

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2013-037**



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**FINAL DECISION**

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receipt of the applicant's completed application on December 14, 2012, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 12, 2013, 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 Reserve [REDACTED] serving on active duty, asked the Board to correct or remove several documents from his military record as explained below:

- a) He asked the Board to remove a non-substantive officer evaluation report (OER) that was prepared for continuity purposes only (a Continuity OER with no marks or comments) for the period February 1 through June 30, 2006, and replace it with a substantive OER for the period February 1, 2005, through July 1, 2006, a copy of which he attached.
- b) He asked the Board to correct the DD 214 documenting his resignation from the regular Coast Guard [REDACTED] upon [REDACTED] to show May 23, 2009, as his Reserve obligation termination date in block 6 (which is now empty) and the Coast Guard Personnel Command as the command to which he was transferred in block 9 and to remove these comments from the remarks in block 18: "DD Form 256CG issued" and "Member's initial service contract was for 4 years."
- c) He asked the Board to remove the mark in the fourth spot on the comparison scale (denoting a "good performer") from his Continuity OER for the period May 30, 2007, through July 6, 2008.
- d) He asked the Board to remove from his record a memorandum dated August 6, 2008, from the Chief of the Reserve Personnel Management Division of the Personnel Command, which stated that as a Reserve Officer, he was required to maintain weight standards but he had not complied with the Coast Guard's semiannual weigh-in requirements.

The memorandum advises him that if he did not comply by September 1, 2008, he would be transferred from the Individual Ready Reserve (IRR) to the Inactive Standby List (ISL).

- e) He asked the Board to remove his non-selections for promotion by the selection boards that convened in [REDACTED] from his record.
- f) He asked the Board, if he is selected for promotion after his record is corrected, to back date his date of rank to what it would have been had he been selected for promotion in [REDACTED] and to award him the back pay and allowances he would be due as a result of this correction.

The applicant explained that he graduated from the U.S. Coast Guard Academy on May [REDACTED] resigned his commission as [REDACTED] pursuant to the Coast Guard's "temporary separation" policy. He alleged that by law he should have been released from active duty (RELAD) to serve in the Reserve because of his continuing Reserve obligation and so block 6 of his DD 214 should show the date [REDACTED] the eighth anniversary of his graduation from the Academy, as his Reserve obligation termination date. In this regard, the applicant noted that his request for temporary separation had included a request to serve in the IRR during his temporary separation, and that request was approved, but his DD 214 incorrectly shows that he had no Reserve obligation and was discharged instead of RELAD. He alleged that his DD 214 should show that he had a Reserve obligation through [REDACTED] and that his new command was the Coast Guard Personnel Command, which was the command of all members assigned to the IRR. In addition, he alleged, he was not issued a DD 256CG (Honorable Discharge certificate) and he did not have a four-year contract, so those remarks in block 18 of his DD 214 are erroneous.

The applicant alleged that because his unit in [REDACTED] discharged him, instead of releasing him to the Reserve, they also failed to document his performance properly in a substantive OER. His supervisor told him in [REDACTED] when his annual OER was almost due, that because he was resigning and had not received an OER since [REDACTED], the command would prepare a Continuity OER to cover the period from [REDACTED], through his date of discharge, [REDACTED]. However, he alleged, such action would only have been correct if he was being separated and was incorrect because he was RELAD. Moreover, the Continuity OER they created covers only the period from [REDACTED], and so, contrary to regulation, he has no OER covering his service for the previous year, from [REDACTED]. The Continuity OER also fails to include a Reviewer's comments page, which, he alleged, is required when one's Reporting Officer is a civilian as his was in [REDACTED].

The applicant stated that in accordance with the temporary separation policy, he returned to active duty about two years later, on [REDACTED]. The Personnel Command then created a second Continuity OER to cover his time in the IRR, but instead of creating it for the period [REDACTED], the Personnel Command made the starting date [REDACTED], and so there is no OER covering his service at all from [REDACTED]. Moreover, this second Continuity OER erroneously contains an evaluation mark on the comparison scale, which was not permitted by the Personnel Manual.

The applicant stated that on [REDACTED] after he was non-selected for promotion to [REDACTED] he reviewed his record with two personnel specialists who pointed out the errors and the absence of a required substantive OER. The applicant stated that he advised the Personnel Service Center (PSC, successor to the Personnel Command) of these errors in [REDACTED], and PSC stated only that they would create another Continuity OER to cover his time in the IRR from [REDACTED]. He contacted the [REDACTED], where he had served in [REDACTED], and informed them of the need for a substantive OER. The civilian who had served as his Reporting Officer was still the office and agreed to help him get the missing OER created. The applicant submitted a copy of an OER signed by the new [REDACTED] and copies of his email correspondence with that command. He asked the Board to have PSC enter this OER in his record to document his performance from [REDACTED] until his temporary separation on [REDACTED] and to remove the erroneous Continuity OER that was created at that time.

The applicant stated that he was not selected for promotion in [REDACTED] and believes that his non-selection was caused by the confusing and prejudicial errors and gaps in his military record. Therefore, he asked the Board to remove his non-selection for promotion in [REDACTED] from his record and, if the Board's decision is not issued before the selection convenes in [REDACTED] to remove any non-selection resulting from that board as well.

In support of his allegations, the applicant submitted copies of many documents, which are included in the summary of the record below.

### SUMMARY OF THE RECORD

The applicant graduated from the Coast Guard and was commissioned an ensign on May [REDACTED]. His semiannual OERs as an ensign and, as of [REDACTED], a lieutenant junior grade, contain good marks and comments and recommendations for promotion "with peers." His last substantive OER before his temporary separation, dated [REDACTED] documents his service as an [REDACTED]. It shows eight "standard" marks of 4,<sup>1</sup> 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."<sup>2</sup>

The applicant was promoted to [REDACTED] 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 then in effect in order to pursue an advanced education in veterinary science. He also asked to be commissioned a Reserve officer in the IRR during his temporary separation.

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<sup>1</sup> 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.

<sup>2</sup> On an OER comparison scale, the reporting officer assigns a mark by comparing the reported-on officer to all other officers of the same grade whom the reporting officer has known throughout his or her career. Although the marks on the scale are not numbered, there are 7 possible marks, which range from a low of "unsatisfactory" for a mark in the first spot on the scale to a high of "a distinguished officer" for a mark in the seventh spot. A mark in the third, fourth (middle), or fifth spot on the scale denotes the officer as "one of the many competent professionals who form the majority of this grade."

On [REDACTED], the Personnel Command issued separation orders for the applicant to be honorably discharged on [REDACTED], as long as he accepted a Reserve commission. The orders do not mention any requirement to sign a Reserve Oath of Office form. On [REDACTED], the Commandant issued ALCGPERSCOM [REDACTED], which states that the Secretary had approved his selection for a Reserve commission and that the officers on the list should complete Oaths of Office upon separation to become officers in the Reserve.

There is no paper OER—substantive or Continuity—documenting the applicant’s active duty service from [REDACTED], in the military record provided to the Board by the Coast Guard. A Continuity OER covers the period [REDACTED], and it was validated not by PSC until [REDACTED]. The Coast Guard claims that in its electronic database, Direct Access, the start date for this OER is [REDACTED].

The applicant’s DD 214 shows that he resigned his commission on [REDACTED]. Block 6, “Reserve Obligation Termination Date,” contains no entry; block 9, “Command to Which Transferred,” states “Not Applicable”; and block 18 contains the disputed remarks, “DD Form 256CG issued” and “Member’s initial service contract was for 4 years.”

The applicant served in the IRR from [REDACTED]. No OER covers his service from [REDACTED], through [REDACTED], but a Continuity OER with a mark of 4 on the comparison scale covers the period [REDACTED].

On [REDACTED] the applicant signed an Oath of Office to return to active duty in the regular Coast Guard. He was assigned to serve as a District Command Center duty officer.

On [REDACTED], the Chief of the Reserve Policy Management Division sent the applicant a letter regarding the IRR requirement that he be weighed each April and November and stating that because he had no current weigh-in report in the database, he would be transferred from the IRR to the ISL unless he met the requirement by [REDACTED].

In [REDACTED], the applicant received increasingly fine OERs as a [REDACTED] officer with strong recommendations for promotion. However, he was not selected for promotion in [REDACTED]. The results of the [REDACTED] selection board are not yet published.

### VIEWS OF THE COAST GUARD

On May 3, 2013, 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 by the Personnel Service Center (PSC). PSC made the following admissions:

- The applicant’s May [REDACTED] Oath of Office obligated him to eight years of military service through May [REDACTED] under 10 U.S.C. § 651 and so his DD 214 is erroneous in that regard. However, because the applicant is an Academy graduate, he had a 5-year

active duty obligation and accepted a regular, active duty commission. Therefore, he was not RELAD into the Reserve on [REDACTED] but discharged from the regular Coast Guard upon the condition that he accept a Reserve commission, and he should have been asked to sign a Reserve Oath of Office on that date. Although there is no Reserve Oath of Office in his record, the circumstantial evidence supports the presumption that he fully intended to affiliate with the IRR upon his separation from active duty in [REDACTED]

- Article 10.A.3.a.5.b.3. provides that active duty officers who are being separated and requesting a Reserve commission must receive substantive instead of Continuity OERs when they detach from their active duty billets. Therefore, the first Continuity OER in the applicant's record was prohibited by policy, and there is a gap in his OER record from [REDACTED] through [REDACTED]
- Article 10.A.3.a.5.2. states that the comparison scale on a Continuity OER must be left blank.
- The second Continuity OER covers only part of the applicant's time in the IRR, from [REDACTED] and Direct Access erroneously shows that he entered the IRR on [REDACTED] PSC speculated that because the applicant's [REDACTED] date of rank was adjusted to [REDACTED] due to his temporary separation, that date may have mistakenly been used for his entry in the IRR and as the start date of the Continuity OER.
- The [REDACTED] memorandum from the Reserve Personnel Management Division about the IRR weigh-in requirements was mistakenly issued after the applicant had already left the Reserve and returned to active duty.
- Given the errors in the applicant's record, it is "more likely than not [that the errors] caused the applicant's record to appear worse before the [REDACTED] selection board that convened in [REDACTED]" and so those non-selections "should be set aside."

PSC also alleged that the applicant did not drill or take correspondence courses to earn retirement points for satisfactory service while he was in the IRR and so should have been transferred to the ISL on May [REDACTED] following his first whole, unsatisfactory anniversary year pursuant to Article 4.B.5.a. of the Reserve Policy Manual.

PSC recommended that the Board make the following corrections to the applicant's record:

- 1) Correct the applicant's DD 214 to show the date [REDACTED] in block 6 and "Coast Guard Personnel Command" in block 9; remove the comment "DD Form 256CG issued" from block 18; and correct the other disputed comment to state "Member's initial service contract was for 5 years."
- 2) Correct Direct Access to show that the applicant entered the IRR on [REDACTED] and remove the entry showing that he entered the IRR on [REDACTED]

- 3) In lieu of a Reserve Oath of Office, place an Administrative Error Memorandum in the applicant's record stating that, although no Oath of Office was executed, the applicant was considered transferred to the IRR on [REDACTED]
- 4) Correct Direct Access to show that he was transferred to the ISL on May [REDACTED]
- 5) Remove the first Continuity OER covering the period [REDACTED] and direct PSC to process the substitute substantive OER submitted by the applicant as Enclosure (2) of his application for review and validation.
- 6) Remove the second Continuity OER covering the period [REDACTED] and replace it with a Continuity OER covering the applicant's period in the IRR (but not the ISL) from [REDACTED]
- 7) Remove the [REDACTED] memorandum about the IRR weigh-in requirement.
- 8) Remove the applicant's non-selection for advancement in [REDACTED]. (PSC issued this memorandum four months before the [REDACTED] selection board re-convened in [REDACTED] and so did not address it. However, PSC contacted the BCMR staff on [REDACTED] and asked that the Board take into account the applicant's possible non-selection in [REDACTED] when deliberating what relief to grant in this case.)
- 9) Place the applicant's corrected record before the next [REDACTED] selection board and, if selected, back date his date of rank to what it would have been had he been selected for promotion in 2012.
- 10) Reissue the applicant's SOCS to reflect IRR service from [REDACTED] [REDACTED] only.

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

On May 22, 2013, the applicant responded to the views of the Coast Guard. He stated that he agreed with the recommendations except insofar as they reflect a transfer to the ISL on May [REDACTED] (recommendations 4, 6, and 10, above). The applicant stated that he does not want his record to be corrected to show that he was transferred to the ISL since he was in the IRR throughout his time in the Reserve.

The applicant explained that because his entry into the IRR was not properly captured in the Direct Access database, he never received the notifications to complete Annual Screening Questionnaires, as required for an IRR officer, or other mailings even though he updated his mailing address in Direct Access upon his separation on [REDACTED]

Moreover, the applicant stated that there was no real reason to transfer him to the ISL in May [REDACTED] because by then he had already submitted his Notice of Intent to return to active duty in accordance with Article 12.F.3.b.1. of the Personnel Manual and so the Coast Guard knew he was returning to active duty on [REDACTED] and would not have bothered to transfer him to the ISL even if they had thought to do so. In support of these allegations, the applicant submitted a copy of an email conversation dated [REDACTED] in which he asked what steps he needed to take to return to active duty in [REDACTED] and a U.S. Postal Receipt dated [REDACTED] [REDACTED] showing that his package had been delivered to PSC.

The applicant also pointed out that under Chapter 4.B.5. of the Reserve Policy Manual, he could have requested a waiver of the IRR participation requirements. If he had been properly notified of a pending transfer to the ISL, he would have requested one and pointed out that he had already submitted his Notice of Intent to return to active duty on [REDACTED] so there would be no point in transferring him to the ISL on [REDACTED]

The applicant noted that the Coast Guard has admitted that the gaps and errors in his record may have caused him to be passed over for promotion and so have caused him significant hardship. Therefore, he argued, he should not be penalized by having the Board create another, different kind of gap in his record by transferring him to the ISL from [REDACTED] when that never actually happened.

## APPLICABLE REGULATIONS

### *Temporary Separation Regulations*

Article 12.F.3.a. of the Personnel Manual in effect in 2006 states that Commander, PSC may approve a request for a temporary separation from active duty for up to 24 months during an officer's or member's career. The requests are granted based on the needs of the Service, and an officer must be "tour complete" at the time of separation, and they must complete all of their responsibilities under the Officer Evaluation System. Members may affiliate with the Reserve during the temporary separation.

Article 12.F.3.b. of the Personnel Manual states the following about returning to active duty following a temporary separation:

An approved request guarantees reinstatement to the same grade or rate on either Active Duty at the end of the temporary separation, or upon assignment in the Reserve during the temporary separation, subject to physical condition and other qualifications. The member must complete a physical examination at a U.S. Military Entrance Processing Station (MEPS) and meet retention physical standards for enlistment or appointment.

1. The applicant must submit a Notice of Intent in the format provided in Figure 12.F.3.2. at least six months, but not earlier than one year before the intended date of return to Active Duty. To ensure the greatest job opportunity, applicants should consider submitting their notice of intent by 1 October to compete for assignments in the following summer.... [Provisions requiring steps to renew security clearance prior to return to active duty.]

Article 12.F.5. of the Personnel Manual provides the following special provisions for officers who temporarily separate:

2. Officers submit their request to separate under this policy as an unqualified resignation in the form prescribed in Article 12.A.6. with a signed Statement of Understanding of Conditions for Temporary Separation (See Figure 12.F.7.1.) as an attachment to the request. The commanding officer's endorsement shall comment on the officer's future potential and a definite recommendation for approval or disapproval.

3. Commander, (CGPC-opm-1) will discharge officers with the understanding they will return with the same grade they last held on Active Duty. If officers desire to affiliate with the Reserve

during the temporary separation, and if not included in the original request for temporary separation, then it is preferred that they apply for a Reserve commission at least three months in advance of the desired date of separation from Active Duty. This application process must be coordinated with the Coast Guard Personnel Command (CGPC-rpm). However, the highest grade to which temporary officers will be appointed is lieutenant.

### ***Reserve Policy Manual***

Chapter 1.C.2.b. of the Reserve Policy Manual (RPM) in effect in 2006 describes the IRR as follows:

The Individual Ready Reserve (IRR). A manpower pool principally consisting of individuals who have had training and have previously served in the Active forces or in the Selected Reserve. The IRR consists of individuals who must fulfill their military service obligation (MSO) under 10 U.S.C. 651, and those who have fulfilled their MSO and who voluntarily remain in the IRR. IRR members are not required to meet the same IDT and ADT training requirements as Selected reservists.

(1) IRR members may voluntarily participate in Reserve training programs (i.e., IDT or ADT) for retirement points only, without pay, and shall be assigned to the same Coast Guard or selected Joint Service units as their SELRES counterparts. They may also apply to perform Active Duty Special Work (ADSW) or Readiness Management Periods (RMPs) for pay. ...

(2) Non-drilling IRR members are assigned to Commander, Personnel Command (rpm), who serves as members' commanding officer and point of contact for all administrative purposes.

Chapter 1.C.3.b. of the RPM describes the ISL as follows:

Inactive Status List, Standby Reserve. This category contains reservists who may be ordered to active duty in time of war or national emergency if it is determined that not enough qualified reservists in an active status are available in the categories required. Members on the Inactive Status List (ISL) may not train for pay or retirement points, are not eligible for promotion, and do not accrue credit for qualifying years of service for retirement in accordance with Chapter 1223 of 10 U.S.C.; they shall be assigned to the Personnel Command (CGPC-rpm). The ISL, Standby Reserve includes:

(1) volunteers, not required by law or regulation to remain in an active status, who possess requisite skills that the Coast Guard may require in a mobilization;

(2) members who were on or were eligible to be placed on the ASL, Standby Reserve but who were instead placed on the ISL in order to prevent an inequity with regard to their pay, promotion or retirement points; and

(3) members with at least 20 years of service computed in accordance with 10 U.S.C. 12732, who have been determined to have a disability rated at less than 30 percent, and who have been transferred to the ISL instead of separated for that disability under 10 U.S.C. 1209.

Chapter 4.A.6. of the RPM states that the following about participation in the IRR:

IRR members are obligated to:

a. Answer official correspondence.

b. Respond to annual screening questionnaires.

c. Promptly advise Personnel Command (CGPC-rpm) (or the Servicing Personnel Office via the chain of command for drilling reservists assigned to units) of changes of residence and changes of phone number(s) or mailing address, changes in marital status or number of dependents, changes in civilian education or civilian employment, and any physical condition or other factor that would affect the member's immediate availability for active military service.



- d. Meet the minimum training requirements for their TRAPAY CATs.
- e. Maintain physical fitness and weight standards.
- f. Officers must accrue a minimum of 50 retirement points in an anniversary year to be retained in an active status (see 10 U.S.C. 12642).

Unsatisfactory participation is the failure to comply with any of the contractual obligations or program requirements listed above, or failure to comply with performance standards during any type of duty.

Chapter 4.B.1.a. of the RPM states the following about unsatisfactory participation:

Commands shall monitor member participation and evaluate performance of prescribed training requirements to determine compliance with the previous section. Every effort shall be made to correct performance deficiencies by timely counseling of members who are not participating satisfactorily.

Chapter 4.B.4.b. states that “Ready Reservists who fail to complete and return annual screening questionnaires shall be designated as ‘unsatisfactory participants.’ The commanding officer shall document counseling in accordance with Section 4.B.1 and follow procedures for compliance measures in Section 4.B.2.”

Chapter 4.B.5.a. of the RPM states that “[o]fficers in the Ready Reserve or Standby Reserve, Active Status who fail to earn the minimum 50 retirement points per anniversary year for satisfactory federal service will be processed by the Personnel Command (CGPC-rpm) for removal from an active status. Requests for waivers may be forwarded to CGPC-rpm via the chain of command.”

### ***Officer Evaluation Regulations***

Article 10.A.5. of the Personnel Manual states the following about Continuity OERs:

Reports for Continuity Purposes (Figure 10.A.5) (may be referred to as a Continuity OER). Such reports may be submitted in cases where an OER is required by these instructions, but full documentation is impractical, impossible to obtain, or does not meet officer evaluation system goals.

a. Reserve. A continuity OER shall be submitted for officers assigned to the Individual Ready Reserve (IRR). The OER shall encompass the entire period the officer was in the IRR. ...

b. A continuity OER may be submitted under the following conditions:

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(3) An officer on an annual schedule has an approved retirement or separation (voluntary resignations and discharges only) date within 18 months of the last regular OER submission and has met the expected high standard of performance during the period. Reviewer comments are not required for these reports. Officers requesting reserve commissions or being released from active duty (RELAD) may not apply these criteria. [Emphasis added.]

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d. When submitting a continuity OER, the Reported-on Officer shall complete Sections 1 and 13. The designated Supervisor shall briefly describe the Reported-on Officer’s responsibilities in Section 2 and state the reason the OER is submitted for continuity purposes, e.g., Submitted IAW Article 10.A.3.a.5., member separating on 01 July 2000. All other evaluation areas, including section 9, shall be left blank with “NOT OBSERVED” marked for each dimension. ...

### *DD 214 Regulations*

Chapter 1.E. of COMDTINST M1900.4D states that block 18 on a DD 214 should remarks about the member's discharge certificate as follows:

- a. Enter the appropriate statement concerning the type of discharge certificate issued: "DD Form 256CG", "DD Form 257CG", "DD Form 259CG", or "DD Form 260CG".
- b. Release from Active Duty. In the case of a Coast Guard Reservist who is released from active duty and continues to hold status as a member of the Coast Guard Reserve on inactive duty, and a Regular Coast Guard enlisted member who is released from active duty and concurrently transferred to the Coast Guard Reserve, enter the statement: "NO DISCHARGE CERTIFICATE ISSUED AT TIME OF SEPARATION."

### **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. Although the application was not filed within three years of the date the applicant presumably knew that he had not received a substantive OER in [REDACTED], it is considered timely.<sup>3</sup>

2. The applicant alleged that two Continuity OERs and other documents and information in his military record are erroneous and unjust. In considering allegations of error and injustice, the Board begins its analysis in every case by presuming that the disputed information in an applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>4</sup> 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."<sup>5</sup> When challenging an OER, an applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a clear and prejudicial violation of a statute or regulation.<sup>6</sup>

3. The Coast Guard has admitted all of the applicant's allegations of error and injustice except to note that he was not RELAD on [REDACTED] but discharged because he had no prior Reserve contract or commission. The Board has reviewed the applicant's allegations and the cited statutes and regulations and agrees with the Coast Guard on the following points:

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<sup>3</sup> *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).

<sup>4</sup> 33 C.F.R. § 52.24(b).

<sup>5</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

<sup>6</sup> *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

- a. When the applicant's regular OER was due on [REDACTED], his most recent substantive OER, dated [REDACTED] was within 18 months of his approved separation date on [REDACTED], but preparation of a Continuity OER in lieu of a substantive OER was not authorized because the applicant had requested a commission in the Reserve.<sup>7</sup> The Continuity OER dated [REDACTED], which his rating chain at the [REDACTED] prepared, is therefore impermissible under the regulations. As PSC agreed, it should be removed<sup>8</sup> and replaced with the substantive OER recently prepared by that command. Because the new, substantive OER covers the period from [REDACTED], it will also fill the prejudicial gap in the applicant's OERs from [REDACTED].
- b. The applicant was discharged, not RELAD, under the Coast Guard's temporary separation policy<sup>9</sup> and should have been advised to sign a Reserve Oath of Office on [REDACTED] because he had asked to join the Reserve and his request for a Reserve commission had been approved by the Secretary. Although the need for a Reserve Oath of Office appeared in ALCGPERSCOM 031/06, which was distributed to employees of the Personnel Command, it was not mentioned in the Personnel Manual or the separation orders issued to the applicant. Therefore, the Board finds that the lack of a signed Reserve Oath of Office dated [REDACTED] constitutes an error committed by the Coast Guard in the applicant's record. His record should be corrected by adding a memorandum explaining that although he did not sign the oath at that time, he is considered to have been commissioned a lieutenant in the Reserve, specifically the IRR from [REDACTED].
- c. Under 14 U.S.C. § 182 and 10 U.S.C. § 651, the applicant incurred a five-year active duty obligation by attending the U.S. Coast Guard Academy and an eight-year military service obligation by accepting his commission on May [REDACTED].<sup>10</sup> In addition, officers in the IRR in [REDACTED] were assigned to the Coast Guard Personnel Command. Therefore, the applicant's DD 214 should be corrected by entering the date [REDACTED] in block 6 and "Coast Guard Personnel Command" in block 9 and by correcting the remarks in block 18 to show that his initial service obligation was five (5) years.
- d. No OER covers the applicant's service in the IRR from [REDACTED]. The Continuity OER for his IRR service covers only the period [REDACTED] though [REDACTED] even though all of an officer's time in the IRR must be documented on a Continuity OER.<sup>11</sup> Thus, his record contains a second impermissible, prejudicial gap in his OERs, which should be filled.<sup>12</sup>
- e. A Continuity OER may not contain any numerical marks or a mark on the comparison scale in section 9.<sup>13</sup> Therefore, the mediocre mark of 4 on the Continuity OER covering

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<sup>7</sup> Personnel Manual, Article 10.A.5.b.

<sup>8</sup> *Hary*, at 708.

<sup>9</sup> Personnel Manual, Article 12.F.

<sup>10</sup> See Recruiting Manual, Chapter 2.A.1.d. (explaining 10 U.S.C. § 651 and noting that Coast Guard personnel incur an 8-year military service obligation).

<sup>11</sup> Personnel Manual, Article 10.A.5.a.

<sup>12</sup> *Hary*, at 708

<sup>13</sup> Personnel Manual, Article 10.A.5.d.

the applicant's IRR service from [REDACTED], is both erroneous and prejudicial, and it should be removed from his record.<sup>14</sup>

- f. The memorandum dated [REDACTED] regarding IRR weigh-in requirements and a possible transfer to the ISL is factually erroneous because the applicant had already returned to active duty by that date. Therefore, it should be removed from his record.
- g. The above-noted errors, especially the two large gaps in the applicant's OERs, have made his record appear worse than it otherwise would have when it was reviewed by the [REDACTED] selection boards in [REDACTED]. Given the good quality of the rest of his military record, the Board finds that it is not unlikely that he would have been selected for promotion had those prejudicial errors not been in his record. Therefore, the Board agrees with the Coast Guard that his non-selection in [REDACTED] and any non-selection in [REDACTED] should be removed from his record,<sup>15</sup> and if he was selected for promotion to [REDACTED] or is selected for promotion in [REDACTED] after the errors are corrected, his date of rank, once promoted to [REDACTED] should be backdated to what it would have been had he been selected for promotion in [REDACTED] and he should receive corresponding back pay and allowances.<sup>16</sup>

4. The applicant stated that because he was not issued an Honorable Discharge Certificate DD Form 256CG, that remark should be removed from block 18 of his DD 214. The Coast Guard agreed without addressing the correctness of the remark. However, DD 214s must be prepared in accordance with COMDTINST M1900.4D, and according to that manual, only reservists and enlisted personnel being released from active duty into the Reserve for the remainder of their military service obligation receive the comment, "NO DISCHARGE CERTIFICATE ISSUED AT TIME OF SEPARATION." All others are supposed to receive the remark in block 18 about which type of discharge certificate was issued, and the DD Form 256CG is the Coast Guard's Honorable Discharge Certificate. The Coast Guard has stated that the applicant was not a reservist being RELAD on [REDACTED], and the temporary separation policy supports that

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<sup>14</sup> *Hary*, at 708

<sup>15</sup> When an applicant proves that his military record contained a prejudicial error or injustice when it was reviewed by a selection board, unlike the other military services, the Coast Guard is not required to hold a special selection board under 10 U.S.C. § 628. *Quinton v. United States*, 64 Fed. Cl. 118, 125 n3 (2005). Instead, this Board must determine whether the applicant's failure of 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 in any event?" *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982). 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. *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. To void a failure of 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." *Engels*, 678 F.2d at 175.

<sup>16</sup> "[O]nce the Board decides to give a remedy, it should not be free to slice the relief illegally or arbitrarily, sending the claimant forth with half-a-legal-loaf or even less." *DeBow v. United States*, 193 Ct. Cl. 499, 504 (1970), *cert. denied*, 404 U.S. 846 (1971); *see Bonen v. United States*, 229 Ct. Cl. 144, 149 (1981) ("The 'half-a-loaf' doctrine normally applies where a corrections board grants plaintiff's claim, but stops short of awarding the full appropriate relief requested by plaintiff. Failure of the board to grant full relief where it is mandated by the records change results in 'a new cause of action' or "'continuing' claim' which revives the statute of limitations.") (citing *Denton v. United States*, 204 Ct. Cl. 188, 195, *cert. denied*, 421 U.S. 963 (1975)).

claim.<sup>17</sup> Nor was he a regular enlisted member being transferred to the Reserve. By default, therefore, he should have received a DD Form 256CG, and the remark in block 18 is proper if not factual since the certificate apparently was not timely issued. Therefore, instead of removing the remark from block 18 of the applicant's DD 214, the Board will order the Coast Guard to issue a DD Form 256CG to document the applicant's Honorable Discharge on [REDACTED]

5. The only real point of contention in this case is whether the Board should correct the applicant's record to show that he was transferred from the IRR to the ISL on [REDACTED] before returning to active duty on [REDACTED], because he had not participated satisfactorily by earning 50 points that anniversary year while in the IRR.<sup>18</sup> The applicant did not request this negative correction but the Coast Guard recommended it as a reflection of what might have happened according to regulations<sup>19</sup> had the Reserve Personnel Management Division known that the applicant was an officer in the IRR and reacted immediately to his failure to earn 50 points in his anniversary year ending on May [REDACTED]. As the applicant noted, however, by May [REDACTED] the Coast Guard already knew that he was returning to active duty on [REDACTED]—within seven weeks—and waivers of the IRR point requirement may be granted.<sup>20</sup> Moreover, this Board is not authorized to order negative corrections to a military record that the applicant has not requested.<sup>21</sup>

6. Currently, the applicant's electronic and paper records are completely muddled about his status during his temporary separation. Although his request for a Reserve commission was approved by the Secretary, the Coast Guard erred by failing to have him sign a Reserve Oath of Office. Some of his records show he was transferred to the IRR on [REDACTED] while others show he was separated from the military entirely on that date, despite his continuing statutory obligation under 10 U.S.C. § 651, and still others show that he entered the IRR on [REDACTED]. In addition, the record indicates that because no Oath of Office was signed on [REDACTED], the Reserve Personnel Management Division failed to communicate properly with the applicant by notifying him of his responsibilities while in the IRR. In light of all these error, the unique circumstances of this case, and the Board's authority to order only those corrections that are requested by an applicant,<sup>22</sup> the Board finds that the applicant's records should be corrected to be consistent with his assignment to the IRR throughout his temporary separation from [REDACTED] through [REDACTED].

7. Relief should be granted in accordance with the above findings.

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<sup>17</sup> Personnel Manual, Article 12.F.5.

<sup>18</sup> Reserve Personnel Manual, Chapters 4.A.6. and 4.B.5.a.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at Chapter 4.B.5.a.

<sup>21</sup> 10 U.S.C. § 1552(b) (“No correction may be made under subsection (a)(1) unless the claimant or his heir or legal representative files a request for the correction . . .”); see *Friedman v. United States*, 141 Ct. Cl. 239, 252-53 (1958) (holding that “[t]he Correction Boards were established for the purpose only of reviewing, on application of a member of the military personnel, a military record to correct errors or injustices *against* such personnel and not to review and reverse decisions of other established boards *favorable* to such personnel).

<sup>22</sup> *Id.*

**ORDER**

The application of [REDACTED] USCG, for correction of his military record is granted in part. The Coast Guard shall make the following corrections to his record:

- 1) Correct his DD 214 dated [REDACTED], to show the date [REDACTED] in block 6 and “Coast Guard Personnel Command” in block 9 and to show in block 18 that his initial service contract was for 5 years, and issue him an Honorable Discharge Certificate, DD Form 256CG, documenting his honorable discharge from active duty on [REDACTED]
- 2) In lieu of a Reserve Oath of Office, 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 [REDACTED] and correct all electronic databases to show that he was assigned to the IRR continuously from [REDACTED]
- 3) Remove the Continuity OER covering his active duty service immediately prior to his temporary separation in [REDACTED] and replace it with the substantive OER covering the period [REDACTED], which he submitted as Enclosure (2) of his BCMR application;
- 4) Remove the Continuity OER covering the period [REDACTED], and replace it with a Continuity OER covering his service in the IRR from [REDACTED] with a description of duties in block 2 but only marks of “not observed” for the performance dimensions and the comparison scale in block 9;
- 5) Remove the [REDACTED] memorandum about the IRR weigh-in requirement;
- 6) Remove his failure of selection for promotion in [REDACTED] by the PY [REDACTED] ADPL [REDACTED] selection board and—if he was not selected for promotion in [REDACTED]—his failure of selection by the PY ADPL [REDACTED] selection board; and,
- 7) If he was selected for promotion by the PY [REDACTED] ADPL [REDACTED] selection board in [REDACTED] or if he is selected for promotion by the next ADPL [REDACTED] selection board to review his record after it has been corrected in accordance with this Order, back date his date of rank, once he has been promoted, to the date of rank he would have had if he had been selected for promotion by the PY [REDACTED] ADPL [REDACTED] selection board and pay him the back pay and allowances he will be due as a result of the backdating of his date of rank.

