

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-046

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FINAL DECISION ON FURTHER CONSIDERATION

AUTHOR: Andrews, J.

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on January 11, 2005, upon receipt of the completed application.

This final decision, dated October XX, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, a Reserve officer, asked the Board to correct his military record to show that he was selected for promotion to commander (CDR) by the inactive duty promotion list (IDPL) CDR selection board convened in 2003; to backdate his date of rank to what it would have been had he been selected for promotion by that board, instead of by the IDPL CDR selection board convened in 2004; and to award him back-pay and allowances.

APPLICANT'S FIRST CASE: BCMR DOCKET NO. 2004-076

In the applicant's prior application to the Board, BCMR Docket No. 2004-076, he asked for the same relief. He alleged that in 2003, when he was serving on extended active duty, he should have had the option of being considered for promotion by the IDPL CDR selection board. The applicant alleged that although at that time, Reserve officers serving on extended active duty (EAD) contracts were required by statute to compete for promotion on the active duty promotion list (ADPL) against regular active

duty Coast Guard officers. However, the Coast Guard unjustly and secretly allowed a few Reserve officers to break their EAD contracts just for the duration of the selection boards so that they could be considered for promotion by the IDPL selection board instead of the ADPL promotion board. He alleged that this requirement placed him at a great disadvantage because Reserve officers are unlikely to be selected for promotion when they have to compete with regular officers. In 2004, the applicant was allowed, along with other Reserve officers, to break his EAD contract for the purpose of competing for promotion on the IDPL. He was selected for promotion to CDR and then returned to EAD.

In the advisory opinion for BCMR Docket No. 2004-076, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny relief based upon a memorandum provided by the Coast Guard Personnel Command (CGPC). CGPC stated that when the applicant began EAD in 2002, he received orders that such required him to compete on the ADPL in accordance with 14 U.S.C. § 41a.¹ However, in June 2002, another officer on an EAD asked CGPC if he could break his contract so that he could compete on the IDPL instead of the ADPL. His request was approved, and he resumed EAD after both the IDPL and ADPL CDR selection boards adjourned. In July 2002, three months after the applicant signed his EAD contract, CGPC “started to incorporate new verbiage in all EAD orders indicating that an officer may submit a written request to be released from EAD during the timeframe that both the ADPL and IDPL boards meet for the purpose of competing on the IDPL.” CGPC stated that over the last few years, “several requests to terminate contracts early to compete on the IDPL have been approved. However, many reserve officers want to compete on the ADPL since selection by an ADPL ‘best qualified’ board allows a reserve officer to integrate as a regular, permanent officer.” CGPC stated that the applicant could have requested to compete on the IDPL but did not do so. CGPC also stated that since July 2002, EAD orders have informed Reserve officers that they may ask to break their EAD contracts for the purpose of competing on the IDPL instead of the ADPL.

In response to the advisory opinion, the BCMR staff asked the JAG under what legal authority the officer who made the request in June 2002 was released early from his EAD contract just to compete on the IDPL.² The JAG cited Article 12.A.7.2. of the Personnel Manual.³

¹ Under 14 U.S.C. § 41a(d), which concerns the ADPL, “[a] Reserve officer, other than one excluded by subsection (a), shall, when he enters on active duty, be placed on the active duty promotion list in accordance with his grade and seniority. The position of such a Reserve officer among other officers of the Coast Guard on active duty who have the same date of rank shall be determined by the Secretary.”

² Chapter 7.A.3.b. of the Reserve Policy Manual states that a “Reserve officer on active duty, other than for training, duty on a board, or duty of a limited or temporary nature (i.e. ADSW, involuntary recall or ADHC), if assigned to active duty from an inactive duty status, shall not be eligible for consideration for promotion on the IDPL (14 U.S.C. 728(a)).” Article 5.A.1.c. of the Personnel Manual states that, “[p]ur-

The BCMR staff also asked the JAG how the opportunity to compete on the IDPL under Article 12.A.7.2. was advertised to Reserve officers on EAD prior to July 2002. The JAG responded only by stating that it was included in EAD contracts beginning in July 2002. The JAG did not explain how a Reserve officer who began serving on EAD before July 2002 could know that beginning in July 2002 a request to break an EAD contract to increase one's chance of promotion might be deemed to clearly serve the needs of the Service, as required under Article 12.A.7.2.

The applicant responded to the Coast Guard's advisory opinion in BCMR Docket No. 2004-076 by stating that he was never advised of the option to compete on the IDPL until after he failed of selection on the ADPL. He argued that this important option should not have been limited to those "in the know" but should have been publicized to all Reserve officers on EAD.

In the Final Decision in BCMR Docket No. 2004-076, the Board dismissed the application without prejudice based upon the following findings and conclusions:

5. The applicant has proved that he and, presumably, many other Reserve officers on EAD have been treated significantly differently from those who have signed their EAD contracts since July 2002 and from at least one Reserve officer who, like the applicant, signed his EAD contract before July 2002. [citation omitted] In essence, these other officers were all informed by the Coast Guard that CGPC had determined that allowing a Reserve officer to break his EAD contract to give him a better chance for promotion (by competing on the IDPL) "clearly" serves the needs of the Service and is therefore permissible under Article 12.A.7. of the Personnel Manual. Previously, CGPC

suant to 14 U.S.C. 728, Reserve officers serving on extended active duty agreements under 10 U.S.C. 12301 shall be considered for promotion by the appropriate ADPL selection board." Under 14 U.S.C. § 728(a), which concerns the promotion of Reserve officers on the IDPL, a "Reserve officer on active duty, other than for training, duty on a board, or duty of a limited or temporary nature if assigned to active duty from an inactive duty status, shall not be eligible for consideration for promotion under this subchapter [14 U.S.C. §§ 720 *et seq.*]; but shall be considered for promotion under chapter 11 of this title [14 U.S.C. §§ 211 *et seq.*]."

³ Article 12.A.7. of the Personnel Manual 12.A.7., titled "Releasing Reserve Officers to Inactive Duty," states that "Commander, (CGPC-opm) will approve a request for release to inactive duty (RELAD) or early release from a Reserve officer who has not fulfilled his or her active duty obligation only under the conditions listed below. Reserve officers serving under an active duty agreement normally must complete the period of active duty specified by the agreement.

"1. When a specific program for early releases applicable to all Reserve officers within a group has been approved.

"2. When the needs of the Service clearly would be served by approving the request.

"3. When a hardship of extreme degree exists which the officer's early release can alleviate."

had required Reserve officers on EAD to compete for promotion on the ADPL in accordance with statute and regulation. However, in June 2002, CGPC apparently reinterpreted the needs of the Service without amending Article 12.A.7. or otherwise advertising this change of policy. Therefore, just as the applicant alleged, in the summer of 2003, a Reserve officer who had been on EAD for at least one year had to be especially “in the know” to take advantage of CGPC’s new interpretation of the needs of the Service under Article 12.A.7.

6. By informing certain Reserve officers of the chance to break their EAD contracts in accordance with the new interpretation of Article 12.A.7. and compete for promotion on the IDPL, while leaving others in the dark, the Coast Guard in essence created a secret access to another, presumably easier “playing field”⁴ (the IDPL). The Board finds that CGPC’s actions in this regard were negligent of the trust and spirit of fair play that are vital to the military promotion system. The Board recognizes that as the needs of the Service change, interpretations of regulations such as Article 12.A.7. may change. However, the Board finds that CGPC’s apparent actions in changing this significant policy without informing all Reserve officers on EAD who were eligible to take advantage of it constitute “treatment by the military authorities that shocks the sense of justice, but is not technically illegal.”⁵

7. In light of this apparent injustice, the applicant asked the Board to remove his failure of selection in 2003 and backdate his date of rank to what it would have been had he been selected for promotion by the IDPL CDR selection board that met in 2003. However, the applicant neither alleged nor proved that if he had been permitted to break his EAD contract to compete on the IDPL in 2003, he would have been selected for promotion by that board. Under *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), the Board must apply “two separate but interrelated standards” before it can remove the applicant’s failure of selection and backdate his date of promotion. First, the Board must determine, as it has determined in this case, that the applicant’s “record has been prejudiced by errors.” Second, the Board must determine whether, despite that prejudice, it is “unlikely that he would have been promoted in any event.” The *Engels* court held that in such a case, the applicant “must make a prima facie case” that he would have been promoted absent the prejudicial error, “but the end-burden of ultimate persuasion lies with [the Coast Guard] to show the improbability of [the applicant’s] selection even if his record were untainted.” *Id.* at 177. The record now before the Board is silent as to this second standard. Given the silence of both the applicant and the Coast Guard on this aspect of the case, the Board is unable to reach a conclusion.

8. Accordingly, the applicant’s request for correction should be denied but without prejudice. If he reapplies to the Board for the same relief and addresses the issues identified in finding 7 above, the Board will grant further consideration.

APPLICANT’S ALLEGATIONS FOR FURTHER CONSIDERATION

⁴ *Berkley v. United States*, 287 F.3d 1076, 1089 (Fed. Cir. 2002); *Baker v. United States*, 127 F.3d 1081, 1086 (Fed. Cir. 1987) (noting the importance of creating a “level playing field” for officers competing for promotion).

⁵ *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); see Decision of the Deputy General Counsel, BCMR Docket No. 2001-043.

The applicant alleged that in light of the very high quality of his officer evaluation reports (OERs), it is clearly *not* “unlikely that he would have been promoted in any event” if he had been allowed to compete on the IDPL in 2003 and so his date of rank should be backdated in accordance with the standards set in *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982). The applicant also pointed out that he was selected for promotion when he was allowed to break his EAD contract temporarily and compete on the IDPL in 2004, and that this fact is also evidence that he would have been selected for promotion in 2003 had he been allowed to break his contract and compete on the IDPL at that time, as other officers had been.

SUMMARY OF APPLICANT’S MILITARY RECORD

On March 28, 2002, the applicant received assignment orders recalling him to active duty. At the time, he had more than 12 years of prior active service and more than 13 years of service in the Reserve. On April 3, 2002, the applicant signed a two-year EAD contract. In July 2003, the applicant was first considered for promotion to CDR by the ADPL CDR selection board. He failed of selection. In July 2004, the applicant was released from EAD for the duration of the selection boards so that he could compete on the IDPL. He was selected for promotion to CDR. The applicant’s OERs appear as shown in the table below. (Officers are evaluated in a variety of performance categories on a scale of 1 to 7, with 7 being best.)

APPLICANT’S MARKS IN OERs FROM 4/1/94 THROUGH 4/30/03

CATEGORY ^a	OER1	OER2	OER3	OER4	OER5	OER6	OER7
Being Prepared/Planning	6	5	5	4	6	7	7
Using Resources	7	6	6	4	5	6	6
Getting Results	7	7	6	5	6	7	7
Responsiveness ^a	6	7	6				
Work-Life Sensitivity ^a	4	4	4				
Adaptability ^a				5	5	6	6
Specialty Expertise/Professional Competence	7	7	6	5	5	6	6
Collateral Duty ^a	6	6	4				
Working with Others/Teamwork	6	6	6	5	6	7	7
Human Relations/Workplace Climate	5	5	4	4	5	5	5
Looking Out for Others	5	5	5	5	5	6	6
Developing Subordinates	6	6	5	6	6	6	6
Directing Others	6	6	4	4	5	6	7
Evaluations	5	5	5	4	4	5	5
Speaking & Listening	6	6	5	5	5	7	7
Writing	6	6	6	5	5	6	6
Initiative	7	7	6	4	6	7	7

Judgment	6	6	5	4	5	6	6
Responsibility	6	6	5	4	5	7	7
Stamina ^a	6	6	5				
Health & Well-Being	6	5	5	5	4	5	5
Military/Professional Bearing ^a	6	5	5				
Professionalism ^a	7	7	6	4	5	6	6
Dealing with the Public ^a	6	7	6				
Average Mark in OER							
Comparison Scale^b	5	6	5	4	5	6	7

^a Some categories' names have changed slightly over the years and some have been discontinued or initiated.

^b The comparison scale is not actually numbered. However, as with the performance categories, there are seven possible marks. Officers are supposed to be marked in comparison with all other officers of the same rank known to the reporting officer. In this row, "4" means the officer was a "good performer; give tough, challenging assignments." A "5" means the officer was an "excellent performer; give toughest, most challenging leadership assignments." A "6" means that the officer is "strongly recommended for accelerated promotion." A "7" means "BEST OFFICER of this grade."

VIEWS OF THE COAST GUARD

On June 2, 2005, the JAG recommended that the Board grant relief. The JAG adopted a memorandum on the case prepared by CGPC.

CGPC noted that in August 2003, the IDPL CDR selection board selected 43 of 62 Reserve officers for promotion so that the "opportunity for selection for promotion [was] 69 percent." CGPC noted that the applicant's record was strong, especially his most recent marks on the Comparison Scale, and was devoid of any misconduct. Therefore, CGPC concluded that "[h]ad his record not been tainted by Coast Guard error, Applicant's selection by the [August 2003] IDPL Commander board was not an improbability" and that the "statistical likelihood" of his selection was high.

Therefore, CGPC argued that the Board should grant relief by expunging the failure of selection to CDR and assigning him the date of rank he would have received had he been selected by the PY04 (the selection boards that met in August 2003 were for promotion year 2004) IDPL CDR selection board and promoted with his active duty running mate. CGPC also stated that the applicant should receive any backpay and allowances he might be due as a result of this correction.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 13, 2005, the applicant responded to the advisory opinion. He stated that he fully concurs in the recommended relief.

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 pursuant to 10 U.S.C. § 1552. The application was timely.

2. The Board concurs with the findings and conclusions of the final decision in BCMR Docket No. 2004-076. The applicant proved by a preponderance of the evidence that the Coast Guard, in changing a significant policy about releasing Reserve officers from EAD so that they could compete for promotion on the IDPL instead of the ADPL, without informing all Reserve officers on EAD who were eligible to take advantage of it, committed an injustice that "shocks the sense of justice."⁶

3. Under *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), the Board must apply "two separate but interrelated standards" before it can remove the applicant's 2003 failure of selection and backdate his date of promotion. First, the Board must determine that the applicant's "record has been prejudiced by errors" when he was considered for promotion in August 2003. As indicated in the final decision in BCMR Docket No. 2004-076, the applicant has proved that his record was prejudiced in that it was placed before the ADPL CDR selection board, in competition with regular active duty officers, rather than before the IDPL CDR selection board, where he would have been competing for promotion against other Reserve officers.

4. Second, under *Engels*, the Board must determine whether, despite that prejudice, it is "unlikely that he would have been promoted in any event."⁷ The *Engels* court held that in such a case, the applicant "must make a prima facie case" that he would have been promoted absent the prejudicial error, "but the end-burden of ultimate persuasion lies with [the Coast Guard] to show the improbability of [the applicant's] selection even if his record were untainted."⁸ The applicant's record contains many excellent OERs, especially the last two in which his reporting officer, in comparing the applicant to all the other lieutenant commanders whom the reporting officer had known throughout his career, recommended the applicant for accelerated promotion and then rated him as the "BEST OFFICER of this grade." Therefore, the Board agrees with the JAG and CGPC that if the applicant's record had been considered

⁶ "Injustice" may be defined for purposes of 10 U.S.C. § 1552(a) as "treatment by the military authorities that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); see Decision of the Deputy General Counsel, BCMR Docket No. 2001-043.

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

⁸ *Id.* at 177.

by the PY04 IDPL CDR selection board, which met in August 2003, it is *not* “unlikely that he would have been promoted in any event.”⁹

5. Accordingly, relief should be granted by removing the applicant’s failure of selection by the PY04 ADPL CDR selection board, backdating his date of rank to what it would have been had he been selected by the PY04 IDPL CDR selection board and promoted with his active duty running mate, and awarding him any backpay and allowances he might be due as a result of these corrections.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁹ *Id.* at 176.

ORDER

The application of LCDR xxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is granted as follows:

The Coast Guard shall remove his failure of selection by the PY04 ADPL CDR selection board from his record; backdate his date of rank to what it would have been had he been selected by the PY04 IDPL CDR selection board and promoted with his active duty running mate; and pay him any backpay and allowances he may be due as a result of these corrections.

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