

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-171



FINAL DECISION

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. After receiving the applicant's completed application on June 13, 2014, the Chair docketed the case and assigned it to [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 13, 2015, 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 retired commander (CDR, O-5) with the Coast Guard Reserve, asked the Board to correct his record to show that he was selected for retention in active service by the inactive duty promotion list (IDPL)¹ CDR retention board for promotion year 2014 (PY 14), which convened in 2013. He also asked the Board to apply retirement points to his record for receiving a joint professional military education, phase 1 (JPME-1), certification through the Naval War College, which he completed after he retired from the Coast Guard Reserve on June 30, 2014.

The applicant alleged that when his record was considered by the retention board, his record was erroneously missing (a) an administrative remarks page (Page 7)² documenting the end of his probation for failing to meet the required weight standard and showing that he had successfully met the weight standard; (b) an official correspondence to the retention board that he had not sent to the board based on the advice of a senior reserve officer; and (c) record entries

¹ The IDPL comprises all Reserve officers in an active status, which includes the Selected Reserve (SELRES), the Individual Ready Reserve (IRR), and the Active Status List (ASL) of the Standby Reserve. Reserve Policy Manual, M1001.28A, Chaps. 1.C. and 7.A.3.

² Under Section 10.A.1 of the Coast Guard's Personnel and Pay Procedures Manual, PPCINST M1000.2B, an Administrative Remarks page (Page 7) provides a means of recording miscellaneous entries, which are not recorded elsewhere in a Personnel Data Record (PDR). Administrative Remarks entries are made to document counseling or to record any other information required by current directives, or considered to be of historical value.

documenting his competencies as a Boarding Officer and Boarding Team Member from 1992. Additionally, the applicant alleged that the record was unjust because he had begun taking courses at the Naval War College prior to the retention board's decision but was unable to complete the courses prior to his retirement date. In support of his allegations and request, the applicant submitted copies of the missing documents and a copy of the Coast Guard service-wide message, ALCGRSV 029/04, documenting his candidacy for the IDPL CDR retention board.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard Reserve in 1991 and was commissioned as an officer in [REDACTED]

In 1992, the applicant earned competencies as a Boarding Officer and a Boarding Team Member to carry and transport small arms and the administration of field sobriety testing measures.

On October 20, 2004, the applicant was counseled on a Page 7 that he met the weight standards because his body fat was 25% even though he weighed 253 pounds and his height was 68 inches.

On August 12, 2008, the applicant was found to be 51 pounds over the maximum allowable weight standard and 3% over the maximum allowed body fat. Pursuant to a letter dated October 24, 2008, the applicant was evaluated by the Reserve Mobilization Disposition Board because he had been weighed in and found noncompliant. As a result, he was informed that he would be moved to the Standby Reserve, Inactive Status List (ISL) on or about December 1, 2008. The applicant's record does not contain any documentation indicating that he was moved to the ISL at this time.³ On his Officer Evaluation Report (OER) dated December 6, 2009, however, his reporting officer noted that he had decreased his body fat by 3% and was a "[s]trong role model for physical health."

The applicant was promoted to CDR on [REDACTED]. On January 17, 2012, he prepared and submitted a CG-4082 for entry in his record to update the list of all his qualifications and coursework completed since his prior CG-4082. None of the CG-4082s that the applicant had entered in his record throughout his career mention his 1992 qualifications as a Boarding Team Member and Boarding Officer.

On his OER for the marking period May 1, 2010, to September 5, 2012, the applicant received above average and high marks of 5⁴ and 6 in the performance dimensions and received a mark as an excellent performer in the comparison scale. His reporting officer stated that the applicant had "grown in to his promotion steadily" and "highly recommended" him for war and

³ The Board has confirmed with the Coast Guard that the applicant's records do not indicate that he was moved to the ISL at this time.

⁴ Coast Guard officers are evaluated in 18 performance dimensions, such as "Teamwork" and "Judgment," on a scale of 1 (worst) to 7 (best). A "standard" mark of 4 in a performance dimension means that the officer's performance met the expected high standards of all Coast Guard officers for that category as described on the OER form. Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3, Article 5.A.2.a.

staff colleges and senior schools. His OER reviewer concurred and recommended the applicant for positions of higher responsibility and visibility. For the Health and Well Being performance dimension specifically, the applicant received a mark of 5. In the corresponding comments, the applicant's reporting officer stated, "Aggressive diet & fitness program; lost 30 lbs & dropped 8% body fat in 12 mos."

On October 19, 2012, however, the applicant received a Page 7 stating that his body fat percentage was 29% and he was still 70 pounds overweight pursuant to the Coast Guard Weight and Body Fat Standards Program, COMDTINST M1020.8 (series). The Page 7 notified the applicant that he was on weight probation and had until January 19, 2013, to lose the 70 pounds or drop to 26% body fat or below. The Page 7 stated, "Failure to demonstrate such reasonable and consistent progress may provide sufficient grounds to proceed with transfer to the ISL [Inactive Status List⁵] before your probationary period expires. If you fail to reach compliance by the end of this probationary period, you will be recommended for transfer to the ISL."

On January 11, 2013, the applicant received a Page 7 stating that his probationary period had ended, he had successfully achieved 26% body fat, and he had successfully met the requirements of the Coast Guard Weight and Body Fat Standards Program. According to the Coast Guard in its advisory opinion (discussed below), this Page 7 was not included in the applicant's electronically imaged personnel data record (EIPDR).

On March 7, 2013, the Coast Guard issued message ALCGPSC 034/13. In this message, a policy change was announced that any officer, active duty or reserve, who was not compliant with the weight and body fat standards would receive a substandard mark (below 4) on his or her OER. ALCGPSC 034/13 stated that the policy change was to impact all future OERs starting with the date of the message.

On August 23, 2013, the Coast Guard issued a PY 14 IDPL CDR retention board candidate announcement, ALCGRSV 052/13. The announcement stated that the retention board would be convened on October 21, 2013, and provided a list of commanders who would be considered by the board for retention in an active status. The applicant's name was included on the list. The announcement noted that 20 commanders on the list would not be retained. The announcement also stated, "Officers not retained by this board must leave an active status on or before 20 Jun[e] 2014." The announcement stated that it encouraged candidates to review their employee summary sheets, summarizing their documents in the Coast Guard's human resource system, as well as their official EIPDR. The announcement included directions for candidates to request to submit a special OER⁶ for the board's consideration. It also noted that candidates could also submit communications to the board, pursuant to Coast Guard service-wide message ALCGRSV 023/13 (issued May 2, 2013). ALCGRSV 023/13 states that candidates may com-

⁵ Chapter 1.C.b. of the Reserve Policy Manual, M1001.28A, notes that members on the ISL may be ordered to active duty in a time of war or national emergency if it is determined that not enough qualified reservists in an active status are available. Members on the ISL, however, may not train for pay or for retirement points, are not eligible for promotion, and do not accrue credit for qualifying years of service for retirement.

⁶ Regarding the submission of special OERs, ALCGRSV 052/13 directed candidates to review ALCGRSV 029/13 (issued June 4, 2013). ALCGRSV 029/13 stated that special OERs may be submitted for candidates for a minimum of 182 days, pursuant to Article 5.A.3.c.1.(1)(c) of the Officers Accessions, Evaluations, and Promotions Manual, COMDTINST M1000, to document all performance since the officer's last regular OER for board consideration.

municate with selection boards about any matter in their military records, but that such communications must be limited solely to matters in their official record.

On or about October 12, 2013, the applicant drafted a letter for submission to the PY 14 IDPL CDR retention board. However, he decided not to submit the letter based on the advice of a senior reserve officer (SRO). The applicant submitted an email chain, in which the SRO stated, “[T]he [board] utilizes the EPSS⁷ for each member and only screens the members for Command. Your opportunity to fill one of the CO [commanding officer] positions will be during the assignment board. Your attached correspondence would not be received well nor included with your package. Everything is a matter of record and hopefully your record will speak volumes for your potential and desire.” The SRO also stated that the applicant could contact the board coordinator, but believed that he would get the same message.

In the applicant’s un-submitted letter, he emphasized and cited the diversity of his assignments with the Coast Guard and noted that he had built expertise in joint/interagency operations. He also emphasized that he had aggressively pursued formal Coast Guard education and cited his participation in courses at the National Defense University and Naval War College, as well as his educational efforts for his civilian position. He cited his professional affiliations to highlight his efforts to keep abreast of current issues surrounding the Coast Guard. The applicant also stated that he was ready and eager for additional responsibilities and challenges as a senior officer for the Coast Guard.

By a letter dated December 19, 2013, the applicant was informed that his name had not been included in the list of officers recommended by the PY 2014 IDPL CDR retention board that had been approved by Commandant.

The applicant served as a planning officer for a maritime expeditionary security squadron from September 6, 2012, to April 30, 2014. In his OER for this period of service, the applicant received mostly above average and high marks of 5 and 6, with one excellent mark of 7, in the various performance dimensions of the OER. The applicant received an average mark of 4 in the Health and Well-Being performance dimension. The applicant was rated as an excellent performer with a mark in the middle spot on the comparison scale.

On June 30, 2014, the applicant was retired from the Coast Guard.

The applicant received a letter dated December 1, 2014, awarding him with a diploma for his completion of the Joint Professional Military Education Phase 1 (JPME-1) program, which consisted of three courses in the areas of Strategy and War, Theater Security Decision Making, and Joint Maritime Operations.

VIEWS OF THE COAST GUARD

On November 18, 2014, the Judge Advocate General (JAG) submitted an advisory opinion recommending that the Board grant partial relief in this case in accordance with the findings

⁷ It is unknown what the captain meant by “EPSS.” However, given the context of the email, it appears to refer to the applicant’s record or ESS.

and analysis provided in a memorandum, dated September 30, 2014, submitted by the Commander, Coast Guard Personnel Service Center (PSC).

In its September 30, 2014 memorandum, PSC stated that after a review of the applicant's EIPDR, it had determined that the January 11, 2013, Page 7, documenting the applicant's successful compliance with the Coast Guard's weight requirements and the end of his weight probation, was never entered into the applicant's record. However, PSC emphasized that it cannot be determined for certain whether the missing Page 7 was a causative factor in the applicant's recommendation for non-retention by the PY 14 IDPL CDR retention board. In addition, PSC stated that the Coast Guard's Military Personnel Data Record (PDR) System manual, COMDTINST M1080.10I, weight compliance documentation is required to be retained permanently in the Servicing Personnel Office-Personnel Data Record (SPO-PDR), but there is no requirement that such documentation be retained in the EIPDR. While PSC acknowledged that the Board would have seen the Page 7, PSC also noted that the Page 7 stated that if the applicant failed to demonstrate reasonable and consistent progress then the applicant would be transferred to the ISL before the end of the probationary period.

PSC argued that although the Page 7 was not in the applicant's EIPDR, his compliance with the weight and body fat standards was nevertheless evident to the retention board members. For example, PSC stated, if the applicant had not been able to meet the weight and body fat standards by the end of the probation period, then under Article 5.B.5.c. of the Reserve Policy Manual, COMDTINST M1001.28A, he would not have been eligible for consideration by the PY 14 IDPL CDR retention board at all because he would have been transferred to the ISL. Additionally, PSC argued that the applicant's compliance with the weight and body fat standards was evident on his OERs, since he received a mark above a 4 in the Health and Well Being dimension. In support, PSC noted that pursuant to the policy change noted in ALCGPSC 034/13, officers found to be noncompliant with the Coast Guard's weight and body fat standards were to receive a substandard mark (below 4) on their OERs. PSC emphasized that the most recent of the applicant's OERs reviewed by the retention board was the applicant's OER for the period ending September 5, 2012, where he received a mark of 5 for Health and Well Being performance dimension.

With regard to the applicant's unsent communication to the PY 14 IDPL CDR retention board, PSC emphasized that it cannot be determined how the letter would have been received by the retention board, and whether it would have resulted in a different outcome. PSC noted that the letter did not include any mention of the applicant's probation for weight issues or the corresponding missing Page 7. PSC also emphasized that the decision to not submit the letter had been made solely by the applicant.

PSC noted that the applicant did not choose to submit a special OER to the retention board as permitted by ALCGRSV 029/13.

PSC also argued that the applicant had the responsibility under ALCGRSV 029/13 to check his EIPDR and ESS to make sure that it contained all information required for the retention board's review.

Regarding the applicant's 1992 records, PSC stated that under the Coast Guard's Competency Management System Manual, M5300.2, it is the responsibility of the member to provide documentation to the Coast Guard's Servicing Personnel Office (SPO) for data entry and to review their competency portfolio.

PSC did not recommend a reevaluation of the applicant's record by the retention board or reinstatement into the Coast Guard. However, PSC recommended a re-calculation of the applicant's retirement points, if the applicant provided proof of his JPME-1 course completion with the Naval War College. PSC also recommended that the missing documents be submitted by the applicant's SPO for inclusion into the applicant's record. PSC also recommended that the applicant review his applicable records for any future boards or panels. PSC did not recommend any further relief.

In its November 18, 2014 memorandum, the JAG concurred with PSC's findings and recommendations. The JAG emphasized PSC's point that members are responsible for verifying the data contained in their PDRs. The JAG noted that the applicant did not provide any evidence that he had attempted to obtain a copy of his PDR for verification prior to the convening of the retention board. The JAG also emphasized that the fact that the applicant was considered by the retention board and the mark of 5 he received for Health and Well Being on his OER served as objective evidence that he had been found compliant with the weight and body fat standards. The JAG also argued that the applicant had not demonstrated by a preponderance of the evidence that there had been any error or injustice committed by the PY 14 IDPL CDR retention board when his record was presented to the board without the missing Page 7.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 29, 2014, the Board received the applicant's response to the Coast Guard's advisory opinion. He stated that he did not have any objection to it.

To document his completed coursework, the applicant attached an email exchange with Naval War College confirming his completion of the JPME-1 through the Naval War College, but noting that the college was still processing his letter of completion for different courses and a diploma for his completion of the JPME-1. The applicant noted that he is due retirement points for Joint Maritime Operations and Strategy and War web-based courses and for pre-work for the courses.

The applicant also requested that his SPO be identified so that he could update his EIPDR with the missing documents and indicated there are additional missing documents from his record.

The applicant also requested that the Board consider and forward his recommendation that future retention boards allow members not retained to complete their tours of duty and leave active service on or before September 30th. He stated that Coast Guard Reserve Officer transfers generally take place on October 1st of each year, and allowing service members to leave on September 30th would not cause the Coast Guard to incur additional cost. He also stated that doing so would reduce the hardship and pain for members and families by giving them additional time

to transition and complete their tours of duty. The applicant noted that he had struggled personally to complete the required documentation for retirement in the time required, his June 30th departure had left his unit short-handed, and that he had to take transition assistance program (TAPS) training after his retirement date.

On December 31, 2014, the applicant submitted a letter dated December 1, 2014, from the Naval War College awarding him with a diploma for the JPME-1 and noting his completion of a Strategy and War course.

APPLICABLE LAW AND POLICY

Reserve Officer Retention Boards

Under Section 741 of Title 14 of the United States Code, whenever the Secretary of the U.S. Department of Homeland Security (DHS)] determines that it is necessary to reduce the number of Reserve officers in an active status in any grade, he “may appoint and convene a retention board to consider all of the Reserve officers in that grade in an active status who have 18 or more years of service for retirement...” A Reserve officer who is not recommended for retention in an active status “shall be given an opportunity to transfer to the Retired Reserve, if qualified, but unless so transferred shall, in the discretion of the Secretary, be transferred to the inactive status list or discharged on June 30 next following the date on which the report of the retention board is approved.”

Guidelines for personnel boards are established in Article 6 of the Officer Accessions, Evaluations, and Promotions manual, COMDTINST M1000.3. Article 6.A.2. of the manual states that personnel boards may be convened for various purposes, including recommending officers for retention in a particular occupational field. Under Article 6.A.4.d., Commander (CG PSC-OPM) furnishes personnel boards the personnel records of all officers to be considered, which “consists of general administrative paperwork including such items as statements of service and sea service, the record of emergency data, Administrative Remarks, Form CG-3307, entries, documentation of alcohol incidents, and reports of civil arrests, performance evaluations, education information, and awards and discipline documentation.” Article 6.A.4.d. also states that while a board must consider an officer’s entire record, for a commander, the seven years of immediate previous service or all service in present grade (whichever is greater) is considered the most significant portion of the record evaluated.

Article 6.A.3.b. establishes 4 basic criteria upon which a personnel board should base its determination: performance evaluations, professionalism, leadership, and education.

Weight and Body Fat Standards Program

Article 1.A. of the Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST 1020.8H, states that the purpose of the standards are applicable to all Coast Guard military personnel and are intended to ensure that all military personnel maintain a healthy weight and body fat, are capable of meeting the service’s operational needs, and present a sharp, professional military appearance. Article 1.B. states that a member must “[m]aintain compliance

with weight and body fat standards at all times, unless specifically stated otherwise by this Manual.” Under Article 3.B, if a member is found to be non-compliant, such non-compliance is to be documented on an administrative remarks form (Page 7). Similarly, Article 3.D.5.b.(2) also notes a member’s compliance with the weight and body fat standards, thus marking the end of a probationary period, is also to be documented on a Page 7.

Under Article 5.B.5.c., “Temporary Physical Disqualification,” of the Reserve Policy Manual (RPM), COMDTINST M1001.28A, personnel who exceed their maximum allowable weight standard at the end of a probationary period shall be transferred to the Standby Reserve, Inactive Status List (ISL), for up to one year. If the member attains their proper weight or body fat percentage, then the member may request to transfer back to the Ready Reserve. Those who have not attained their proper weight after that year are transferred to the Retired Reserve or separated. Officers on the ISL are not in an active status and so are not on the IDPL and are ineligible for selection for promotion or retention. RPM, Chap. 7.A.3.; ALCGRSV 052/13.

Chapter 4.D.8.b. of COMDTINST M1020.8H, states that if a member complies with the weight or body fat standards by the end of a probationary period, the command should prepare a Page 7 documenting compliance. Under the Coast Guard’s Military Personnel Data Record (PDR) System manual, COMDTINST M1080.10I, weight compliance documentation is required to be retained permanently in the Servicing Personnel Office-Personnel Data Record (SPO-PDR), but there is no requirement that such documentation be retained in the EIPDR. However, Enclosure 6 of the Personnel and Pay Procedures Manual, states that when a command prepares a Page 7, the original is kept in the local SPO-PDR, and a copy is sent to PSC “for electronic imaging into the EIPDR.” Enclosure 6 provides the texts for the authorized Page 7s and includes the text for a Page 7 documenting successful completion of weight probation. The bottom of the sample Page 7 repeats the requirement that the original copy be filed in the SPO-PDR and that a copy be mailed for entry in the EIPDR.

Special OERs

Under Article 5.A.3.c.(1)(c) of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3, commands may issue special OERs for officers who are going to be considered by selection panels or boards if the officer has not received an OER within the previous 182 days—i.e., the evaluation period must be at least 182 days long—if the officer normally receives OERs annually. Reserve officers who receive OERs on a biennial schedule and who are in zone for promotion on the IDPL during an odd numbered calendar year shall complete a Special OER for that year to document all performance since the last regular OER for board consideration. These OERs shall not be delayed past the normal submission month (e.g. March for CDRs, April for LCDRs). Extensions will not be granted. This OER counts for continuity.

Laws and Regulations Regarding Satisfactory Service for Retirement Purposes

Title 10 U.S.C. § 12732 states, “[F]or the purpose of determining whether a person is entitled to retired pay under section 12731 of this title, the person’s years of service are computed by adding ... [e]ach one-year period ... in which the person has been credited with at least 50 points on the following basis: (A) One point for each day of (i) active service ... (B) One point for each attendance at a drill or period of equivalent instruction that was prescribed for that

year by the Secretary concerned and conformed to the requirements prescribed by law ... (c) Points at the rate of 15 a year for membership ...”

Chapter 8.C.3. of the RPM states that qualifying service toward retirement under 10 U.S.C. § 12732 is computed by adding each anniversary year in which at least 50 points have been credited on the basis of 1 point for each day of active duty; 1 point for each inactive duty training drill attended or period of appropriate duty performed during the anniversary year; 15 points per year for membership in a Reserve component; and various points earned by satisfactory completion of correspondence courses.

Under Chapter 8.C.5. of the manual, retirement points for a correspondence course are credited on the date specified in the course completion letter to the student. It also states, “Members should forward a copy of course completion letters for other than Coast Guard courses to the Personnel Service Center (PSC) for verification and approval of retirement points. PSC (ses) is final authority to validate eligibility of retirement point credit for correspondence courses.”

Under Chapter 8.C.6., reservists who find discrepancies on their Reserve Retirement Point Statement should send a request for correction with supporting documents via the chain of command to PSC (ses). In cases that cannot be resolved, PSC shall provide a meaningful endorsement with any additional supporting documents available and forward the request to CGPC-rpm for resolution.

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.
2. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. The applicant was informed that he was not selected for retention by the PY 14 IDPL CDR retention board on December 19, 2013. The applicant retired from the Coast Guard on June 30, 2014. Therefore, the application is timely.
3. The applicant asked the Board to overturn the recommendation by the PY 14 IDPL CDR retention board that he not be retained. He also asked that retirement points for certain coursework completed after he retired on June 30, 2014, be applied to his record. The applicant alleged that he was unjustly or erroneously recommended for non-retention because certain records were missing from his record when considered by the retention 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

⁸ 33 C.F.R. § 52.24(b).

Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁹

4. The applicant alleged that he was erroneously and unjustly not recommended for retention by the PY 14 IDPL CDR retention board because his record was missing a Page 7 dated January 11, 2013, that documented his successful compliance with the Coast Guard’s weight and body fat standards after having been placed on weight probation in 2012. The record reflects, and the Coast Guard has acknowledged, that the Page 7 was missing from the applicant’s record, although the corresponding Page 7 from October 19, 2012, placing him on probation for failing to comply with the standards was in his record when it was reviewed by the retention board. Pursuant to Enclosure 6 of the Personnel and Pay Procedures Manual, the Page 7 documenting his compliance with the weight standards at the end of his probation should have been entered in his EIPDR.

The Coast Guard argued in its advisory opinion that other “objective evidence” in the form of the applicant’s mark of 5 in the Health and Well Being performance dimension on his September 5, 2012, OER and his candidacy for the PY 14 IDPL CDR retention board would have made the applicant’s compliance with the weight and body fat standards evident to the retention board. With regard to the applicant’s OER, the message cited by the Coast Guard in support of its argument, ALCGPSC 034/13, noted that the policy change cited was to begin with OERs as of the date of the message – March 7, 2013. As a result, the policy change where members are to receive marks lower than 4 for Health and Well Being in their OERs if they are not compliant with the Coast Guard’s weight and body fat standards was not in effect the applicant’s 2012 OER and would not have proved his compliance with the standards to the retention board. And, indeed, the Page 7 noting that the applicant was not compliant was dated October 19, 2012, which was after the end of the marking period for the OER cited by the Coast Guard.

The Board agrees with the Coast Guard, however, that the mere fact that the applicant was a candidate considered by the PY 14 IDPL CDR retention board *per se* made it clear to the members of the retention board that he had complied with the weight and body fat standards. Under Chapter 5.B.5. of the RPM, the Temporary Physical Disqualification policy, the applicant would have been transferred to the ISL if he had not been compliant by the end of the probationary period established in the initial Page 7; hence, he would not have been a candidate for the PY 14 IDPL CDR retention board.¹⁰ IDPL selection and retention boards consider only officers who are on the IDPL—i.e., in an active status—which does not include officers on the ISL (inactive status list). Since the applicant would have been transferred to the ISL and would not have been a candidate for selection by an IDPL board if he had failed weight probation, his successful completion of weight probation was apparent to the retention board members due to the fact that he was under consideration for retention along with all of the other officers in an active status.

Because of the Temporary Physical Disqualification policy, the Board finds that a preponderance of the evidence in the record shows that the applicant would have been objectively viewed as having met the Coast Guard’s weight and body fat standards at the time that the PY 14

⁹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹⁰ ALCGRSV 052/13 (noting that only reservists in an active status would be under consideration for retention).

IDPL CDR retention board was convened. As a result, the fact that the January 11, 2013, Page 7 documenting his successful compliance with the standards was missing from his record when it was reviewed by the retention board does not make the retention board's decision unjust or erroneous.

6. The applicant also complained that two 1992 qualification letters, as well as the Page 7, were not in his record when it was reviewed by the retention board. The applicant had entered several CG-4082s during his career listing his qualifications and coursework, but he had not listed the 1992 qualifications. However, the applicant and all other candidates for selection had been warned in ALCGRSV 052/13, which announced their candidacy, to review their EIPDRs to ensure they were complete. In BCMR Docket Nos. 2011-215 and 2013-147, this Board granted relief to officers who proved that they had complied with this policy by timely checking their EIPDRs and submitting the missing documents through correct channels to ensure their entry by PSC and had called or emailed PSC to ensure the documents had been received before their selection boards convened—all to no avail. This applicant, however, apparently did not check his EIPDR and has neither alleged nor proved that he made any effort to ensure that his EIPDR contained the missing entries. While every agency is obliged by the Privacy Act 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,”¹¹ a yeoman checking an officer's record cannot know what documents are missing unless the documents are required or unless the officer tells him. Therefore, the Coast Guard's policy of putting the onus on the officers themselves to check the completeness of their EIPDRs is reasonable. The applicant apparently failed to comply with the policy, however. Nor would the 1992 qualifications letters have carried any weight before the retention board, which was supposed to focus on his seven years of service immediately prior to the board.¹²

7. The applicant also alleged that he was erroneously and unjustly not recommended for retention by the PY 14 IDPL CDR retention board because he did not send, upon the advice of an SRO, an official correspondence to the retention board. Whether the SRO's advice was sound or not is unclear. The fact that the applicant was not selected for retention does not prove that the advice was wrong, however. Moreover, the applicant himself decided to take the advice of the SRO and chose not to submit this letter to the retention board. Therefore, the absence of the letter from his record did not render his record erroneous or unjust when it was reviewed by the retention board.

8. When an applicant asks the Board to remove the results of a selection board from his record, this Board must determine whether the 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 [retained] in any event?”¹³ When an officer shows that his record was prejudiced before a selection board by

¹¹ 5 U.S.C. § 552a(e)(5).

¹² Officer Accessions, Evaluations, and Promotions Manual, Article 6.A.4.d.

¹³ *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982) (although *Engels* concerned a selection for promotion, rather than retention, the Board finds that the same legal principles should apply).

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.¹⁴ To void a failure of selection, the Board “need not find that the officer would in fact have actually been promoted [retained] in the absence of the error, but merely that promotion [retention] was not definitely unlikely or excluded.”¹⁵

9. Pursuant to the *Engels* test, the Board finds that although the Page 7 documenting his successful completion of weight probation and the 1992 qualifications should have been in his record, his record was not actually prejudiced by error or injustice when the retention board reviewed it. The lack of the Page 7 would not have led the Board members to think that he had failed weight probation because his candidacy for retention *per se* proved that he had not failed probation. Nor, in light of the applicant’s long career and many qualifications, did the absence of two letters from 1992 prejudice his record before the retention board. Therefore, the applicant has not met the first prong of the *Engels* test. Moreover, even assuming *arguendo* that the applicant’s record would have looked slightly better if the three missing documents had been present, their absence is directly attributable to the applicant’s own failure to comply with ALCGRSV 052/13 by checking the completeness of his own EIPDR prior to the retention board. Accordingly, the Board finds no grounds for changing the results of the retention board.

10. Accordingly, the applicant’s request to overturn the selection board’s decision not to select him for retention should be denied. However, the Board concurs with the Coast Guard’s recommendation that the missing January 11, 2013, Page 7 and his 1992 qualifications as a Boarding Team Member and Boarding Officer should be entered in his record. According to the applicant’s response to the Coast Guard’s advisory opinion, it appears that other documents may also be missing from the applicant’s record. Therefore, PSC or the applicant’s SPO should contact him to determine if there are other missing documents that should be entered in his record to ensure its completeness.

11. The applicant also requested that retirement points be applied to his record for the successful completion of the JPME-1 program and submitted documentation of his completion of the program. The Coast Guard recommended a recalculation of the applicant’s retirement points upon the receipt of such documentation. The applicant agreed with the Coast Guard’s recommendation. The Board concurs that if the applicant submits the required documentation, the Coast Guard should review it and recalculate his retirement points as necessary.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁴ *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.

¹⁵ *Engels*, 678 F.2d at 175.

ORDER

The application of [REDACTED] [REDACTED] USCG (Retired), for correction of his military record is granted in part as follows:

- His EIPDR shall be corrected to include the January 11, 2013 Page 7 regarding his compliance with the Coast Guard's Weight and Body Fat Standards Program, COMDTINST M1020.8 (series); his 1992 competencies as a Boarding Officer and a Boarding Team Member; and any other records that he submits within 90 days of the date of this decision that should be in his EIPDR under current policy; and
- If he submits documentation showing his successful completion of the JPME-1 program to PSC within 90 days of the date of this decision, PSC shall review it and recalculate his retirement points in accordance with applicable law and policy.

No other relief is granted.

March 13, 2015

