

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-009

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████████████████

FINAL DECISION

This is a proceeding under 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the applicant's completed application on December 19, 2014, and assigned it to staff member ██████████ to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 6, 2015, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

BACKGROUND: BCMR DOCKET NO. 2013-037

In his original application, BCMR Docket No. 2013-037, the applicant, an active duty lieutenant (LT) in the Coast Guard, asked the Board to make various corrections to his record, including replacing a non-substantive officer evaluation report (OER) with a substantive one prepared by his rating chain; removing his non-selections for promotion in 2012 and 2013; and, if subsequently selected for promotion, backdating his date of rank to what it would have been if he had been selected for promotion in 2012 and awarding him back pay and allowances. The Board granted this and other substantial relief on September 12, 2013, including ordering the Coast Guard to "place an Administrative Error Memorandum in his record stating that, although no Oath of Office was executed, he was commissioned a lieutenant in the Reserve and transferred to the IRR on July 2, 2006."

In implementing the Board's order in 2013-037 in November 2013, the Coast Guard put a memorandum addressed to the applicant in his military record with the subject line "Administrative Error," but the memorandum referenced the Board's decision by docket number and mentioned the Board's order to issue the memorandum. The applicant did not challenge the content of the memorandum or the reference to his BCMR case until after he was non-selected for promotion again in 2014. On October 22, 2014, the applicant pointed out to the Personnel Service Center (PSC), that the reference to his BCMR case was improper under Article 5.A.7.f. of COMDTINST 1000.3A because selection boards are not supposed to see or consider BCMR decisions. He also noted that the memorandum addressed him as a Reserve officer (USCGR),

although he was an active duty officer in November 2013, and he alleged that the following language in the memorandum implied that the lack of an Acceptance and Oath of Office in his record was his own fault: “Although no CG-9556, Acceptance and Oath of Office, was executed, you were appointed as a lieutenant in the Coast Guard Reserve on 2 July 2006.”

In response to the applicant’s complaint, PSC amended the memorandum on November 4, 2014, by removing the references to his BCMR case, addressing him as an active duty officer (USCG vs. USCGR), and revising the challenged sentence to say the following: “Your official record is missing a CG-9556, Acceptance and Oath of Office. However, you were appointed as a lieutenant in the Coast Guard Reserve on the 2 July 2006.” On November 10, 2014, the applicant requested more corrections of the memorandum. He asked that the subject line be changed from “Administrative Memorandum” to “Acceptance and Oath of Office,” that a reference to an “Administrative Error Memorandum” be changed to just “memorandum,” and that the disputed sentence begin with the words, “Due to an administrative error by PSC, your official record ...” PSC declined to make further corrections to the memorandum.

APPLICANT’S REQUEST AND ALLEGATIONS

In his new application, the applicant asked the Board to expunge from his record the results of the Promotion Year 2015 (PY2015) lieutenant commander (LCDR) Selection Board, which convened in 2014, due to the original, erroneous Administrative Error Memorandum that was present in his file when that board reviewed it. He also asked the Board to make the additional corrections to the memorandum that he had asked PSC to make on November 10, 2014, and argued that the language of the memorandum as revised on November 4, 2014, implies that the lack of a CG-9556 in his record was his fault. Further, he asked the Board to remove any non-selection for promotion by the PY2016 LCDR Selection Board in August 2015 if the memorandum was not corrected before that board convened. Additionally, the applicant requested that, if promoted, his date of rank and position on the active duty promotion list (ADPL) be changed to what it would have been had he been selected for LCDR in 2012 by the PY2013 LCDR selection board and that he receive the corresponding back pay and allowances, as this Board already granted him in BCMR Docket No. 2013-037. Finally, the applicant requested that, if he is not selected in the PY2015 LCDR Selection Board, he be retained on active duty by the Coast Guard until his record is reviewed by a LCDR Selection Board with a stated opportunity of selection of 80% or higher or that, under 14 U.S.C. § 263, he be granted a Special Selection Board. He also asked that he be allowed to appear before the BCMR to plead his case.

SUMMARY OF THE RECORD

The applicant graduated and was commissioned as an Ensign on [REDACTED] in the Coast Guard. His semiannual OERs as an Ensign and, as of [REDACTED] a Lieutenant Junior Grade contained good marks and comments and recommendations for promotion “with peers.” His last substantive OER, before his temporary separation from active duty in 2006, dated January 31, 2005, documents his service as an [REDACTED]. [REDACTED] It shows eight “standard” marks of 4, eight marks of 5, and two marks of 6 in the

various performance categories; a mark in the fifth spot on the comparison scale; and a recommendation for promotion “with peers.”

The applicant was promoted to lieutenant with his peers on [REDACTED] On [REDACTED] while still serving as an [REDACTED] the applicant submitted a request to resign under the Coast Guard’s temporary separation policy in Article 12.F. of the Personnel Manual to pursue an advanced education in [REDACTED]. He also asked to be commissioned as a Reserve officer in the IRR during his temporary separation.

On January 5, 2006, the Personnel Command issued separation orders for the applicant to be honorably discharged on July 2, 2006, as long as he accepted a Reserve commission. The applicant served in the IRR from July 2, 2006, through July 6, 2008. On July 7, 2008, the applicant signed an Oath of Office to return to active duty. He was assigned to serve as a District Command Center duty officer.

In 2009, 2010, 2011, and 2012, the applicant received increasingly fine OERs as a District Command Center duty officer with strong recommendations for promotion. However, he was not selected for promotion by the PY2013 LCDR Selection Board that convened on August 20, 2012, with an Opportunity of Selection (OOS) of 80%, as per ALCGOFF 054/12 (May 15, 2012).

In 2013 and 2014, the applicant continued to receive fine OERs with recommendations for promotion, but he was not selected for promotion by the PY2014 LCDR Selection Board, which convened in August 2013 with a stated OOS of 74%.

In response to the Board’s decision in BCMR Docket No. 2013-037, PSC entered the original Administrative Error Memorandum in the applicant’s record in November 2013 with the references to the Board’s decision. The PY2015 LCDR Selection Board convened on August 4, 2014, with a stated OOS of 73%, as per ALCGOFF 045/14 (May 30, 2014). The applicant was not selected for promotion.

On November 4 2014, at the applicant’s request, PSC replaced the original Administrative Error Memorandum, issued as a result of the Board’s decision in BCMR 2013-037, with a new one, which states the following:

Subj: ADMINISTRATIVE ERROR

1. This Administrative Error Memorandum shall be placed in your Electronically Imaged Personnel Data Record (EI-PDR) in lieu of a CG-9556, Acceptance and Oath of Office.
2. Your official record is missing a CG-9556, Acceptance and Oath of Office. However, you were appointed a lieutenant in the Coast Guard Reserve on the 2 July 2006 (sic).

For the PY2016 LCDR selection board that convened on August 10, 2015, the opportunity of selection was 75%, as per ALCGOFF 076/15 (July 10, 2015). The applicant was selected for promotion.

VIEWS OF THE COAST GUARD

On July 15, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial and alternative relief. In so doing, he adopted the findings and analysis provided in a memorandum submitted by PSC, which admitted that the original Administrative Error Memorandum issued in November 2013 erroneously mentioned the applicant's BCMR case and was viewable by the LCDR Selection Board in 2014. Therefore, PSC recommended that if the applicant is selected for promotion in 2015, his date of rank be backdated as provided in the Board's decision in 2013-037 and that the applicant receive back pay and allowances.

Regarding the applicant's remaining requests for relief, PSC alleged that the replacement memorandum issued on November 4, 2014, is correct and should remain in the record. PSC noted that there is no evidence that the lack of an Acceptance and Oath of Office dated July 2, 2006, in the applicant's record was caused by PSC. PSC also recommended denying the applicant's request that he be retained on active duty until considered for promotion by a LCDR Selection Board with an opportunity of selection of 80% or higher. PSC stated that there is no way to know whether the OOS will ever be 80% or higher again, and so this relief would unfairly give the applicant countless review by the annual LCDR Selection Boards.

The JAG's own memorandum emphasized the following positions:

- The Administrative Error Memorandum as corrected in November 2014 should remain as is. There is no basis for changing the memorandum to state "due to error by PSC." Further, in BCMR 2013-037, the Board's order requires that an Administrative Error Memorandum be filed with the language "was commissioned a lieutenant in the reserve and transferred to the IRR on July 2, 2006." The Administrative Error Memorandum dated November 4, 2014, was corrected to remove the BCMR reference and is sufficient as written.
- The Coast Guard agrees that the original Administrative Error Memorandum erroneously referenced the previous BCMR case and that the PY2015 LCDR Selection Board results should be removed from the Applicant's record because the memorandum was visible to the that board.
- Furthermore, the Coast Guard also agrees that, if selected by the PY2016 ADPL LCDR Selection Board on August 10, 2015, in accordance with the Board's order in BCMR 2013-037, the applicant should have his date of rank backdated to the date of rank he would have had if he had been selected for promotion by the PY2013 ADPL LCDR Selection Board. Additionally, the applicant should be paid the appropriate back pay and allowances as a result of the backdating of the date of promotion.
- However, the Coast Guard strongly disagrees with the applicant's contention that, if he is twice non-selected going forward, he should continue to be screened by promotion boards until such time as there is a promotion board with an OOS of 80% or more. The Coast Guard argued that this requested relief is inappropriate for several persuasive

reasons, which will not be summarized here because the applicant's selection for promotion has made the issue moot.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 17, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. After receiving an extension, the applicant submitted his response on September 21, 2015. He submitted a copy of a previous OER, lists of officers submitted for promotion with the stated opportunity for selection percentage, and a written statement.

In his written statement, the applicant presented some errors he found in the Coast Guard's advisory opinion, including that he was referred to as a Reserve officer, when he was not a Reservist, and that PSC indicated PY2014, instead of PY2013, as the year with a stated opportunity for selection being 80%. Overall, the applicant agreed with part of the Coast Guard's recommendation, specifically the recommendation to remove the non-selection by the PY2015 LCDR Selection Board and to backdate his date of rank and award him back pay if selected for LCDR by the PY2016 Selection Board. The applicant disagreed with the Coast Guard's recommendation to leave the Administrative Error Memorandum as it is because, he argued, it still implies that he caused the error. He also disagreed with their contention that the applicant should not be retained in the Service if he is twice non-selected for promotion to LCDR with a corrected record.

Since he has in fact been selected for promotion by the PY2016 LCDR Selection Board, the applicant asked the Board to expunge the results of the PY2015 LCDR Selection Board from his record due to the erroneous placement of the Administrative Error Memo that was in his file and mentioned the BCMR's decision.

Furthermore, the applicant asked that his date of rank and position on the ADPL be changed to what it would have been had he been selected for LCDR in PY2013 and to award him corresponding back pay and allowances. Additionally, he requested new relief: He asked that he be frocked as an LCDR as early as possible and that his date of rank on his most recent OER be backdated as well.

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 over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued. The application was timely filed within three years of his discovery of the alleged error in the original Administrative Error memorandum.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.¹

3. The applicant has been selected for promotion to the rank of LCDR. Thus, his request for retention until he is considered by a selection board with an opportunity of selection of 80% or higher and for removal of a potential non-selection by the PY2016 LCDR Selection Board due to the allegedly erroneous Administrative Error Memorandum still in his record are moot.

4. The Coast Guard has agreed to remove the applicant's non-selection by the PY2015 LCDR Selection Board, which convened on August 4, 2014, because at that time, the original Administrative Error Memorandum with references to his BCMR case, 2013-037, was in his record and seen by the selection board. Although the applicant failed to promptly challenge the content of the original Administrative Error Memorandum in November 2013, because BCMR matters may not be viewed by selection boards,² the Board agrees that the applicant's non-selection in August 2014 should be removed from his record.

5. With regard to the new Administrative Error Memorandum, the Board disagrees that the language in the memorandum implies that the applicant caused the error. The common definition of the word "administrative" denotes action by an administrator, administrative office, or management of an organization.³ The new memorandum complies with the Board's order in 2013-037, and the applicant has not proved by a preponderance of the evidence that the new version is erroneous or unjust. The Board notes that the applicant was selected for promotion with the new memorandum in his record.

6. In accordance with the Board's decision and order in BCMR Docket No. 2013-037, the applicant's date of rank should be backdated to what it would have been had he been selected for promotion by the PY2013 selection board in 2012 and he should receive corresponding backpay and allowances because he was selected for promotion by the first LCDR Selection Board to review his record after it had been fully corrected.

7. The applicant had not yet been promoted to LCDR when he received the OERs in question and so all of the evaluation marks and the comparison scale marks on the OERs were assigned to him as a LT, not as a LCDR. As an officer's rank is taken into account when marks are assigned on an OER—for example, an Ensign's mark of 6 for professional competence is unlikely to reflect the same amount of expertise as that of a Lieutenant or Captain who receives a mark of 6—it is very unlikely that the applicant would have received identical marks and recommendations had he actually been a LCDR when he received these OERs. Because his

¹ *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

² COMDTINST 1000.3A, Article 5.A.7 f.

³ Webster's Dictionary defines the term Administrative, as seen with regard to the Administrative Error Memo, as "relating to the management of a company, school, or other organization."

rating chain prepared the OERs with his LT rank in mind, changing the applicant's rank or date of rank on the disputed OERs to reflect his backdated rank of LCDR would introduce substantial error and inaccuracy into the applicant's record even though it would fix an inconsistency. While the Board has many times caused officers' dates of rank to be backdated in past cases, the Board is unaware of any occasion on which it has therefore also changed the officers' past OERs to reflect the higher rank. Therefore, although the applicant's LCDR date of rank will be backdated pursuant to the Board's decision in 2013-037, the Board finds that the OERs he has received as a lieutenant in the interim should not be changed to show that he received those performance marks and comments as a LCDR.

8. In response to the advisory opinion, the applicant asked that he be frocked as a LCDR as soon as possible. Because this request was not included in the application, the Coast Guard has not had an opportunity to respond to it as required by the Board's regulations. However, the Board will encourage the Coast Guard to frock the applicant as an LCDR as soon as possible under applicable policy.

9. Thus, the Board will grant partial relief by removing the applicant's non-selection for promotion in 2014 and re-ordering the backdating of his date of rank, the adjustment of his position on the ADPL, and the award of back pay and allowances. The Board will also encourage the Coast Guard to frock the applicant as an LCDR as soon as possible under applicable policy. However, he has not proved by a preponderance of the evidence that the new Administrative Error Memorandum or his rank or date of rank on his LT OERs should be changed. Therefore, his request for relief is approved in part and denied in part.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

The Coast Guard shall remove from his record his non-selection for promotion by the PY2015 LCDR Selection Board. Once promoted pursuant to his selection by the PY2016 LCDR Selection Board, the Coast Guard shall backdate his LCDR date of rank to what it would have been had he been selected for promotion by the PY2013 LCDR Selection Board; adjust his position on the ADPL accordingly; and award him corresponding back pay and allowances. In addition, the Coast Guard is encouraged to frock him as a LCDR as soon as possible under applicable policy.

November 6, 2015

