 2013.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard in April 1979, served four years on active duty, and was released to inactive duty in the Reserve for two years in April 1983. He reenlisted in the Reserve in September 1998 as a [REDACTED] and drilled in the

Selected Reserve. In [REDACTED] he received active duty orders, attended Officer Candidate School, was commissioned an ensign in the Reserve, and began serving as a port safety and security officer. He received a good officer evaluation report (OER) for this work on [REDACTED] with a mark in the fourth spot (out of seven) on the comparison scale, and was promoted to lieutenant junior grade on [REDACTED]

The applicant was released from active duty on [REDACTED] and drilled regularly in the Selected Reserve as a port safety and security officer. He received another good OER with primarily marks of 4 and 5 in the various performance categories,¹ a mark in the fourth spot on the comparison scale,² and a recommendation for promotion on [REDACTED]. He received a similar OER the next year on [REDACTED] although this OER included a comment about him “continu[ing] to professionally grow in maturity” instead of a recommendation for promotion.

In [REDACTED] the applicant received a Bachelor’s degree in [REDACTED]. He continued to drill regularly and was promoted to lieutenant on [REDACTED]. On his biannual OER dated [REDACTED] the applicant received good marks, another mark in the fourth spot on the comparison scale,³ and a recommendation for promotion “with peers.”

On [REDACTED], the applicant received active duty orders and began serving as a program manager for the Coast Guard’s [REDACTED]. On [REDACTED], he received a good OER with primarily marks of 5 in the various performance categories, another mark in the fourth spot on the comparison scale, and a strong recommendation for promotion “with peers” for this active duty assignment. On [REDACTED], he received an OER covering his inactive duty in the Reserve since [REDACTED], on which he received similar marks and a recommendation for promotion but a mark in the fifth spot on the comparison scale, denoting an “excellent performer.”

On September 30, 2009, the applicant signed a four-year extended active duty contract and began serving as a prevention watchstander at an Area Command Center. On his OER for this service dated July 31, 2010, the applicant received primarily marks of 6 in the various performance categories, another mark in the fifth spot on the comparison scale, and a recommendation for promotion with “best of peers.” His next OER, dated March 31, 2011, contains similar high marks and comments.

On December 6, 2011, the applicant signed a CG-4082 listing dozens of awards, certifications, and qualifications (see attached). His CO signed it on May 1, 2012, and it was entered in his record.

¹ On OERs, officers are evaluated in eighteen different performance categories, such as “Professional Competence,” “Teamwork,” and “Judgment,” on a scale of 1 to 7, with 7 being best.

² On the comparison scale on an OER, the reporting officer compares the reported-on officer to all other officers of the same grade whom the reporting officer has known throughout his career. The 7 possible marks on the comparison scale range from a low of “[p]erformance unsatisfactory for grade or billet” to a high of “distinguished officer.” On an OER form for an ensign and lieutenant junior grade, a mark in the third, fourth, or fifth spot on the comparison scale denotes the officer as “one of the many competent professionals who form the majority of this grade.”

³ On a lieutenant’s OER form, there are 7 possible marks on the comparison scale, ranging from “unsatisfactory” to “best officer of this grade.” A mark in the fourth spot denotes a “good officer” and a mark in the fifth spot denotes an “excellent officer.”

On May 31, 2012, while still serving as a watchstander at the Area Command Center, the applicant received an OER with numerical marks of 4 and 5; a mark in the fourth spot on the officer comparison scale, denoting a “good officer”; and a recommendation for promotion “with peers.” His reporting officer noted that the applicant—

possesses a mature demeanor coupled with a confident, positive attitude. Having an engaging personality, always puts forth personal best effort to promote team work & inspire enthusiasm in others. Highly dedicated to the pursuit [of] life-long learning; currently enrolled in [REDACTED] University’s Master in Emergency Management Graduate program and has aggressively found ways to gain additional professional development opportunities. Previous Marine Safety background has set this officer up for follow-on Prevention assignments, to include Waterways Management, Inspection, or Investigation positions. Recommend for promotion with peers.

Because the numerical marks on this OER were significantly lower than those on his prior OER, the applicant’s OER Reviewer added a comment page on which he wrote the following:

This evaluation reflects [the applicant’s] observed performance by a completely different rating chain when compared to his 2011 evaluation. During this period, there were changes in [the applicant’s] assigned duties associated with the reconstitution of the ... Area Command Center from the previously envisioned larger OPCON Command Center.

[The applicant] was provided performance counseling by both his Supervisor and Reporting Officer during this period. I concur that this evaluation accurately reflects [his] performance.

The applicant was not one of the 268 lieutenants (67%) selected for promotion by the LCDR selection board that convened on August 20, 2012, and reviewed the records of 398 candidates. On January 31, 2013, when his Reporting Officer transferred to another unit, he received another OER with primarily marks of 4 and 5 in the various performance categories, a mark in the fourth spot on the comparison scale, and a recommendation for promotion “with peers.” This OER also praised him for his pursuit of lifelong learning and noted that he was pursuing a Master’s degree in Emergency Services Management and had already earned four credit hours.

On the applicant’s annual OER dated May 31, 2013, he received higher marks—primarily 5s and 6s—in the performance categories, a mark in the fifth spot on the comparison scale, and his new Reporting Officer’s “strongest recommendation for promotion [with] peers.” This OER stated that the applicant was “making continual progress on Master’s prgm in Emergency Services Mngt.” However, the applicant was not among the 242 lieutenants selected for promotion (59%) from the 407 candidates considered by the LCDR selection board that convened on August 5, 2013.

On October 1, 2013, the applicant began serving on a nine-month extended active duty contract.

VIEWS OF THE COAST GUARD

On March 25, 2014, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC admitted that the applicant's CG-4082, which he emailed to PSC on March 27, 2013, was not entered in his record when the LCDR selection board convened in August 2013. PSC noted, however, that the proceedings of selection boards are by statute kept confidential and so it is not possible to know whether the lack of this CG-4082 caused the applicant not to be selected for promotion.

PSC claimed that a CG-4082 is an optional form in an officer's record, not a required form, and that the applicant "bears the burden for ensuring his record is complete, especially for an optional form such as the Record of Professional Development, Form CG-4082." PSC pointed out that on March 7, 2013, it released ALCGPSC 037/13 about the upcoming selection boards, which advised candidates for selection to review their military record (EIPDR) and the Direct Access database to ensure their information was accurate and complete "well before the convening date of the applicable board ... We highly recommend candidates confirm their record is complete." In addition, on June 26, 2013, PSC released ALCGOFF 056/13, the announcement for the LCDR selection board, which likewise advised the candidates "to take steps to review their official record. Directions on how to obtain a copy of the [EIPDR] ... are listed on the PSC BPOS-MR website at" PSC noted that the applicant had several months to check his EIPDR to ensure that the CG-4082 had been entered in it but failed to do so.

PSC stated that before selection boards meet, PSC checks officers' records only for required documents, not for optional documents. PSC stated that it

strongly opposes any preceden[t] being set that allows an officer who was non-selected to argue that the non-selection was the result of an *optional* document not being present for the selection board to view. Each selection board announcement message [published at least 30 days prior to each selection board] published by CG PSC specifically advises "*all officers being considered* [by a selection board] *are highly encouraged to take steps to review their official records.*" While the applicant emailed his Record of Professional Development, Form CG-4082 to CG Military Records on 27 March 2013, he did not take steps to confirm its entry into his record prior to the PY14 Lieutenant Commander (O-4) Selection Board.

PSC concluded that the applicant had ample time to confirm the completeness of his record during the weeks before the selection board convened on August 5, 2013, but did not do so; that his record did contain all required documents—his OERs—when the selection board reviewed it; and that because selection boards are confidential, the reasons for his non-selection in 2012 and 2013 cannot be known. Therefore, PSC and the JAG recommended that the Board deny the applicant's request.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 28, 2014, the applicant responded to the views of the Coast Guard and strongly disagreed with them. He stated that after emailing the CG-4082 to PSC on March 27, 2013, he called the Military Records office to ensure it had been received. Then on or about May 23, 2013, he reviewed his EIPDR and saw that it had not yet been entered in his record. He called PSC again on June 18, 2013; July 23, 2013, and July 30, 2013, because the form was not yet in his record and asked that it be entered to no avail. The applicant stated that he made five attempts to ensure the CG-4082 was entered in his record, which shows due diligence, but learned from PSC on November 6, 2013, that it had not been entered before the selection board met, which may have been a factor in his non-selection. In support of these allegations, the applicant submitted the following documents:

- On March 27, 2013, the applicant sent the CG-4082 by email to the Military Records division of PSC. His email was acknowledged by an employee the same day.
- On July 17, 2013, PSC sent the applicant an email with written guidance about submitting letters to selection boards.
- On July 30, 2013, the applicant responded by emailing his letter to the selection board to PSC for entry in his record. His email does not mention the CG-4082.
- On August 1, 2013, PSC acknowledged receiving the applicant's letter to the selection board. The applicant acknowledged this email the same day and did not mention the CG-4082.
- On November 6, 2013, the applicant forwarded to PSC a copy of his March 27, 2013, email with the CG-4082 and PSC's acknowledgement.
- On May 19, 2014, the applicant exchanged emails with a yeoman about the fact that requests for training should be submitted on CG-4082s; that his training requests had been returned; and that the yeoman had therefore completed a new CG-4082 for him with his training requests.

PRIOR CASES INVOLVING MISSING CG-4082s

In BCMR Docket No. 2011-215 (see attached), the applicant asked the Board to remove his non-selection in July 2010 from his record. He proved that beginning in April 2010 he worked to get several errors corrected and on July 19, 2010, he submitted five signed pages of CG-4082 to his Servicing Personnel Office. However, he later learned that two of the five pages, documenting 22 courses and qualifications he had completed from June 9, 2005, to August 14, 2009, were not entered in his record. Therefore, his record was substantially incomplete when the selection board convened on July 27, 2010.

In the advisory opinion for the case, PSC stated that although the applicant "made every effort" to have his record corrected, his CG-4082 was incomplete when it was reviewed by the selection board. PSC stated that the missing pages "could have had an impact on the board's determination not to promote the applicant, as these omitted documents spanned a five year period of professional development." PSC noted that the applicant had not been selected for

promotion in 2011 even after his record was corrected but recommended that his 2010 non-selection be removed from his record and that, if he was selected for promotion in 2012, his date of rank be backdated to what it would have been had he been selected for promotion in 2011.

The Board found in 2011-215 that the applicant's record was prejudicially incomplete when it was reviewed by the selection board because it was lacking the information on two full pages of CG-4082 entries. Therefore, the Board granted the relief recommended by the Coast Guard.

In BCMR Docket No. 2013-147 (see attached), the applicant asked the Board to remove his August 2012 non-selection for promotion from his record. He submitted evidence showing that he reviewed his record in February 2012 and submitted an updated CG-4082 showing six recently completed courses with his OER in May 2012, which were not elsewhere reported in his record. Although his CO signed both the OER and CG-4082 on June 29, 2012, and forwarded them for entry in the applicant's record, the OER was timely entered in his record but the CG-4082 was not.

The Coast Guard submitted an advisory opinion for 2013-147 very similar to the one it submitted in this case. It argued that relief should be denied because the CG-4082 is only an optional document and that the applicant had not exercised due diligence to ensure that his record was correct and complete when it was reviewed by the selection board.

The Board recommended granting relief in 2013-147, noting that under Articles 1.E.10.k. and 4.C.1. of COMDTINST M1500.10C, officers are required to submit CG-4082s annually and at least a month before a selection board reviews their records. It found that the Coast Guard has a duty under the Privacy Act⁴ to base decisions on accurate personnel records and erred by failing to enter the CG-4082, which showed the applicant's completion of six courses in two years and continuing commitment to professional growth, in his record. The Board found that the missing CG-4082 rendered the applicant's record "substantially incomplete," that the absence of the information was a prejudicial error, and that it was not unlikely that the applicant would have been selected for promotion if the CG-4082 had been in his record given the good quality of the rest of his record. Therefore, pursuant to the *Engels* test,⁵ the Board recommended removing the applicant's non-selection for promotion. The Board's decision was approved by the delegate of the Secretary.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission, and applicable law:

⁴ 5 U.S.C. § 552a(e)(5) (requiring federal agencies to "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination.").

⁵ *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982) (holding that in deciding whether to remove a non-selection for promotion, the Board should answer two questions: "First, was [the applicant's] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?").

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application to the Board was timely.⁶

2. The applicant requested an oral hearing before the Board. The Chair denied the request, acting pursuant to 33 C.F.R. § 52.51, and recommended disposition of the case without a hearing. The Board concurs in that recommendation.⁷

3. The applicant alleged that his non-selection for promotion in 2013 was erroneous and unjust because his record contained a prejudicial error—a missing CG-4082, Record of Professional Development, documenting his enrollment in a Master’s program and completion of one credit hour for completing graduate student orientation and three credit hours for an emergency management course—when it was reviewed by the LCDR selection board. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁸ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁹

4. The Coast Guard has admitted that the applicant’s military record did not include his updated CG-4082 when it was reviewed by the LCDR selection board that convened on August 5, 2013. The Board finds, therefore, that the applicant has proven by a preponderance of the evidence that the CG-4082 that he emailed to PSC on March 27, 2013, was not timely entered in his record before the selection board convened. The Coast Guard has not explained why the CG-4082 was not timely entered in his record. Because officers are required to submit CG-4082s at least one month before their selection boards convene,¹⁰ the Coast Guard clearly expects its personnel to enter such documents into officers’ records within a month so that they will be seen by the selection boards. Therefore, the Board concludes that the Coast Guard committed an error by failing to enter the applicant’s CG-4082 in his record before the selection board convened on August 5, 2013.

5. The Coast Guard argued that the applicant’s record was not incomplete or erroneous when the selection board reviewed it in 2013 because the CG-4082 is “optional.” The Coast Guard did not address the fact that the applicant properly submitted the form for entry in his record more than a month before the selection board met. The Coast Guard also cited no regulation supporting the claim that the form is optional, but in COMDTINST 1410.2, “Documents Viewed by Coast Guard Officer Promotion and Special Boards,” the Coast Guard calls every performance record except OERs “permissive.” Article 1.E.10.k. of the Coast Guard’s Performance, Training and Education Manual, COMDTINST M1500.10C, states the following about members’ responsibilities:

⁶ 10 U.S.C. § 1552(b) (requiring application within 3 years of the applicant’s discovery of the alleged error).

⁷ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that “whether to grant such a hearing is a decision entirely within the discretion of the Board”).

⁸ 33 C.F.R. § 52.24(b).

⁹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992).

¹⁰ U.S. Coast Guard, COMDTINST M1500.10C, Performance, Training and Education Manual, Arts. 1.E.10 k. and 4.C.1. (2009).

Military members, active and reserve, *shall* inform Commander, Coast Guard Personnel Service Center (PSC) and Commandant (CG-1B1) by 1 August of each year of recently acquired training or education on the Record of Professional Development, form CG-4082, for inclusion into Direct Access. (Emphasis added.)

The use of “shall” in this article could be read to mean that the form is not optional but required. Article 4.C.1., however, states the following about CG-4082s in a chapter on workforce development:

The Record of Professional Development (CG-4082) allows military members to include education, training, professional certifications and licenses, and other information in their permanent record. *This form is optional, but strongly recommended.* Regular submission of this form is particularly important for members (both officers and enlisted) whose records will be evaluated by promotion boards and special assignment panels. *In order to ensure its inclusion into an officer’s record, this form must be submitted to Coast Guard Personnel Service Center (PSC-adm-3) at least 30 days prior to any applicable board, panel, or proceeding.* (Emphasis added.)

Therefore, Coast Guard policy is ambiguous about whether the CG-4082 is a required record entry. For the purposes of this analysis, however, the Board will assume that the form is required.

6. An officer’s education is one of the four basic criteria for promotion that selection boards are required to consider,¹¹ and the Commandant expressly instructed the 2013 selection boards that it is important for officers to be dedicated to continual learning.¹² Articles 1.E.10.k. and 4.C.1. of COMDTINST M1500.10C apparently require officers to submit CG-4082s to PSC annually and at least one month before a selection board convenes,¹³ and PSC is supposed to furnish “education information” to the selection boards.¹⁴ Although PSC calls the CG-4082 “optional” and the form is “permissive” under COMDTINST 1410.2, it is the only form on which Coast Guard officers may report their own education and training.¹⁵ The applicant properly submitted his CG-4082 to PSC on March 27, 2013, for entry in his record, but it was not timely entered in his record. Therefore, the Board finds that the absence of the CG-4082 from the applicant’s record when the LCDR selection board convened in August 2013 constituted an error.¹⁶

7. PSC argued that the applicant’s request should be denied because it was his responsibility to ensure that his record was correct when it was reviewed by the LCDR selection board and noted that it had advised officers in ALCGPSC 037/13 and ALCGOFF 056/13 to review their records before the selection boards convened to ensure their accuracy and completeness. The applicant claimed that after submitting the CG-4082 to PSC on March 27, 2013, he had follow-on telephone calls about it, but he did not mention the missing CG-4082 in his subsequent emails to PSC about his letter to the selection board. PSC’s policy of advising officers to

¹¹ COMDTINST M1000.3, Article 6.A.3.b.

¹² U.S. Coast Guard, Commandant’s Guidance to PY14 [2013] Officer Selection Boards and Panels (June 2013).

¹³ COMDTINST M1500.10C, Articles 1.E.10.k. and 4.C.1. (annual submission requirement and requirement for submission at least one month before selection board convenes).

¹⁴ COMDTINST M1000.3, Article 6.A.4.d.

¹⁵ *Id.* at Art. 6.A.4 h.

¹⁶ COMDTINST M1500.10C, Articles 1.E.10.k. and 4.C.1.

check the completeness of their own records is reasonable and practical because an officer is really the only person who has complete knowledge of his qualifications and education and can know what is missing from his record by reviewing it. As noted above, however, the Coast Guard requires officers to submit CG-4082s for entry in their records annually,¹⁷ and the Coast Guard erred by failing to enter the applicant's CG-4082 in his record when he submitted it. The applicant clearly tried to have the CG-4082 entered in his record but was himself unauthorized and unable to enter documents in his own EIPDR. Therefore, despite PSC's policy of relying on officers to check their own records, the Board finds that the absence of the CG-4082 rendered the applicant's record erroneous before the LCDR selection board in August 2013.

8. When an officer proves that his record contained an error when it was reviewed by a selection board, the Board must answer two questions to determine whether the officer's non-selection for promotion should be removed from his record: "First, was [his] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [he] would have been promoted in any event?"¹⁸ When an officer shows that his record was prejudiced before a selection board by error, "the end-burden of persuasion falls to the Government to show harmlessness—that, despite the plaintiff's *prima facie* case, there was no substantial nexus or connection" between the prejudicial error and the failure of selection.¹⁹ To void a non-selection, the Board "need not find that the officer would in fact have actually been promoted in the absence of the error, but merely that promotion was not definitely unlikely or excluded."²⁰

9. For an error to prejudice an officer's record before a selection board, it must add negative information to the officer's record or remove positive information. In BCMR Docket Nos. 2011-215 and 2013-047, the Board granted relief after finding that the applicants' missing CG-4082s rendered their military records substantially incomplete because the significant positive information about the applicants' education and qualifications on the CG-4082s was not available to the selection boards. On the other hand, in BCMR Docket No. 2014-020 (see attached), the Board denied relief after finding that most of the information on Page 7s and award citations (which are also "optional" documents, according to PSC) missing from the applicant's record was actually available to the selection board in the applicant's OERs and Employee Summary Sheet compiled from his electronic records. The missing CG-4082 in this case included the information that the applicant was enrolled in a graduate school program leading to a Master's degree in Emergency Services Management and had successfully completed four credit hours, including student orientation and a course in Emergency Management. The substance of this information was available to the selection board, however, in the applicant's OERs dated May 31, 2012, January 31, 2013, and May 31, 2013. Because this information about the applicant's pursuit of graduate education was available in his three most recent OERs, the Board finds that the error committed by PSC in failing to enter the CG-4082 in his record did not actually prejudice his record before the selection board. Therefore, the answer to the first question of the *Engels* test, "was [the applicant's] record prejudiced by the error[] in the sense that the record

¹⁷ COMDTINST M1500.10C, Article 1.E.10.k.

¹⁸ *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

¹⁹ *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003); *Quinton*, 64 Fed. Cl. at 125.

²⁰ *Engels*, 678 F.2d at 175.

appears worse than it would in the absence of the error[],”²¹ is no, his record was not prejudiced by the error. Because the first prong of the *Engels* test has not been met, the Board finds no grounds for removing the applicant’s non-selection for promotion in 2013.

10. Accordingly, the applicant’s request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

²¹ *Engels*, 678 F.2d at 175.

ORDER

The application of [REDACTED] USCGR, for correction of his military record is denied.

September 5, 2014

[REDACTED]

[REDACTED]

[REDACTED]