

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2018-155**



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**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 application upon receiving the applicant's completed application on June 12, 2018, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 8, 2019, 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 former lieutenant (LT/O-3) in the Coast Guard Reserve, asked the Board to reinstate him in the Reserve so that he receives constructive service credit and to promote him to lieutenant commander (LCDR/O-4). The applicant alleged that CDR X, one of the officers on the August 1, 2016, Inactive Duty Promotion List (IDPL /Reserve) LCDR selection board, had a conflict of interest because CDR X had been his unit's Reserve Program Administrator from 2009 to 2011. The applicant also stated that during that time frame he—

had problems with submission of OER. OER problem rectified in 2016 prior to [selection] board convening. 2016 promotion OER rater comments made statement "promote to O-4 now!" and considered an excellent performer. Upon applicant learning that O-4 selection was not made, a waiver request was generated, approved by chain of command and forwarded to [the District Force Readiness Branch]. Upon being reviewed by [the District Force Readiness Branch], it was never processed or forwarded to RPM-1 for consideration. Coincidentally, the waiver was denied by [CDR X] who also neglected to complete applicant's 2011 transfer OER and who also sat on applicant's 2016 [Reserve LCDR selection board]. Applicant believes that denial of promotion and waiver is personal in nature.

In support of his allegations, the applicant submitted the following documents:

- On his annual OER dated May 31, 2016, the applicant received very high marks of 6 and 7 (on a scale from 1 to 7) and a mark in the fifth spot (of seven) on the officer comparison

scale, which denotes an “excellent performer.” The high marks are supported by laudatory comments, including “Promote to O-4 now!”

- ALCGPSC 105/16, issued on September 15, 2016, announced the results of the Reserve LCDR selection board that had convened on August 1, 2016, and shows that the applicant was not selected for promotion and that CDR X was one of the seven officers on the selection board. Selection was determined by majority vote.
- In a memorandum dated April 20, 2017, the applicant requested a waiver of his mandatory separation so that he could continue to serve in the Reserve. He stated, “After seventeen years of dedicated service in the Coast Guard; being considered an ‘excellent performer’ on my last OER (May 2016); and the current shortage of reserve personnel as stipulated in [ALCOAST 181/16], I wish to continue to serve my country.” The memorandum was routed through the District Force Readiness Branch to the Reserve Personnel Management Division of the Coast Guard Personnel Service Center. It is electronically signed by his supervisor but not by CDR X.
- In an email dated May 3, 2017, CDR X replied to a lieutenant [the original email was not included] regarding an “Extension Request,” that a member—presumably the applicant—“has less than 18 years of service and has twice failed for selection to the next higher grade. 14 USC 740 governs actions of members under this category. Member will be transferred to the inactive status list or discharged on June 30 from when the approval date of the board report of which the member’s second failure of selection occurred.” CDR X cc’ed this email to an active duty Commander and a chief yeoman.
- On July 13, 2017, the lieutenant forwarded CDR X’s email dated May 3, 2017, to the applicant “as requested,” noted that he would be receiving a Continuity OER, and asked him to drop off his badge and parking pass. The applicant replied the same day stating, “it appears from the e-mail chain below that my waiver didn’t get forwarded up to RPM-2 level for consideration but rather stayed at [the District Force Readiness Branch] level. Coincidentally, [CDR X] was my supervisor when I was assigned to [the Sector] Response and also sat on my recent 0-4 board which I wasn’t selected for.”
- In an email dated August 15, 2017, the applicant advised the RPM-2 branch of RPM that he had been discharged from the Reserve as of June 30, 2017, even though he had submitted a waiver request to be retained as an O-3 in April 2017, and he asked if RPM-2 had received his waiver request. The branch chief of RPM-2 replied the next day and stated that her office had not received a waiver request from the applicant but that waiver requests were processed by RPM-1. She cc’ed the branch chief of RPM-1.
- In an email dated August 16, 2017, the RPM-1 branch chief advised the applicant that his office had not received a waiver request from him and that, if they had, it would have been routed to CG-131 because approval authority for waiver requests resided with CG-131. The branch chief advised him to check with his previous unit’s District Force Readiness Branch administrator.
- In an email dated October 12, 2017, the applicant asked the lieutenant for a copy of the extension request that he had submitted, and she sent it to him.

### SUMMARY OF THE RECORD

After enlisting in the Reserve on July 11, 2000, the applicant was appointed an ensign in the Coast Guard Reserve on May 28, 2005. On May 29, 2005, the applicant reported for duty at a Sector [REDACTED]. On his first OER in this position, dated June 26, 2006, the applicant received marks of 4 and 5 in the various performance categories<sup>1</sup> and a mark in the fifth spot on the officer comparison scale.<sup>2</sup> He was also recommended for promotion, and on November 28, 2006, he was promoted to lieutenant junior grade (O-2). On his next OER, dated July 31, 2007, the applicant again received primarily marks of 4 and 5 in the various performance categories and another mark in the fifth spot on the comparison scale. He was “[h]ighly recommended for promotion with peers.”

In the summer of 2007, the applicant was transferred to the Sector [REDACTED]. On his first OER in this position, dated June 30, 2008, the applicant received primarily marks of 5 in the various performance categories and another mark in the fifth spot on the officer comparison scale. He was “[h]ighly recommended for promotion with peers,” and on May 28, 2009, the applicant was promoted to lieutenant (O-3). On his second OER, dated May 31, 2010, the applicant received all marks of 4 and 5 in the various performance categories and a mark in the fourth (middle) spot on the officer comparison scale, denoting a “good performer.” In addition, he was “[s]trongly recommended for promotion to LCDR w/ peers.” However, on his final OER at the Sector [REDACTED], dated September 30, 2011,<sup>3</sup> the applicant received primarily marks of 4 in the performance categories and a mark in the fourth (middle) spot on the comparison scale. He was also “[h]ighly recommended for promotion with peers.”

In October 2011, the applicant was transferred to a nearby Base, where he served as a Reserve Supervisor for a branch of the [REDACTED] Division. On his first OER in this position, dated May 31, 2012, the applicant received all marks of 5 and 6 and a mark in the fifth spot on the comparison scale, as well as his Reporting Officer’s “[r]ecommend[ation] for promotion with peers.” On his second OER, dated May 31, 2014, the applicant received eight marks of 5, eight marks of 6, and two marks of 7 in the various performance categories and another mark in the fifth spot on the officer comparison scale. In addition, he received his Senior Reserve Officer’s “highest recommendation for promotion to LCDR with best of peers.” On his third OER, dated May 31, 2015, the applicant received primarily marks of 5 and 6 in the performance categories and another mark in the fifth spot on the officer comparison scale. In addition, he received his Senior Reserve Officer’s “highest recommendation for promotion to LCDR w/ best of peers.” However, the applicant was not selected for promotion to LCDR in August 2015.

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<sup>1</sup> On an OER form, officers are rated in 18 performance categories of a scale of 1 (worst) to 7 (best).

<sup>2</sup> On an OER comparison scale, the Reporting Officer picks one of 7 marks by comparing the evaluatee against all other officers of the same grade whom the Reporting Officer has known throughout his or her career.

<sup>3</sup> This OER was signed by the applicant’s rating chain in November 2011 but the date that it was entered in his record is not clear. In his response to the advisory opinion, the applicant alleged that this OER was missing from his record until 2016. Initials on this OER form show that the month and day of the start date for the reporting period and the month and day of the date in 2005 when the applicant first reported to the Sector have been corrected by “HM.”

As noted above, on his OER dated May 31, 2016, the applicant received very high marks of 6 and 7 and another mark in the fifth spot on the officer comparison scale. His Reporting Officer included the recommendation, "Promote to O-4 now!" However, the applicant was not selected for promotion in August 2016, when CDR X was one of seven members of the selection panel. None of the applicant's OERs are signed by CDR X as Supervisor, Reporting Officer, or Reviewer.

On November 3, 2016, the chief of RPM advised the applicant in a memorandum that because he had not been selected for promotion by the Reserve LCDR selection board and had "multiple non-selections to the next higher paygrade, you must be separated from the Service no late than 30 June 2017 in accordance with [14 U.S.C. § 740]." He was advised to contact his unit's administrative office or local Reserve Force Readiness office for assistance.

The applicant was honorably discharged from the Reserve on June 30, 2017. His final year of service is covered by a Continuity OER, with no numerical marks or comments. It indicates that the applicant concurred in the decision to submit a Continuity OER instead of a substantive one.

### **VIEWS OF THE COAST GUARD**

On November 16, 2018, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case.

The JAG noted that the applicant had "failed to provide the Board with any information or amplifying details concerning the alleged conflict with [CDR X]" or about the problems with the submission of his OER in 2011. She also noted that the applicant admitted that the alleged problems with that OER were corrected before the LCDR selection board convened.

The JAG stated that the applicant had failed to provide any evidence showing that anyone within his chain of command or anyone on the LCDR selection board acted improperly or with bias. She noted that the emails show that the applicant had interacted with CDR X, but submitted no evidence supporting his contention that his non-selection for promotion resulted from CDR X's being on the selection board or from any personal bias. The JAG noted that the applicant was also not selected for promotion in 2015, when CDR X was not on the selection board, and argued that his claims are "unsubstantiated and without merit."

The JAG stated that under the Reserve Policy Manual, COMDTINST M1001.28C, lieutenants who are twice non-selected for promotion may be retained based on the needs of the Service, but the manual does not provide a procedure. The JAG stated that the Reserve Policy Manual "does not require or otherwise authorize individuals to route a 'waiver'" of the mandatory separation requirement and there is no policy or procedure requiring RPM to consider such a waiver request and so no error was committed when the applicant's request was not forwarded for consideration. The JAG stated that when there is a need to retain officers, the selection boards are directed not only to select officers for promotion but to select officers for retention from among those that are not selected for promotion.

The JAG stated that no lieutenants were selected for retention in 2016 and even if the applicant's waiver request had been forwarded to Headquarters for consideration, the request would have been denied as a matter of policy. The JAG explained that "[e]ach promotion year, the Coast Guard Assistant Commandant for Human Resources (CG-1) conducts an analysis of the status of the officer corps (both reserve and active duty) and publishes an Officer Corps Management Plan (OCMP) with recommendations to the Commandant to help maintain a healthy officer workforce. Among the recommendations for PY 2017 [2016] was 'not administratively retaining any IDPL [Reserve] LTs twice or more non-selected for promotion.'" The JAG submitted a copy of this document, which was initiated by the Assistant Commandant for Human Resources and initialed by the Commandant on June 6, 2016. It states the following in pertinent part:

2. The IDPL officer workforce requires a managed reduction to meet FY 2014 through FY 2016 billet cuts. To meet these reductions and maintain a healthy reserve officer workforce my recommendations include:
  - a. Convening IDPL CAPT and CDR Retention Boards, and the number of officers of each rank to non-retain. ...
  - b. IDPL OOSs [Opportunities of Selection]: CAPT 44 percent, CDR 55 percent, LCDR 55 percent, and LT 92 percent.
  - c. Not administratively retaining any IDPL LTs, LCDRs, or CDRs twice or more non-selected for promotion.

The JAG also adopted the findings and analysis of the case provided in a memorandum prepared by the Personnel Service Center (PSC). PSC stated that CDR X was never a member of the applicant's rating chain, although he was "formerly assigned to Sector ... Contingency Planning Readiness Staff from 2009 through 2010" while the applicant was assigned to the same Sector's [REDACTED]. Regarding CDR X's service on the selection board, PSC noted that under 14 U.S.C. § 730(c), selection board members are sworn to perform their duties without prejudice or partiality and that "not less than a majority of the total membership of a selection board shall concur in each recommendation made by the board."

PSC stated that because the applicant was twice non-selected for promotion to LCDR in 2015 and 2016, he was required to separate from the Reserve no later than June 30, 2017. PSC stated that the applicant submitted a waiver request on April 20, 2017, and that the May 3, 2017, email submitted by the applicant shows that CDR X "forwarded his recommendation not to retain the applicant on 3 May 2017 based solely on his twice non-selection." PSC stated that the applicant has failed to submit evidence showing that CDR X had any conflict of interest when serving on the 2016 Reserve LCDR selection board and so recommended that the applicant's requests be denied.

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

The applicant submitted his response to the advisory opinion by email on January 5, 2019. He wrote that certain matters were not addressed in the advisory opinion and should be considered by the Board:<sup>4</sup>

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<sup>4</sup> Allegations of error and injustice that were not presented in the original application are not properly before the Board in this case but may be resubmitted to the Board in another application.

- The applicant alleged that his OER dated September 30, 2011, had been missing and he “made attempts to have [CDR X] rectify this by submitting the missing OER in question to him. These attempts were met with negative results with my former supervisor. I ultimately had to seek out others in the chain of command who did not directly supervise me to include retired personnel to assist with the completion of the OER.
- The applicant alleged that the missing 2011 OER caused him to be passed over for selection in 2015. He alleged that the problems in rectifying the missing OER were caused by CDR X.
- Because the 2011 OER was missing from his record when the LCDR selection board convened in 2015, he wrote a letter to selection board explaining the gap. He alleged that his letter to the 2015 selection board “obviously had negative impact on selection in both 2015 and 2016.”
- The applicant alleged that the 2016 selection board was not impartial because “[a] former supervisor ([CDR X]) of mine had a direct impact of a missing OER, failed to complete said OER which caused a non-selection in 2015. He further participated in a selection board in 2016 even though he had a direct negative impact on a member’s career in. [sic] This decision to participate in the board should not be considered impartial.”
- The applicant alleged that because he was passed over in 2015 due to the missing OER, his chances of promotion were severely limited “during the 2016 board conveying only 55%.”

### APPLICABLE LAW AND POLICY

Under 14 U.S.C. § 740 (2016), the Secretary “may remove from an active status a Reserve officer who has twice failed of selection to the next higher grade.”

Article 7.A.6.b. of the Reserve Policy Manual (RPM), COMDTINST M1001.28C, states, “Officers who twice fail of selection are normally removed from an active status on 30 June following the approval date of the board report upon which the second failure of selection occurs, unless needs of the Service dictate otherwise.”

Article 7.A.6.e. of the RPM provides that lieutenants who have been non-selected twice and have less than 18 years of service may be retained based on the needs of the Service if they are selected for retention by the second selection board that does not select them for promotion.

Under Article 7.A.6.f. of the RPM, Reserve officers of any grade who have more than 18 years of satisfactory service toward retirement may not be discharged or transferred from active status before the date they are entitled to be credited with 20 years of service or the third anniversary of the date they would otherwise be discharged or transferred from an active status.

## 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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter under 10 U.S.C. § 1552. The application was timely filed.<sup>5</sup>

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.<sup>6</sup>

3. In his application to the Board, the applicant alleged that his non-selection for promotion in 2016 and his discharge on June 30, 2017, were erroneous and unjust because a member of the IDPL selection board in 2016 was biased against him and then refused to forward his request for a waiver of his separation due to non-selection. These are the only issues that are properly before the Board in this case. Although the applicant mentioned in his application a problem he had submitting an OER, he did not identify the OER and he stated that the problem had been resolved before the selection board convened.

4. The applicant did not state in his application that his 2011 OER was missing when his record was reviewed by the 2015 selection board. He made no complaints about the 2015 board in his application or about the alleged effect of his letter to that board and his 2015 non-selection on the 2016 selection board. Because the applicant presented these issues only in his response to the advisory opinion, the Coast Guard has had no opportunity to respond to them as required by 33 C.F.R. § 52.42, and so these issues are not properly before the Board. However, the applicant may submit these allegations and issues in another application.

5. When considering allegations of error and injustice, the Board begins its analysis in every case 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.<sup>7</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>8</sup>

6. The applicant has not overcome the presumption of regularity or proven by a preponderance of the evidence that CDR X, a member of the 2016 IDPL LCDR selection board, was biased against him. The record before the Board contains only one email showing that there

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<sup>5</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>6</sup> *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).

<sup>7</sup> 33 C.F.R. § 52.24(b).

<sup>8</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).

was any interaction between the applicant and CDR X, and that interaction was indirect—channeled through another officer—and occurred many months after the selection board convened. CDR X’s email, dated May 3, 2017, shows only that when asked about the applicant’s retention request dated April 20, 2017, CDR X pointed out that the applicant had less than 18 years of service and had twice failed of selection and so was being separated or transferred to inactive status on June 3, 2017, pursuant to 14 U.S.C. § 740. CDR X cc’ed his email to another Commander and a chief yeoman, and PSC stated that the email showed that CDR X had “forwarded his recommendation not to retain the applicant on 3 May 2017 based solely on his twice non-selection,” rather than any personal bias. Although the applicant’s retention request was not forwarded to RPM, the Board finds that CDR X’s actions with respect to that request in May 2017 do not show that he was biased against the applicant and do not overcome the presumption of regularity accorded his service as a selection board member in August 2016.<sup>9</sup> In the absence of substantial evidence of the alleged personal bias, the Board presumes that CDR X fulfilled his responsibility as a selection board member impartially.<sup>10</sup> Therefore, the Board finds no grounds for disturbing the results of the 2016 IDPL LCDR selection board.

7. The applicant has not proven by a preponderance of the evidence that he should be reinstated in the Reserve because his request for retention dated April 20, 2017, was not forwarded to RPM. The record shows that RPM did not receive his request and had no authority to retain him even if it had. Under 14 U.S.C. § 740, Reserve lieutenants who are twice non-selected for promotion are normally separated on the following June 30<sup>th</sup> but may be retained. The Commandant has prescribed the rules for retention under this statute in Article 7.A.6. of the Reserve Policy Manual, and under Article 7.A.6.e., a lieutenant who, like the applicant, has less than 18 years of service and is twice non-selected for promotion may be retained past June 30<sup>th</sup> based on the needs of the Service but only if the lieutenant is selected for retention by the second selection board that does not select the lieutenant for promotion. The applicant was not selected for retention by the 2016 selection board, which was the second selection board not to select him for promotion. Therefore, the applicant was ineligible for retention under the rules in the Reserve Policy Manual.

8. As the JAG noted, the Reserve Policy Manual provides no procedure for seeking retention apart from the rules in Article 7.A.6., and the applicant was not eligible for retention under those rules. Numerous articles of the manual expressly allow members to request waivers of specific rules and identify an approval authority, but Article 7.A.6. does not. According to an email dated August 16, 2017, the RPM-1 branch chief advised the applicant that such a waiver request would have been routed to CG-131 because approval authority for waiver requests resided with CG-131, but even assuming that CG-131 had the authority to approve a waiver of the separation rules in Article 7.A.6., which is not proven, that would not prove that the applicant’s District Command lacked the authority and discretion to disapprove his request and refuse to forward it. Moreover, the record shows that the Commandant had already decided on June 6, 2016, not to retain any Reserve lieutenants, lieutenant commanders, or commanders who were twice non-selected for promotion in 2016. Therefore, the applicant has not proven by a

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<sup>9</sup> *Id.*

<sup>10</sup> The Board notes that to be selected for promotion in 2016, a unanimous vote of the selection board was not required. Only a majority of the selection board members—four out of the seven—would have had to select the applicant for promotion. ALCGPSC 105/16.



preponderance of the evidence that his separation on June 30, 2017, due to twice being non-selected for promotion was erroneous or unjust.

9. Accordingly, the applicant's request should be denied, but as noted in finding 4, above, he may submit another application with the allegations of error and injustice that he included in his response to the Coast Guard's advisory opinion.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

**ORDER**

The application of former LT [REDACTED], USCGR, for correction of his military record is denied, but he may submit another application with the allegations of error and injustice that he included in his response to the Coast Guard's advisory opinion in this case.

March 8, 2019

