

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-229



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 on December 2, 2014, upon receipt of the completed application and records, and subsequently assigned it to staff member [REDACTED] to prepare the decision as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 25, 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 asked the Board to remove from his record his non-selection for promotion to lieutenant commander (LCDR) by the promotion year 2015 (PY15) LCDR selection board, which convened on August 4, 2014. He also asked that if selected for promotion by the promotion year 2016 (PY16) LCDR selection board, he receive the date of rank and position on the active duty promotion list (ADPL) that he would have held had the PY15 selection board selected him. Additionally, he requested to receive the applicable back pay and allowances for the revised position on the ADPL. He alleged that when the LCDR selection board convened and reviewed his record, the following documents were missing from his record:

- a. An accurate Officer Evaluation Report (OER) for the period of [REDACTED], which reflected his Primary Duty as "Sector Command Center (SCC) Chief" and not "Command Center Control-Duty";
- b. A citation for a Commendation Medal awarded to him for outstanding achievement while serving as SCC Chief, from [REDACTED]; and
- c. His receipt of the Advanced Boat Force Operations Insignia on [REDACTED] which was not timely entered into the Direct Access database, although he timely submitted the Page 7 documenting his entitlement to wear the insignia, and it was scanned into his record.

In support of his allegation that this documentation was missing when his record was reviewed by the LCDR selection board, the applicant submitted the following:

- a. An email from the OER Administrator to CGPSC-OPM, dated [REDACTED], with the accurate, submitted OER attached;
- b. A copy of the submitted OER, with SCC Chief shown as his primary duty;
- c. An email from the CGPSC-OPM to the applicant, dated [REDACTED], after the selection board convened, with the validated OER attached;
- d. A copy of the validated OER, with Command Center Control-Duty shown as the applicant's primary duty; and
- e. An email from his Sector's Servicing Personnel Office (SPO) to the applicant, dated [REDACTED] confirming the entry of the Commendation Medal into Direct Access on [REDACTED] and stating that it was forwarded to CGPSC-PSD-MR for scanning into the applicant's electronically imaged personnel data record (EI-PDR). The email also noted that the medal had not been marked as "urgent board entry," and that the award was submitted for urgent board entry on [REDACTED]

SUMMARY OF THE RECORD

On [REDACTED] the applicant was commissioned an ensign in the Coast Guard. His first duty station was a cutter, where he was assigned as a deck watch officer.

On his first two OERs, for the period of [REDACTED] the applicant received primarily "standard" marks of 4 and "above standard" marks of 5 in the various performance categories;¹ a mark in the fourth spot on the comparison scale on the first OER and in the fifth on the second OER;² and his reporting officer's recommendation for selection to attend a post-graduate school of choice and for promotion to LTJG with peers on both.

The applicant was promoted to LTJG on [REDACTED]. On his third and fourth OERs, for the period of [REDACTED], the applicant received primarily marks of 5 and 6 in the performance categories; a mark in the fourth spot on the comparison scale on the third OER and in the fifth spot on the fourth OER; and his reporting officer's recommendation for promotion to LT with peers both times. The applicant was transferred to Commander Coast Guard District Command Center on [REDACTED]

While at the Command Center, from [REDACTED] the applicant's OERs continued to improve. The applicant was promoted to LT on [REDACTED]. On his final OER from the Command Center, for the period of [REDACTED], he received thirteen marks of 6, and five marks of 7 and a mark in the fifth³ spot on the comparison scale.

¹ In OERs, officers are evaluated in a variety of performance categories, such as "Professional Competence," "Teamwork," and "Judgment," on a scale of 1 to 7, with 7 being best.

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

³ On an OER form for a lieutenant and lieutenant commander, a mark in the a mark in the fourth spot describes the officer as a "good performer," ready for "challenging assignments," whereas a mark in the fifth spot describes the officer as an "excellent performer," ready for the "most challenging leadership assignments."

The applicant was then transferred to a Sector command. Initially, he served as a duty officer in the Sector Command Center, but during his last year at the Sector, he was designated as the SCC Chief.

While assigned to the Sector, the applicant has received only marks of 6 and 7 on his OERs. On his final substantive OER, for the period of [REDACTED] he received three marks of 6 and fifteen marks of 7 and a mark in the sixth spot on the comparison scale denoting the applicant as “strongly recommended for accelerated promotion.” The applicant was selected to attend graduate school beginning in [REDACTED]

On [REDACTED] the applicant received a Commendation Medal citation for outstanding achievement while serving as SSC Chief from [REDACTED]. And on [REDACTED], the applicant received a Page 7 documenting his entitlement to wear the Advanced Boat Force Operations Insignia. On [REDACTED], the applicant’s OER for the period of [REDACTED] [REDACTED] was emailed to the Personnel Service Center Officer Personnel Management branch for processing and validation. And on [REDACTED], the validated OER was returned to the applicant. The validated OER listed “Command Center Control-Duty” in the Primary Duty box.

VIEWS OF THE COAST GUARD

On April 10, 2015, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant 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 stated that prior to the PY15 LCDR selection board, the applicant had provided his SPO with a copy of his Commendation Medal award citation and the Page 7 that documented his Advanced Boat Forces Insignia. Further, PSC stated that the SPO had a reasonable amount of time to forward both documents to PSC-BOP-C-MR to ensure entry into the applicant’s EI-PDR.

PSC alleged that the disputed Page 7 was entered into the applicant’s EI-PDR on [REDACTED] [REDACTED] before the LCDR selection board convened. PSC included in its response an email dated February 11, 2015, from PSC Business Operations Division, which supports this claim about the date of entry of this document. PSC did not address whether Direct Access was updated to include the insignia before the selection board convened.

PSC conceded, however, that the Commendation Medal award citation was not transmitted and entered into his EI-PDR prior to the LCDR selection board. PSC stated that the SPO failed to ensure the document was entered pursuant to the Pay and Personnel Center instruction guidance. However, PSC noted, the Awards Manual stipulates that the member is ultimately responsible for ensuring the accuracy of all award data and ensuring all awards are entered into the service record and Direct Access.

Despite the delay in the entry of the citation for the Commendation Medal, PSC argued that the applicant was not disadvantaged before the PY15 LCDR selection board. PSC argued that although the citation with the narrative description of his performance was not entered into

the applicant's EI-PDR, the fact that he had received this medal was entered into Direct Access. Additionally, the content of the award citation was contained elsewhere in the member's record.

PSC conceded that there was an error in the validation process where the primary duty title was changed incorrectly but argued that the description of duties was correctly stated in the OER. Additionally, PSC noted that the applicant's employee [REDACTED] correct primary duty. However, since selection board deliberations are confidential, PSC conceded that there is not complete assurance that the incorrect OER had no influence on the selection board.

[REDACTED]

PSC disagreed with applicant's argument that since he was selected for post-graduate school and [REDACTED] negative was added to his EI-PDR it must be the incorrect OER and missing award citation that influenced the selection board to not select him. However, the considerations for a post-graduate program are not the same considerations for promotion selection. PSC stated that [REDACTED] not common, it is not an aberration that [REDACTED] [REDACTED] or post-graduate school, or other training, and then be non-selected for promotion.

[REDACTED]

PSC recommended that the Board remove the applicant's non-selection by the PY15 LCDR selection board from his record, and if selected by the PY16 LCDR selection board, adjust his date of rank, pay, and ranking as if selected by the previous year's board. PSC's stated findings for granting relief are as follows:

- a. The SPO did not ensure that the applicant's award citation was imaged into his EI-PDR, but the applicant is ultimately responsible;
- b. The PY15 LCDR selection board did have access to the complete content of the applicant's record, as the information allegedly missing was captured in other places in the record and was available to review; and
- c. PSC cannot determine if the applicant was disadvantaged by the erroneous OER because the selection board's proceedings are confidential. However, the OER has subsequently been corrected so no changes are required to correct the record before the PY16 LCDR selection board.

[REDACTED] APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD [REDACTED]

On March 27, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response within thirty days. A revised recommendation from the Coast Guard, correcting clerical errors, was sent to the applicant on April 28, 2015. On May 5, 2015, the applicant responded.

The applicant agreed with the Coast Guard's official recommendation of granting relief. However, the applicant desired to comment on four particular points contained in the PSC memo:

- a. The applicant disagreed with PSC's statement, "the member is ultimately responsible for ensuring the accuracy of all award data." The applicant argued that he fulfilled his responsibility by recognizing something was missing from his record and requesting the SPO add it. The applicant argued that members in his position should not be held

ultimately responsible, as members do not have the access or authority to add documents to an EI-PDR or Direct Access.

- b. The applicant argued that PSC misstated his claim regarding his Advanced Boat Forces Insignia. He noted that he never claimed that the Page 7 was not in his EI-PDR but that his entitlement to wear the insignia was not entered in Direct Access. Because the insignia was not entered in Direct Access, it was not on the employee summary sheet that was made available to the selection board.
- c. Regarding the incorrect OER, the applicant argued that the description of duties could be misconstrued under the context of a different title, so PSC's argument that the description of duties lessened any effect of the incorrect primary duty listing on the OER is incorrect. Further, the applicant argued that the inconsistency between his primary duty as recorded on the OER and on the employee summary sheet could have been perceived as a demotion or an unusual circumstance that created doubt during the promotion board.
- d. The applicant wished to clarify that he added into the record his selection for a post-graduate program as evidence that he was a strong candidate for promotion prior to the record errors, and not to argue that he should have been promoted based solely on his selection for graduate school.

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.⁴
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.⁵
3. The applicant alleged that his non-selection for promotion by the PY15 LCDR selection board was erroneous and unjust because his records lacked several important documents and contained an erroneous OER when it was reviewed by the selection board. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁶ In this case, however, the Coast Guard has admitted that the OER stating the wrong primary duty was before the board and that the Commendation Medal

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

⁵ 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").

⁶ 33 C.F.R. § 52.24(b).

award citation was not transmitted and entered into his EI-PDR prior to the LCDR selection board. Therefore, the Board finds that the applicant has proven by a preponderance of the evidence that his military record contained an OER showing an incorrect primary position; lacked the citation for his Commendation Medal when it was reviewed by the PY15 LCDR selection board; and lacked a notation of his entitlement to wear the Advanced Boat Forces Insignia in Direct Access.

4. 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?"⁷

5. Under 5 U.S.C. § 552a(e)(5), federal agencies, including the Coast Guard, are required to maintain and base decisions on accurate personnel records, but within reason, the Coast Guard may define what constitutes a complete personnel record for the purpose of selection boards, and it has made Page 7s and award citations permissive, instead of required, documents.⁸ The record indicates that the applicant's Commendation Medal was entered in the database and so appeared on his employee summary sheet but that the narrative citation for the medal was not scanned into his record before the selection board convened. However, the three-year tour of duty for which he received the medal was documented in his OERs. Conversely, the Page 7 concerning the applicant's entitlement to wear the Advanced Boat Forces Insignia was scanned into his record, but the insignia did not appear on his employee summary sheet because the SPO failed to update the database in time. Given that the applicant's record contained all of the relevant information about his medal and insignia, if not in all possible places, these two apparent errors alone do not persuade the Board that his record was prejudiced by error when it was reviewed by the selection board in 2014.

6. The Board is persuaded that the applicant's record was prejudiced before the PY15 LCDR selection board, however, by the combined errors, and especially by the error in the Primary Duty block on his OER for the period [REDACTED]. The submitted OER reported his primary duty as SCC Chief, while the validated OER which was reviewed by the selection board reported his primary duty as Command Center Control-Duty. Clearly, being the Chief of the center is a position of more responsibility than being a duty officer at the center. While both versions of the OER are otherwise identical, the Board is not persuaded that the accuracy of the description of duties on the validated OER negated the potential prejudice caused by the position/title of lesser responsibility noted on the OER. Additionally, as the applicant argued, the inconsistency between the OER and the employee summary sheet regarding the applicant's primary duty made his position uncertain and theoretically could have been negatively construed by the selection board, which might have thought that he had first been assigned as the Chief by PSC and that the command had demoted him to the position of duty officer. Therefore, the Board finds that the applicant's record was

⁷ *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

⁸ U.S. Coast Guard, COMDTINST 1410.2, "Documents Viewed by Coast Guard Officer Promotion and Special Boards" (July 3, 2006).

prejudiced by error when the selection board reviewed it, and the first prong of the *Engels* test is met.

7. 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.⁹ 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.”¹⁰ In this case, the Coast Guard has conceded that it is not possible to provide complete assurance that the incorrect OER had no influence on the selection board. Moreover, the applicant’s performance record contains no negative OER marks or comments or other entries that would have precluded his selection for promotion. Accordingly, the applicant’s non-selection for promotion in 2014 by the PY15 LCDR selection board should be removed from his record.

8. The applicant asked the Board to backdate his promotion if selected by the PY16 LCDR selection board in 2015. When the Board corrects an officer’s record by removing a non-selection, the applicant is normally entitled to a backdated date of rank, as well as corresponding back pay and allowances, if he is selected for promotion by the next such selection board to review his record as corrected.¹¹ Therefore, if the applicant is selected for promotion by the next LCDR selection board to review his record, once promoted, his date of rank should be backdated to what it would have been had he been selected for promotion by the PY15 LCDR selection board, he should receive the appropriate position on the ADPL, and the Coast Guard should pay him corresponding back pay and allowances.

9. According to the applicant and the Coast Guard, the errors identified in his record when it was reviewed by the PY15 LCDR selection board have already been corrected. Accordingly, the only relief warranted is that outlined above.

(ORDER AND SIGNATURE [REDACTED])

⁹ *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003); *Quinton*, 64 Fed. Cl. at 125.

¹⁰ *Engels*, 678 F.2d at 175.

¹¹ See *Sanders v. United States*, 219 Ct. Cl. 285 (1979).

ORDER

The application of LT [REDACTED] USCG, for correction of his military record is granted.

His non-selection for promotion by the PY15 LCDR selection board shall be removed from his record.

If he is selected for promotion by the PY16 LCDR selection board, once promoted, his date of rank shall be backdated to what it would have been had he been selected for promotion by the PY15 LCDR selection board, his position on the ADPL shall be adjusted accordingly, and the Coast Guard shall pay him corresponding back pay and allowances.

June 25, 2015

[REDACTED]

[REDACTED]

[REDACTED]