


**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. 2014-062**

, LTJG/O-2 (former)

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**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 March 25, 2014, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 17, 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 junior grade (LTJG) serving on active duty, asked the Board to remove from his record his non-selection for promotion by the lieutenant (LT) selection board that convened in September 2013. He alleged that his record was prejudicially incomplete because his Officer Evaluation Report (OER) dated December 3, 2011, was missing from his record when the Board convened.

The applicant explained that in August 2012, he was a Reserve officer eligible for selection for promotion to LT in the Reserve. On August 17, 2012, the Coast Guard issued ALCG-RSV 058/12 listing the eligible Reserve officers and it had a note beside his name indicating that an OER was missing from his military record. Nevertheless, he was selected for promotion to LT in the Reserve. His command belatedly submitted the missing OER to the Reserve Policy Management (RPM) branch of the Personnel Service Center and received an emailing confirming its receipt on February 1, 2013.

The applicant then returned to extended active duty while still an LTJG and so was eligible to compete for promotion and integration as a regular LT in September 2013. Therefore, in May 2013, he followed guidance and ordered a complete copy of his electronic record (EI-PDR) to review for accuracy and completeness. He submitted a copy of an email dated May 20, 2013, forwarding him a copy of his EI-PDR to review in response to his request. The applicant stated that upon review, he noticed that the previously missing OER, which RPM had acknowledged

receiving on February 1, 2013, was still missing from his record. Therefore, he resubmitted it and followed up with RPM. The applicant submitted a copy of an email from an officer in RPM dated August 20, 2013, in which that officer wrote, "I have done a record review of your OER history. I have corrected all gaps, and as of today ... everything looks good."

In November 2013, the applicant learned that he had not been selected for promotion by the active duty LT selection board in September 2013. He ordered another copy of his EI-PDR only to discover that the previously missing OER was still missing despite his efforts and RPM's assurance that there were no gaps in his OERs. The applicant argued that he did everything in his power to ensure that his EI-PDR contained all of his OERs and the lack of one undoubtedly influenced his non-selection for promotion. Therefore, the applicant asked the Board to remove his non-selection for promotion in 2013 so that he will have another chance to be selected.

### SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on [REDACTED] having served in the [REDACTED] for several years. He earned the [REDACTED] rating and advanced to E-5. He was then selected for Officer Candidate School, incurring a three-year active duty obligation, and on [REDACTED], he was appointed an ensign in the regular Coast Guard Reserve. He was assigned to a Sector waterways management division and received increasingly good OERs with recommendations for promotion on [REDACTED]

The applicant was promoted to LTJG in the Reserve on [REDACTED], and transferred to the contingency planning staff of another Sector office, where he received increasingly good OERs with recommendations for promotion on [REDACTED], when he was released from active duty. The OER dated [REDACTED] was stamped as received and validated by the Personnel Service Center on July 26, 2013.

On inactive duty from December 4, 2011, through February 18, 2013, the applicant received one excellent OER dated July 31, 2012, and one mediocre OER, with mostly "standard" marks of 4<sup>1</sup> but with a recommendation for promotion from an entirely new rating chain upon his departure from his Reserve unit on February 18, 2013.

The applicant returned to active duty as an LTJG on February 19, 2013, and was assigned to the logistics management division of another Sector. He has received two excellent OERs for this service with very strong recommendations for promotion dated June 30, 2016, and January 31, 2014. However, on May 19, 2014, the applicant was voluntarily discharged from the service.

### VIEWS OF THE COAST GUARD

On July 22, 2014, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief in this case. In so doing,

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<sup>1</sup> 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. A mark of 4 is the "standard" mark of good performance expected of all officers.

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 OER dated December 3, 2011, was not in the applicant's record when it was reviewed by the selection board in 2013 even though it had been received and validated by RPM in July 2013. Because his record was missing this OER when it was reviewed by the selection board, PSC recommended that the Board remove the applicant's non-selection for promotion from his record and, if selected for promotion in 2014, backdate his date of rank to what it would have been had he been selected for promotion in 2013.

### APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 24, 2014, the Chair sent a copy of the Coast Guard's advisory opinion to the applicant's address of record and invited him to respond within thirty days. This mailing was returned to the Board by the Post Office as undeliverable and all attempts to contact the applicant have failed. Upon inquiry, PSC stated that its portion of [REDACTED] opinion had been prepared [REDACTED] applicant resigned and that the personnel [REDACTED] t's military status as terminated.

### FINDINGS AND CONCLUSIONS

[REDACTED] 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> [REDACTED]

2. The applicant alleged that his non-selection for promotion in 2013 was erroneous and unjust because an OER was missing from his record. 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>3</sup> In this case, however, the Coast Guard has admitted that the OER was missing from the applicant's record when the selection board reviewed it.

3. 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?"<sup>4</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"

<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> 33 C.F.R. § 52.24(b).

<sup>4</sup> *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

between the prejudicial error and the failure of selection.<sup>5</sup> 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.”<sup>6</sup>

4. The missing OER covered the applicant’s service for five months and contained many positive marks and comments and a strong recommendation for promotion. Therefore, the applicant’s record was clearly prejudiced by error when the selection board reviewed it, and the first prong of the *Engels* test is met. The second prong of the test has also been met because there are no negative marks, comments, or other entries in the applicant’s military record that would have precluded his selection for promotion even if the missing OER had not been missing. Accordingly, the applicant’s non-selection for promotion in September 2013 should be removed from his record.

5. The Coast Guard recommended additional relief that would have been appropriate had the applicant remained in the Service. Since the applicant has been discharged, however, the additional recommended relief would serve no useful purpose.

6. Accordingly, the applicant’s non-selection for promotion in September 2013 should be removed from his record but no further relief is warranted.

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

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<sup>5</sup> *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003); *Quinton*, 64 Fed. Cl. at 125.

<sup>6</sup> *Engels*, 678 F.2d at 175.

**ORDER**

The application of former LTJG [REDACTED], USCGR, for correction of his military record is granted as follows: The Coast Guard shall remove his non-selection for promotion by the PY 2014 LT selection board, which convened in September 2013, from his record.

October 17, 2014

