

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2014-034**



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**FINAL DECISION**

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. After receiving a letter from the applicant requesting reconsideration of a prior case, the Chair reviewed and docketed the matter as a new case on December 23, 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 in the Reserve, asked the Board to remove from his record his non-selection for promotion to lieutenant commander (LCDR/O-4) by the Reserve LCDR selection board that convened on August 5, 2013, and to direct the Coast Guard not to interfere with his communications to future boards and panels. He alleged that his commanding officer's (CO's) endorsement of his letter to the selection board<sup>1</sup> was improperly redacted before it was presented to the selection board. The applicant alleged that this improper redaction was an act of reprisal by an officer—LCDR T—in the Reserve Personnel Management (RPM) division of the Personnel Service Center who was biased against him because of a prior BCMR case.

The applicant explained that he submitted his letter to the selection board to his CO for review on July 28, 2013, and his CO wrote his endorsement to it on July 29, 2013. After having a legal officer review the letter and endorsement to ensure they conformed to policy, the applicant submitted them to RPM on Wednesday afternoon, July 31, 2013, to be presented to the selection board convening on Monday morning, August 5, 2013. On Friday afternoon, August 2,

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<sup>1</sup> 14 U.S.C. § 730(d) (“An officer eligible for consideration for promotion by a [Reserve] selection board may forward, through official channels, a written communication inviting the attention of the board to any matter in the officer’s record in the armed forces that, in the opinion of the officer concerned, is important to the board’s consideration. A communication forwarded under this subsection shall arrive in time to allow delivery to the board prior to its convening, and may not criticize or reflect upon the character, conduct, or motive of any officer.”).

2013, however, he received an email from a lieutenant at RPM stating that his CO's endorsement had been removed and would not be presented to the board because communications to the selection board "cannot be used as a means of communication from a command to the selection board." Knowing that endorsements were allowed and that the CO's endorsement of another officer's letter had apparently not been removed or redacted, his CO and the executive officer (XO) of his unit sent emails and left voicemails with the Chief and Assistant Chief of RPM several times over the next few days to find out why the CO's endorsement of the applicant's letter had been removed but received no reply. When the XO finally contacted LCDR T by phone and asked for an explanation, LCDR T refused to [REDACTED] in and then, when asked three times why [REDACTED] he had personally reviewed the CO's endorsement, replied with standard procedure, saying that everyone in the office reviewed all of the communications. The XO believed that the Chief and Division Chief of RPM were retaliating against the applicant based on their prior history. (See XO's email attached.) [REDACTED]

[REDACTED] The selection board met from August 5 to 9, 2013. When the applicant asked for a copy of his letter as it was being presented to the Board, he did not receive it until August 22, 2013. On that date, he discovered that two significant phrases had [REDACTED] from his CO's endorsement, one stating that the applicant had an "outstanding record of achievement" and another stating that the CO had "reviewed [the applicant's] military records." The applicant [REDACTED] with these phrases, that his CO's endorsement conformed to all applicable policy, and that the phrases should not have been redacted. He alleged that RPM apparently did not remove or redact the CO's endorsement of the letter of another (LT L) to the same selection board because no such notice [REDACTED] received, and so the redaction of his own letter was clearly unjustified and an act of reprisal. In her letter to the selection board, LT L explained why she had stopped drilling in the Selected Reserve for a couple of years so that she and her children could live with her husband during his overseas active duty assignment for the [REDACTED] [REDACTED] explained how she had used the time productively by taking numerous military correspondence courses, how she had rejoined the Selected Reserve promptly upon her family's return stateside, how she strongly desired to continue serving in the Reserve (see attached). In his endorsement to this letter, the CO praised LT L's "exceptional dedication" in pursuing military education while overseas when she could not drill and noted how quickly she had returned to active status in the Selected Reserve upon her return by initiating the check-in process, contacting other personnel, and thoroughly preparing to become a valuable member of his unit.

The applicant alleged that the redaction of his CO's endorsement was a result of bias and retaliation for his prior BCMR case, BCMR Docket No. 2013-015. He explained that LCDR T was the officer who served as his supervisor in 2010 and signed the officer evaluation report (OER) disputed in that case. As the Assistant Division Chief at RPM in August 2013, LCDR T had control over what documents were shown to the selection board. The applicant alleged that LCDR T was biased against him because of his prior BCMR case and retaliated by ensuring that his CO's endorsement was redacted. The applicant cited as evidence of this retaliation the fact that his CO's endorsement of LT L's letter was apparently presented to the selection board with no interference or redactions. He argued that "[c]orrective action is therefore needed not only as a matter of correcting and removing injustice as provided in 10 U.S.C. § 1552, but also because of the chilling effect such actions generate, improperly discouraging Coast Guard personnel from exercising their statutory right to seek relief from the BCMR." In addition, he stated, whereas

most officers are notified of their non-selection by their own COs, he was notified by email from the lieutenant at RPM, who stated that “[t]he staff had you in the PSC notifications (because your [Direct Access] assignment, most recently, shows RPM-2, not ... . I went ahead and notified you, anyway, since you were on the list. ... you might receive contact from [the applicant’s new chain of command] also.”

### SUMMARY OF THE RECORD

The applicant served four years in the [REDACTED] from 1986 to 1990 and ten years in the [REDACTED] Reserve before enlisting in the Coast Guard Reserve on October 3, 2000. He attended Officer Candidate School and was commissioned an ensign in the Reserve on [REDACTED]. After the terrorist attacks of 9/11, he began serving long stretches of active duty under Title 10 orders. He received very good OERs and was promoted to lieutenant junior grade (LTJG) on [REDACTED]. He continued to receive fine OERs as a LTJG in various stateside and overseas assignments and was awarded a Meritorious Service Medal, as well as Coast Guard and Army Commendation Medals, Army and Navy Achievement Medals, and a Commandant’s Letter of Commendation. He was promoted to lieutenant, his current rank, on [REDACTED].

On his first OER as a lieutenant, covering his service at a Reserve port security unit from [REDACTED] the applicant received primarily marks of 5 and 6 (out of 7) in the eighteen performance categories; a mark in the fifth of seven spots on the officer comparison scale, denoting an “excellent performer”; and a recommendation for promotion “ahead of peers.” On his second OER at this unit, dated [REDACTED] the applicant received primarily marks of 6 and 7 in the performance categories; a mark in the sixth spot on the officer comparison scale, indicating that he was “strongly recommended for accelerated promotion”; and another recommendation for promotion “ahead of peers.” On his third OER at this unit, dated [REDACTED] the applicant received mostly top marks of 7; a mark in the seventh spot on the officer comparison scale, indicating that he was the best lieutenant his reporting officer had ever worked with; and another recommendation for promotion ahead of his peers. The applicant received another Commendation Medal for his tour of duty at the port security unit.

In June 2010, the applicant signed a three-year extended active duty contract to serve as a Reserve Program Administrator (RPA). He was assigned to serve as the Chief of Reserve Boards and Panels at RPM. His first OER in the assignment was the disputed OER in BCMR Docket No. 2013-015 (see attached). As the applicant’s supervisor, LCDR T, who was then a branch chief at PSC, assigned him two marks of 5 and eleven marks of 6 in the performance categories in the supervisor’s section of the OER. The applicant’s reporting officer, who was the Assistant Division Chief for RPM, assigned the applicant two marks of 5, a mark of 4 for “Professional Presence,” and two low marks of 3 for “Judgment” and “Responsibility.” These marks were supported by comments stating that the applicant had impermissibly given his Direct Access user name and password “to another member who used them to access the system.” In addition, the reporting officer wrote that he could not give the applicant an unqualified recommendation for promotion and assigned him a mark in the fourth spot on the comparison scale, denoting a “good performer.”

The evidence submitted to the Board for BCMR Docket No. 2013-015 indicated that a lieutenant who was assisting a panel of officers convened to select members to attend Officer Candidate School asked the applicant for help because the captain presiding over the panel had requested information from the Direct Access database that the lieutenant could not access. The applicant was busy training someone and so, instead of getting the information himself, violated information security policy by giving the lieutenant his password.

The applicant argued in his application for 2013-015 that the low marks of 3 were excessively harsh given the panel president's legitimate urgent need for the information from Direct Access. He noted that the lieutenant did not misuse his password and accessed only the information requested by the panel, and he quickly reset his password after the lieutenant used it. The applicant argued that the marks were impermissibly based on his performance during a single hour instead of over the course of the entire evaluation period.

The applicant also claimed that the low marks were a product of bias because his rating chain did not like the lieutenant to whom he had given his password and resented the applicant's working relationship with the lieutenant. To support these allegations, the applicant submitted a statement from the officer who investigated the matter. She stated that during the investigation, the applicant's rating chain mentioned some irrelevant matters, and so she came to believe there was bias against the applicant and his rating chain that were working against him. She stated that she thought the low marks on his OER were unjust.

The applicant also argued in 2013-015 that he was subject to disparate treatment. He submitted a copy of the other lieutenant's OER for the same period, which was prepared by a different rating chain and which does not fault or criticize the lieutenant in any way for using the applicant's password to access Direct Access on behalf of the panel. The applicant asked the Coast Guard not to allow the members of his rating chain for 2013-015 to serve on any selection board or assignment panel reviewing his record.

The Coast Guard recommended denying relief in its advisory opinion for 2013-015. It argued that the rating chain had performed its duties correctly and submitted declarations from the rating chain, including a very short one from the applicant's supervisor, LCDR T, who wrote, "I carried out my OER Supervisor responsibilities consistent with the policy in COMDTINST M1000.6A, Personnel Manual. I have no further input and stand by my marks and comments."

The Board denied relief in 2013-015, finding that there was insufficient evidence of bias or animus on the part of the rating chain, that the investigator's statement was speculative, and that the fact that the more junior lieutenant was not criticized in his OER for accepting and using the applicant's password did not prove that the applicant was subject to disparate treatment since he was the more senior officer and he was the one entrusted with the password.

The applicant was not selected for promotion by the RPA LCDR selection board that convened in 2011. He was reassigned to serve as an RPM assignment coordinator, responsible for managing the assignments of approximately 4,000 Reserve members and officers. On his OER dated May 31, 2012, the applicant received all high marks of 6 or 7 in the performance cat-

egories, a mark in the fifth spot on the comparison scale, and a strong recommendation for promotion and designation as a permanent RPA.

The applicant was not selected for promotion by the RPA LCDR selection board in 2012, but he was selected to be a permanent RPA. However, he chose to be released from active duty when his contract expired in June 2013 and returned to active status in the Selected Reserve. In the Selected Reserve, he was eligible for promotion by the Reserve LCDR selection board that was convening on August 5, 2013.

On July 28, 2013, the applicant signed a letter to communicate with the LCDR selection board about his 2011 OER and desire to remain in the Reserve (see attached). In his letter to the board, the applicant addressed his desire, ability, and trustworthiness to serve as a LCDR; his OER reply in which he explained why he had shared his password, accepted responsibility, and expressed contrition; his recent selection as a permanent RPA based on strong recommendations and his exceptional career and despite the “isolated incident”; and his decision to leave active duty and return to the Selected Reserve. The applicant’s CO endorsed his letter to the selection board, and the applicant emailed his letter with the endorsement to RPM at 1:02 p.m. MDT (3:00 p.m. EDT) on Wednesday, July 31, 2013. The CO’s endorsement states the following (the phrases redacted by PSC are shaded):

1. [The applicant] is a newly reported member of CGRU NORAD-NORTHCOM and comes to us with an outstanding record of achievement as a staff and operational officer. He has already demonstrated excellent initiative and leadership.
2. I have had the privilege of serving with [the applicant] for many years and he has earned my utmost trust and confidence. He possesses extensive knowledge of the Coast Guard Reserve Program and exemplifies servant leadership and as such is an outstanding role model for junior personnel.
3. I have reviewed [the applicant’s] military records and fully endorse his Letter of Communication to the PY14 Lieutenant Commander Selection Board.

At 3:34 p.m. EDT (1:34 MDT) on Friday afternoon, August 2, 2013, a lieutenant at RPM sent an email to the applicant stating that the CO’s endorsement had been removed entirely because communications to selection boards “cannot be used as a means of communication from a command to the selection board.”

On August 5, 2013, the applicant’s XO sent him an email describing how he and the CO had repeatedly tried but failed to get an explanation from RPM, how LCDR T had dodged three direct questions about whether he had personally handled the matter, and how he was convinced that LCDR T and the Chief of RPM were seeking retribution against the applicant for filing a BCMR to correct a bad OER.

On August 22, 2013, in response to a request from the applicant dated August 9, 2013, RPM sent him a copy of what had been presented to the selection board, which showed that two phrases had been redacted from the CO’s endorsement, as shown above.

On September 12, 2013, LT L provided the applicant with a copy of the letter and endorsement that she submitted to RPM for the selection board.

On October 2, 2013, a lieutenant at PSC sent the applicant an email notifying him that he had not been selected for promotion. The lieutenant noted that he sent the email because in Direct Access, the applicant was still listed as being assigned to PSC.

### APPLICABLE REGULATIONS

Chapter 3.A.4.f. of COMDTINST M1000.3, Officer Accessions, Evaluations, and Promotions, states the following about “Communicating with the Selection Board”:

- (1) Background and Authority. Each officer eligible for consideration by a selection board may communicate with the board through the officer’s chain of command by letter arriving by the date the board convenes, inviting attention to any matter in his or her Coast Guard record that will be before the selection board. A letter sent under this paragraph may not criticize any officer or reflect on any officer’s character, conduct, or motive. (See 14 U.S.C. § 253(b).)
- (2) Enclosures and Attachments. One OER chain endorsement is optional. Enclosures or attachments are limited to copies of official records and materials allowed to be submitted with Officer Evaluation Reports, Form CG-5310 under Article 5.A.4.c.3. of this Manual. Letters from other officers shall not be solicited or submitted as enclosures. Officers requesting acknowledgement of receipt shall provide an e-mail address in their communication.
- (3) Endorsements. Endorsements to letters submitted to selection boards shall not include opinions whether an officer should be selected for promotion or opinions on selection boards and their methods.

Paragraph 5.d. of PSC Notice 1401, issued on June 30, 2013, included the following policy for selection boards convening between July 1, 2013, and June 30, 2014:

Communications to Selection Boards. As stated in Section 253(b) for ADPL and Section 730 for IDPL of reference (d) [Title 14 U.S.C.], any officer eligible for consideration by a selection board may send a communication to the board. The purpose of the communication is to invite attention to any matter in the member’s Coast Guard record that will appear before the selection board as outlined in reference (e). The letter must be in standard Coast Guard memo format, must restrict itself to addressing only matters of record, and must arrive at PSC-OPM-4 (ADPL officers) or PSC-RPM-1 (IDPL officers) before the board convenes. A communication to a board may not criticize any officer or civilian government employee or reflect on his or her character, conduct, or motive. All communications must be sent through the officer’s chain of command to the commanding officer or office chief, and must be annotated with at least a signature line endorsement. Endorsements cannot include opinions whether a board should select an officer, and they cannot reflect on the officer’s performance, abilities, or potential. The endorsement must be confined to the matter of record indicated in the communication. Each communication is limited to one detailed endorsement (i.e., supervisor, reporting officer, or reviewer). Letters from other members cannot be submitted as enclosures. Enclosures or attachments are limited to copies of official records and materials allowed to be submitted with OERs. See Chapter 3.A.4.f and Chapter 5.A.3.a.4 of reference (a) [COMDTINST M1000.3] for additional guidance.

## VIEWS OF THE COAST GUARD

On April 7, 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 alleged that pursuant to Chapter 3.A.4.f. of COMDTINST M1000.3, the Officer Accessions, Evaluations, and Promotions Manual, a CO's "endorsement to a member's letter of communication must be confined to the matter of record indicated in the member's communication and shall not include opinions of whether an officer should be promoted." Based on a declaration submitted by LCDR T, PSC stated that the comment about the applicant's "outstanding record of achievement" was redacted because "endorsements ... are not intended to be an additional pathway for commands to communicate outside of the Officer Evaluation Report (OER). This ensures that all officers going before the same selection board have equity in the type of documents allowed for viewing by the Board." PSC stated that the comment about the CO having "reviewed [the applicant's] military record" was redacted because "this statement is from the Commanding Officer's perspective with his limited access to the member's entire military record." PSC alleged that it makes "similar redactions for all command endorsements, during the validation process to ensure compliance with policy and fairness to all candidates and are vetted through legal." PSC noted in this regard that the copy of LT L's letter and endorsement submitted by the applicant was not the validated copy that was presented to the selection board.

PSC also argued that it "cannot be presumed that the non-selection of the applicant was solely based on the redaction of a single command's endorsement" given the many records and selection boards are required to consider. In addition, PSC stated, neither LCDR T nor any other RPM staff member was a member of the LCDR selection board in August 2013. PSC concluded that the applicant's record, including his non-selection for promotion, "is presumptively correct, and the applicant has failed to substantiate any error or injustice with regards to his/her record." Therefore, PSC recommended that the Board deny the applicant's request.

### *Declaration of LCDR T, Acting Assistant Division Chief of RPM*

LCDR T stated that officers' communications to selection boards are redacted by RPM in accordance with written policy as explained in an answer to a frequently asked question (FAQ) on PSC's website, which states that "[i]f there is no time to allow for resubmission before the board, the prohibited comments will be marked out."

LCDR T stated that under the applicable policy about such communications, the CO's comment about the applicant's "outstanding record of achievement" was prohibited, additional commentary on the applicant's performance because such endorsements "are not intended to provide an additional pathway for commands to communicate outside of the Officer Evaluation Report," which "ensures that all officers going before the same selection board have equity in the type of documents allowed for viewing by the board."

LCDR T stated that another officer, the Acting RPM-1 Branch Chief, recommended to

him that the phrases “with an outstanding record of achievement” and “I have reviewed [the applicant’s] military records” be removed from the endorsement. LCDR T stated that the applicant’s assertion that the redaction of the CO’s endorsement was retaliatory “is speculative at best and grossly inconsistent with RPM’s procedures and the standards of ethical behavior of a commissioned officer.” He stated that every such communication to the selection board was reviewed by the Boards and Panels Coordinator and the Acting RPM-1 Branch Chief, who followed normal policy and procedures and consulted with PSC’s attorneys to ensure that all officer communications to the selection boards—both redacted and unredacted—conformed to policy.

LCDR T denied that the applicant’s communication to the selection board was interfered with because it was “simply reviewed and redacted in accordance with policy and normal operating procedures.” He stated that the legal officer who apparently reviewed the applicant’s submission before he submitted it should have consulted the legal specialists at PSC about it.

### **APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On May 7, 2014, the applicant responded to the Coast Guard’s advisory opinion to make several points. Regarding the timing of the redactions, he stated that “nothing in the record indicates that it was infeasible for [RPM] to alert [him] if it was going to censor his communication to the board, or the endorsement thereto. To fail to provide notice when it could have been provided is a fundamental unfairness, since it deprives the officer under consideration of an opportunity to modify his or her submission if necessary.” He pointed out that while LCDR T cited the FAQ answer on PSC’s website that states that PSC can redact prohibited comments, he failed to provide the full FAQ answer, which states the following:

What if my communications contain prohibited comments? Can I revise it?

CG PSC (opm) reviews all communications to the board for legal sufficiency. If there is a prohibited comment, we will attempt to contact the officer and explain the problem, giving an opportunity to revise it. This is why it is important to submit the communications early. If there is no time to allow for resubmission before the board, the prohibited comments will be marked out.

The applicant alleged that LCDR T’s alleged reasons for the redactions “do not withstand scrutiny.” He stated that none of the policy documents cited by LCDR T or the advisory opinion support the redactions made to the endorsement. He argued that the language in the statute, 14 U.S.C. § 730(d), is broad and “requires only two things: that the matter be in the officer’s record and that the officer personally thinks it is important.” The corresponding regulation, Chapter 3.A.4.f. of COMDTINST M1000.3, he argued, “is faithful to the statute by being narrow in what it forbids—“opinions whether an officer should be selected for promotion or opinions on selection boards and their methods.” The comments redacted from the CO’s endorsement, he argued, were neither recommendations for promotion nor opinions about selection boards and so should not have been redacted pursuant to Chapter 3.A.4.f.

Regarding PSC Notice 1401, the applicant stated, it purports to increase the statutory prohibitions on officers’ communications to selection boards by forbidding CO’s endorsements from “reflect[ing] on the officer’s performance, abilities, or potential” and by confining their comments “to the matter of record indicated in the communication.” The applicant argued that



“[t]o the extent these provisions go beyond § 730(d), they are invalid,” but in any case, neither of the redacted comments offended either of these requirements.

The applicant argued that as described in PSC’s FAQ answer, officers’ communications to selection boards are reviewed “for legal sufficiency,” which means that the communications “must violate a statute or regulation before they can be either remanded or, if there is no time for resubmission, censored on an ex parte basis.” LCDR T’s declaration, he alleged, indicates that RPM personnel “seem to be under the impression that they have a ‘roving commission’ when screening communications and endorsements. [REDACTED] don’t. No agency can simply make t [REDACTED] up as it goes along or apply secret idiosyncratic standards.” He argued that RPM’s “censorship was both unauthorized and unjustified.” [REDACTED]

The applicant stated that because PSC claimed that the copy of the letter and e [REDACTED] [REDACTED] led by LT L was not the validated copy submitted to the LCDR selection board, LT L agreed to ask PSC whether her letter to the selection board or the CO’s endorsement were modified before they were presented to the board. The applicant submitted an email LT L sent to RPM on April 24, 2014, in which she asked if her communi [REDACTED] endorsement “was modified in any way in the validation process and if so, how?” In response, the Chief of RPM’s Boards and Panels Section stated that he has access to that information but would only share with [REDACTED] reviewed to ensure that there are no restricted comments, and “[i]f there are any issues, and there is time, the CG PSC staff will contact the member and discuss any challenges and recommended changes.” The Chief claimed, “I cannot tell you in what condition your Letter of Communication w [REDACTED] e before the Board unless higher competent authority directs me to disclose to you, your command, or legal representation Board deliberations of which you were a candidate.” He told her that she could be confident that her communication to the selection board was handled in accordance with law, policy, and PSC [REDACTED] e applicant stated that although LT L has been very upstanding with respect to the applicant’s requests, she had declined to “go over the head” of the Chief of the Boards and Panels Section to get her question answered, and he himself cannot do so since it is not his record.

The applicant also alleged that RPM’s justification for redacting the CO’s comment about reviewing the applicant’s military records is also erroneous. PSC claimed that it redacted this comment because the CO had only limited access to the applicant’s record, but in fact the applicant gave his CO his entire record—the Electronic Image Personnel Data Record (EIPDR) that the selection board received. The applicant submitted a signed statement from the CO, who wrote in response to the advisory opinion that the applicant had “provided his entire Electronic Image Personnel Data Record (EIPDR). I reviewed his EIPDR prior to providing a favorable command endorsement. The comments in LCDR [T’s] declaration [about the CO’s limited access to the applicant’s record] are inaccurate.”

## 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:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application to the Board was timely.<sup>2</sup>

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.<sup>3</sup>

3. The applicant alleged that his non-selection for promotion in 2013 was erroneous and unjust because his CO's endorsement of his letter to the selection board was illegally redacted by a prior supervisor who was biased against him. 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.<sup>4</sup> 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."<sup>5</sup>

4. Under 14 U.S.C. § 730(d), the applicant was entitled to "forward, through official channels, a written communication inviting the attention of the board to any matter in the officer's record in the armed forces that, in the opinion of the officer concerned, is important to the board's consideration." The only restrictions on this entitlement are that the officer's letter must arrive before the board convenes and must not impugn another officer. On the other hand, the statute does not expressly or implicitly entitle an officer to submit the communications of other officers to the selection board. Therefore, the Board finds that the Coast Guard did not violate 14 U.S.C. § 730(d) because the record shows that the applicant's own letter was submitted unredacted to the selection board.

5. By written policy in Chapter 3.A.4.f. of COMDTINST M1000.3 and PSC Notice 1401, the Coast Guard currently allows an officer to have one person in the officer's rating chain add a detailed endorsement to the officer's letter to the selection board before forwarding it to PSC. The policy documents cited by the Coast Guard and the applicant include only three restrictions for the endorsement:

- It "shall not include opinions whether an officer should be selected for promotion";
- It "cannot reflect on the officer's performance, abilities, or potential"; and
- It "must be confined to the matter of record" addressed in the officer's letter.

The Board notes that the restrictions require very careful drafting of an endorsement because any "matter of record" that an officer is going to address in his letter to a selection board is a matter that reflects on his performance, abilities, and/or potential. The only reason to write such a letter, after all, would be to improve the selection board's opinion of the officer's performance, abili-

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<sup>2</sup> 10 U.S.C. § 1552(b) (requiring application within 3 years of the applicant's discovery of the alleged error).

<sup>3</sup> 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").

<sup>4</sup> 33 C.F.R. § 52.24(b).

<sup>5</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992).

ties, or potential as an officer. Thus, comments in an endorsement cannot address the “matter of record” without also at least minimally “reflecting” on the officer’s performance, abilities, or potential. Presumably, RPM must apply some rule of reason in allowing the endorser to comment on the “matter of record” without reflecting significantly or at length on the officer’s performance, abilities, or potential.

6. Most of the comments in the CO’s endorsement to the applicant’s letter (see finding 7) obviously violated the restriction against statements reflecting on the officer’s performance, abilities, or potential. The CO wrote that the applicant has an outstanding record of achievement, has demonstrated excellent initiative and leadership, possesses extensive knowledge of the Reserve program, and exemplifies servant leadership. These prohibited comments not only reflect significantly and at length on the applicant’s performance, abilities, or potential but also address matters not addressed in the applicant’s own letter to the selection board, which says nothing about his initiative, leadership, knowledge of the Reserve program, or servant leadership.

7. The applicant’s submission had to be received and validated in time to be submitted to the selection board before it convened on Monday morning, August 5, 2013.<sup>6</sup> He submitted it to RPM at 1:02 MDT/3:02 EDT on Wednesday afternoon, July 31, 2013, leaving only two working days for RPM to review and validate it during the preparations for the selection board. At 1:34 MDT/3:34 p.m. EDT on Friday, August 2, 2013, with no remaining working days in which a revised endorsement could be written, submitted, reviewed, and validated before the selection board convened, RPM completed its review process and advised the applicant that the endorsement would be removed from the letter. Possibly in response to calls and emails from the applicant’s XO and CO, the endorsement was instead submitted to the selection board with just two phrases redacted:

1. [The applicant] is a newly reported member of CGRU NORAD-NORTHCOM and comes to us with an outstanding record of achievement as a staff and operational officer. He has already demonstrated excellent initiative and leadership.
2. I have had the privilege of serving with [the applicant] for many years and he has earned my utmost trust and confidence. He possesses extensive knowledge of the Coast Guard Reserve Program and exemplifies servant leadership and as such is an outstanding role model for junior personnel.
3. I have reviewed [the applicant’s] military records and fully endorse his Letter of Communication to the PY14 Lieutenant Commander Selection Board.

8. The first redaction removes only one of several comments reflecting on the applicant’s performance, abilities, and potential, and the second redaction concerns the CO’s review of the applicant’s military record. PSC stated in the advisory opinion that the redactions were made because such endorsements “are not intended to provide an additional pathway for commands to communicate outside of the [OER].” This claim about the purpose of endorsements is clearly inaccurate or incomplete because a CO’s endorsement to a letter to a selection board is, if nothing else, a communication to the selection board outside of an OER.

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<sup>6</sup> 14 U.S.C. § 730(d).

9. The redaction of the phrase “with an outstanding record of achievement” conforms to the written policy for endorsements in paragraph 5.d. of PSC Notice 1401, which prohibits statements reflecting on the officer’s performance, abilities, or potential. The fact that RPM failed to redact several other phrases reflecting on the applicant’s performance, abilities, or potential from the endorsement—errors in the applicant’s favor—does not make the correct redaction of the phrase “with an outstanding record of achievement” erroneous or unjust.

10. The redaction of the phrase about the CO reviewing the applicant’s military records does not conform to any of the three restrictions in the written policy. PSC stated that [REDACTED] redacted because “this statement is from the Commanding Officer’s perspective,” and the staff did not think that the CO had access to the applicant’s entire EIPDR. [REDACTED] content in every endorsement is from the endorser’s perspective, however, and nothing in the policy states that RPM may redact comments just because the staff thinks the endorser might be [REDACTED]. [REDACTED] Although COs may normally have personal access to only parts of a member’s record, RPM redacted the phrase based on an apparently erroneous assumption that the CO had not ensured that he had reviewed the applicant’s entire EIPDR. The CO has stated that contrary to PSC’s claim, he reviewed the applicant’s entire EIPDR. Therefore, [REDACTED] that RPM’s redaction of the phrase “have reviewed [the applicant’s] military records and” from the CO’s endorsement was erroneous.

11. The applicant alleged that RPM did not redact his CO’s endorsement of LT L’s letter to the selection board, which was submitted to RPM earlier than his own, and that the lack of redaction is evidence that the endorsement [REDACTED] letter was targeted for redaction in retaliation for his prior BCMR case. LT L received no notification of a redaction even though she submitted her letter and endorsement about six days before the applicant did and RPM’s policy is to notify officers of redactions when there is sufficient time for revisions. Therefore, [REDACTED] RPM’s improper refusal to inform LT L of any such redactions, the Board finds that the applicant has proven by a preponderance of the evidence that LT L’s letter and endorsement by their CO were not redacted in any way when presented to the LCDR selection board on August 5, 2013.

12. In her letter to the selection board, LT L explained why she had left the Selected Reserve for a couple of years so that she and her children could live with her husband during his overseas active duty assignment for the Navy. She explained how she had used the time productively by taking numerous military correspondence courses, how she had rejoined the Selected Reserve promptly upon her family’s return stateside, and how she strongly desired to continue serving in the Reserve. In his endorsement to this letter, the CO commented on LT L’s “exceptional dedication” in pursuing military education while overseas when she could not drill and noted how quickly she had returned to active status in the Selected Reserve upon her return by initiating the check-in process, contacting other personnel, and thoroughly preparing to become a valuable member of his unit. Because the comments in the CO’s endorsement are reasonably restricted to confirming the matters of record LT L mentioned in her letter and do not include substantial praise of her performance, abilities, or potential, comments about other matters of record, or a recommendation for promotion, the Board finds that the fact that RPM did not redact LT L’s letter or endorsement proves nothing.

13. The applicant alleged that the redaction of his CO's endorsement in 2013 was an act of reprisal because LCDR T, whose office decided what redactions should be made, was his supervisor in 2011 and so was on the rating chain for the disputed OER in BCMR Docket No. 2013-015. In that case, the applicant unsuccessfully challenged two low marks of 3 he received from his reporting officer—not LCDR T—for sharing his Direct Access personnel database password. The applicant also asked that no member of that rating chain serve on a future selection board or assignment panel for him. As a result of the applicant's challenge, LCDR T was required to write and sign a short declaration in which he claimed to have carried out his evaluation duties properly and stood by his own marks and comments in the disputed OER. There is no evidence that the applicant's claims in 2013-015 had any negative impact on LCDR T's career.

14. The record also shows that the applicant's XO was frustrated in his attempts between 3:34 p.m. EDT on Friday, August 2, 2013, and Monday morning, August 5, 2013, when the selection board convened, to find out why the CO's endorsement was being removed and did not like LCDR T's generic responses about RPM's procedures to direct questions about his own involvement. The XO concluded, based on RPM's non-communicativeness during the weekend and generic, procedural answers on Monday, that LCDR T and the new Chief of RPM were seeking retribution for the applicant having submitted his prior BCMR application. The new Chief of RPM, however, was not on the applicant's rating chain for the disputed OER in 2011, and the applicant has not shown that he had any reason to retaliate against him. Nor does the fact that LCDR T (a) had to write a short declaration about his preparation of the supervisor's part of the 2011 OER and (b) gave generic answers about RPM procedures when asked specific questions by the XO overcome the presumption of regularity accorded to him under 33 C.F.R. § 52.24(b).<sup>7</sup> The Board finds that the applicant has not proved by a preponderance of the evidence that the redaction of his CO's endorsement to his letter to the selection board was an act of reprisal.

15. The applicant alleged that the erroneous redaction of his CO's letter prejudiced his record before the LCDR selection board in August 2013 and asked the Board to remove his non-selection for promotion. When an applicant proves that his military record contained an error when it was reviewed by a selection board, this Board must determine whether the applicant's non-selection should be removed by answering 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?"<sup>8</sup> 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.<sup>9</sup> To void a failure of selection, the Board "need not find that the officer would in fact have actually

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<sup>7</sup> *Arens*, 969 F.2d at 1037 (Fed. Cir. 1992) (holding that absent evidence to the contrary, Government officials are presumed to have carried out their duties "correctly, lawfully, and in good faith").

<sup>8</sup> *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

<sup>9</sup> *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003), citing *Engels*, 678 F.2d at 175; *Quinton*, 64 Fed. Cl. at 125.

been promoted in the absence of the error, but merely that promotion was not definitely unlikely or excluded.”<sup>10</sup>

16. The phrase in the endorsement about the CO reviewing the applicant’s military records implies that the CO knew about the applicant’s 2011 OER with the low marks of 3 but still—as the second, unredacted clause of the sentence states—supported the applicant’s letter to the selection board, including the applicant’s implicit request for promotion. If that information were not otherwise obvious to the selection board, its redaction might be considered prejudicial. However, the selection board knew from the endorsement that the CO had read and supported the applicant’s letter, which itself discusses the 2011 OER with low marks of 3. Therefore, the erroneous redaction of the phrase did not remove significant information from the applicant’s record or leave the selection board with the mistaken impression that the CO was unaware of the applicant’s 2011 OER with low marks of 3 when he wrote the laudatory endorsement.

17. The Board notes that a redaction of text in an endorsement to an officer’s letter to a selection board cannot be considered prejudicial just because the selection board will see that a phrase has been removed. Such endorsements are optional, and so an officer would not have to submit one with negative comments. Moreover, by policy, only praise and recommendations for promotion are normally redacted, and in this case the CO’s endorsement is highly laudatory. Therefore, any selection board seeing the redactions would assume that additional positive information—more praise or recommendations for promotion—had been removed by RPM. The policy and the remaining text and context of the endorsement make the gaps in the endorsement—evidence of RPM’s redactions—non-prejudicial.

18. Accordingly, the Board finds that the applicant’s request to have his non-selection for promotion in August 2013 removed from his record should be denied because he has not proven by a preponderance of the evidence that his record was prejudiced by error when it was reviewed by the selection board. The applicant has not met the first prong of the *Engels* test.<sup>11</sup>

**(ORDER AND SIGNATURES ON NEXT PAGE)**

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<sup>10</sup> *Engels*, 678 F.2d at 175.

<sup>11</sup> *Engels*, 678 F.2d at 176.

**ORDER**

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

September 5, 2014

