

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-007

[REDACTED]

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on October 17, 2017, and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated July 27, 2018, 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, an active duty lieutenant commander (LCDR), asked the Board to correct his record by removing his non-selection, back-dating his date of rank to "what it would have been for promotion year 2014," and by awarding him all back pay and allowances. He later stated that he would also accept a Special Selection Board (SSB). He stated that this Board removed an Officer Evaluations Report (OER) in BCMR Docket No. 2014-015 and replaced it with a continuity OER because it "contained erroneous information." The applicant asserted that he would have been selected for promotion for Promotion Year (PY) 2014, which convened in 2013, had the erroneous OER not been in his record before the selection board. He noted that he was selected for promotion in August 2014 by the PY 2015 LCDR selection board after the erroneous OER had been removed and replaced with a continuity OER.

In support of his application, the applicant provided several documents which are described below in the Summary of the Record.

SUMMARY OF THE RECORD

On October 4, 2013, the applicant learned that he was not among those selected for promotion to LCDR.

On June 27, 2014, the Board decided Docket No. 2014-015 and removed the OER for the period of June 21, 2007, to July 16, 2008, from the applicant's record because it was "prepared in apparent retaliation" and it was unjustly prejudicial. In its place, the Board ordered a continuity OER to be placed in the applicant's record.

On October 15, 2014, the applicant was informed that he was selected for promotion to LCDR for PY 2015, and he was subsequently promoted.

VIEWS OF THE COAST GUARD

On April 26, 2018, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant alternative relief in this case. In doing so, he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that the application is timely and should be considered on the merits. PSC stated that the PY 2014 selection board was presented with the applicant's military record as it appeared when they were considering him for selection. He was not found to be best-qualified for promotion to Lieutenant Commander by the PY 2014 selection board. When the applicant was considered for promotion by the PY 2015 selection board, the unjust OER had been removed from his record and he was then found to be among the best-qualified for promotion. PSC recommended that the Board direct the Coast Guard to convene an SSB in accordance with the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3, Article 6.B.13., to determine if the applicant would have been selected in PY 2014 if the unjust OER had not been in his military record. If the applicant is selected for promotion by the SSB, then PSC recommended that his date of rank be back-dated to what it would have been had he been selected by the original PY 2014 selection board and that the Board award him associated back pay and allowances.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 30, 2018, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. On May 11, 2018, the applicant responded and stated that he had no objections to the Coast Guard's recommendation.

APPLICABLE LAWS & REGULATIONS

Title 14 U.S.C. § 263, entitled Special Selection Boards; Correction of Errors, states the following:

(b) Officers considered but not selected; material error.--

(1) In general.--In the case of an officer or former officer who was eligible for promotion, was considered for selection for promotion by a selection board convened under section 251, and was not selected for promotion by that board, the Secretary may convene a special selection board to determine whether the officer or former officer should be recommended for promotion, if the Secretary determines that--

(A) an action of the selection board that considered the officer or former officer--

(i) was contrary to law in a matter material to the decision of the board; or

(ii) involved material error of fact or material administrative error; or

(B) the selection board that considered the officer or former officer did not have before it for consideration material information.

(2) Effect of failure to recommend for promotion.--If a special selection board convened under paragraph (1) does not recommend for promotion an officer or former officer, whose grade is that of commander or below and whose name was referred to that board for consideration, the officer or former officer shall be considered--

(A) to have failed of selection for promotion with respect to the board that considered the officer or former officer prior to the consideration of the special selection board; and

(B) to incur no additional failure of selection for promotion as a result of the action of the special selection board.

(c) Requirements for special selection boards.--Each special selection board convened under this section shall--

(1) be composed in accordance with section 252 and the members of the board shall be required to swear the oaths described in section 254;

(2) consider the record of an applicable officer or former officer as that record, if corrected, would have appeared to the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board and that record shall be compared with a sampling of the records of--

(A) those officers of the same grade who were recommended for promotion by such prior selection board; and

(B) those officers of the same grade who were not recommended for promotion by such prior selection board; and

(3) submit to the Secretary a written report in a manner consistent with sections 260 and 261.

(d) Appointment of officers recommended for promotion.--

(1) **In general.**--An officer or former officer whose name is placed on a promotion list as a result of the recommendation of a special selection board convened under this section shall be appointed, as soon as practicable, to the next higher grade in accordance with the law and policies that would have been applicable to the officer or former officer had the officer or former officer been recommended for promotion by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.

(2) **Effect.**--An officer or former officer who is promoted to the next higher grade as a result of the recommendation of a special selection board convened under this section shall have, upon such promotion, the same date of rank, the same effective date for the pay and allowances of that grade, and the same position on the active duty promotion list as the officer or former officer would have had if the officer or former officer had been recommended for promotion to that grade by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.

(3) **Record correction.**--If the report of a special selection board convened under this section, as approved by the President, recommends for promotion to the next higher grade an officer not eligible for promotion or a former officer whose name was referred to the board for consideration, the Secretary may act under section 1552 of title 10 to correct the military record of the officer or former officer to correct an error or remove an injustice resulting from the officer or former officer not being selected for promotion by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.

The Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3, Article 6.B.13. memorializes the law into Coast Guard policy.

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 was timely.¹

2. The applicant alleged that his non-selection for promotion by the PY 2014 LCDR selection board was erroneous and unjust. 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.² Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."³

3. The Board found in the Final Decision for BCMR Docket No. 2014-015 that the applicant's record was prejudiced by the unjust July 16, 2008, OER. The decision is dated June 27, 2014. The PY 2014 selection board met in the summer of 2013. Therefore the record shows that the unjust OER was in the applicant's record at the time of the PY 2014 selection board. Because the OER was in the applicant's file, the Board finds that a material error existed in his record when it was reviewed by the PY 2014 LCDR selection board.

4. The applicant originally asked for his non-selection to be removed and for his date of rank to be back dated. He later stated that he would accept an SSB as well. The Coast Guard recommended granting him an SSB in accordance with Article 6.B.13. of the Officer Accessions, Evaluations, and Promotions Manual, and the applicant stated that he had no objections to this recommendation. The Board agrees that a SSB is the proper remedy in this situation. An SSB convened under 14 U.S.C. § 263 is in essence a repeat of the original selection board. The applicant's record will appear before the selection board as it would have at the time except without the unjust OER and with the addition of the continuity OER. Because Congress has provided this remedy for officers whose records, like the applicant's, were materially erroneous when reviewed by a selection board, the Board finds that this remedy should be used and will direct the Coast Guard to convene an SSB for the applicant.

5. The applicant also requested that his original non-selection for promotion be removed from his record and that he receive all back pay and allowances. In 14 U.S.C. § 263(b)(2), however, Congress specified that if an SSB does not select an officer for promotion, he "shall be considered—(A) to have failed of selection for promotion with respect to the board that considered the officer or former officer prior to the consideration of the special selection board." In other words, a non-selection by an SSB validates the non-selection that was rendered invalid by the material error in the officer's record. Therefore, under the statute, if the SSB does not select the

¹ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

² 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

applicant for promotion, his 2013 non-selection should be deemed valid. Such a non-selection would not affect his current promotion from 2014 as decided by the PY 2015 selection board.

6. If the applicant is selected for promotion by the SSB, however, he would be entitled to the relief provided by 14 U.S.C. § 263(d), including appointment to LCDR with a backdated date of rank and the back pay and allowances he would have received had he been selected for promotion in 2013.

7. Accordingly, the relief described in these findings should be granted.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

1. Within 120 days of the date of this decision, the Coast Guard shall convene a special selection board pursuant to 14 U.S.C. § 263 based on the material error in his record when it was reviewed by the active duty LCDR selection board that convened in 2013, so that his record as it appeared before that board—except with the addition of his continuity OER—shall be reviewed along with the required samplings of other candidates' records as they appeared before the active duty LCDR selection board in 2013.
2. If not selected for promotion to LCDR by the special selection board, in accordance with 14 U.S.C. § 263(b)(2), he shall be considered to have failed of selection for promotion with respect to the active duty LCDR selection board that convened in 2013 and he shall be entitled to no further relief under this order.
3. If selected for promotion by the special selection board, (a) he shall be entitled to all the relief provided by 14 U.S.C. § 263(d)—including the LCDR date of rank and the back pay and allowances he would have received had he been selected for promotion to LCDR in 2013 by the PY 2014 LCDR selection board.

July 27, 2018

