

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-147

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

This proceeding was conducted 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 on July 14, 2006, upon receipt of the completed application.

This final decision, dated March 30, 2007, is 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, who was a commander in the Coast Guard Reserve when he submitted his application, asked the Board to remove from his record his failure of selection for promotion to captain by the Reserve captain selection board that met in the summer of 2005. He further asked that, if selected for promotion by the board that met in the summer of 2006, his date of rank be backdated to what it would have been had he been selected for promotion in 2005. (The applicant was in fact selected for promotion by the Reserve captain selection board that met in 2006.)

The applicant alleged that many weeks before the Reserve captain selection board met in 2005, he submitted a promotion package to that board through his chain of command. However, his supervisor departed on leave for five weeks and never forwarded the package. Therefore, his package remained in his supervisor's in-box and was not reviewed by the selection board when it met.

In support of his allegation, the applicant submitted statements from his supervisor, CAPT C, and from the Area Chief of Staff Reserves, CAPT D. CAPT C wrote that in the "summer of 2005, I was out of the office on leave and TAD for approximately five weeks out of a six week period. I returned to the office at the end of that period to find a package from [the applicant] to the Reserve O-6 promotion board in my inbox. Unfortunately, administrative staff

did not recognize the urgency of the package. By the time I realized what it contained, it was too late to get the information before the board.” CAPT D wrote that the applicant’s promotion package was inadvertently delayed while his supervisor was out of the office. CAPT D stated that CDR N of the Reserve Personnel Management Division at Headquarters had informed him that the applicant’s package was not received until after the Reserve captain selection board had completed its deliberations.

VIEWS OF THE COAST GUARD

On December 7, 2006, the Judge Advocate General of the Coast Guard issued an advisory opinion recommending that the Board grant the applicant’s request. In doing so, he adopted the facts and analysis provided in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

CGPC noted that the bulletin that announced the candidates for the Reserve captain selection board in the summer of 2005, ALCGPERSCOM 050/05, issued on June 10, 2005, included the applicant as a candidate and stated that “Reserve officers eligible to be considered by this board are strongly encouraged to submit communications to the board IAW Art. 5.A.4.e. of [the Personnel Manual]. Communications should be sent in care of [CGPC-RPM] to arrive NLT the day the board convenes.”

CGPC stated that the applicant’s chain of command has admitted that the applicant’s communication to the selection board was not timely forwarded to CGPC and that the applicant was unaware of the problem until his supervisor returned, by which time it was too late. CGPC stated that the “delay in processing the Applicant’s request was beyond his control and he was unjustly disadvantaged by having an incomplete record considered by the board.”

CGPC stated that the applicant was not selected in 2005 but was selected for promotion to captain in 2006. CGPC stated that, had the applicant been selected in 2005, his date of rank as a captain would have been July 1, 2006. CGPC recommended that the Board promote the applicant to captain with a date of rank of July 1, 2006, and award him back pay and allowances.

APPLICANT’S RESPONSE TO THE COAST GUARD’S VIEWS

On December 8, 2006, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

FURTHER PROCEEDINGS

On March 8, 2007, in response to a question from the BCMR staff about the applicant’s status, CGPC explained that, to avoid having to retire the applicant, the Coast Guard promoted him to captain on September 29, 2006, following Senate confirmation of the selection list resulting from the Reserve captain selection board that convened in the summer of 2006. The Coast Guard stated that when the applicant was promoted, his name appeared at the top of the 2006 selection list and the 2005 list had been depleted.

APPLICABLE LAW

Title 14 U.S.C. § 729 states the following regarding the promotion of Reserve officers and recommendations of selection boards:

- (a) Except as otherwise provided by law, a Reserve officer shall only be promoted pursuant to the recommendation of a selection board.
- (b) The Secretary shall convene selection boards from time to time to recommend Reserve officers for promotion to the next higher grade. A board may be convened to consider officers in one or more grades.
- (c) A selection board shall, from among the names of those eligible Reserve officers submitted to it, recommend for promotion to the next higher grade ...
- (d) (1) Before convening a selection board to recommend Reserve officers for promotion, the Secretary shall establish a promotion zone for officers serving in each grade to be considered by the board. ...
- (f) The provisions of section 260 of this title apply to boards convened under this section. The Secretary shall determine the procedure to be used by a selection board.
- (g) The report of a selection board shall be submitted to the Secretary for review and transmission to the President for approval. When an officer recommended by a board for promotion is not acceptable to the President, the President may remove the name of that officer from the report of the board.
- (h) The recommendations of a selection board, as approved by the President, constitute a list of selectees from which the promotions of Reserve officers shall be made. An officer on a list of selectees remains thereon until promoted unless removed by the President under section 738 of this title. If an existing list of selectees has not been exhausted by the time a later list has been approved, all officers remaining on the older list shall be tendered appointments prior to those on the later list.
- (i) A Reserve officer whose name is on a list of selectees for promotion shall, unless that officer's promotion is lawfully withheld, be tendered an appointment in the next higher grade on the date a vacancy occurs, or as soon thereafter as practicable in the grade to which the officer was selected for promotion or, if promotion was determined in accordance with a running mate system, at the same time, or as soon thereafter as practicable, as that officer's running mate is tendered a similar appointment.

Article 7.A.9. of the Reserve Policy Manual (RPM) states that “[t]he recommendations of selection boards as approved by the Commandant (for promotion to lieutenant commander and below) and as approved by the President (for promotion to commander and above) constitute a list of selectees from which the promotions of Reserve officers shall be made (14 U.S.C. 729(h)).”

Article 7.A.11.a. of the RPM states that a “Reserve officer whose name is on an approved promotion list will be promoted to the next higher grade at the same time or as soon thereafter as practicable as the officer's running mate is promoted (14 U.S.C. 729(i)).”

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 section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant has proved by a preponderance of the evidence that his record was incomplete when it was reviewed by the Reserve captain selection board that met in 2005. His communication to the selection board was not timely forwarded by his chain of command. Given the provisions in ALCGPERSCOM 050/05 strongly encouraging the candidates to submit such communications, the Board finds that the lack of one in the applicant's record when it was considered by the selection board in 2005 likely prejudiced him before that board. In light of the applicant's selection for promotion in 2006, the Board finds that the applicant likely would have been selected in 2005 had his communication been timely forwarded to the selection board. Therefore, in accordance with the decision in *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982),¹ the applicant's failure of selection in 2005 should be removed from his record.

3. The applicant asked the Board to backdate his promotion if selected by the Reserve captain selection board in 2006. The Coast Guard has stated that July 1, 2006, is the date the applicant would have been promoted had he been selected for promotion by the selection board that convened in 2005. When the Board corrects an officer's record by removing a failure of selection by a selection board, the applicant is normally entitled to a backdated date of rank, as well as corresponding back pay and allowances, if he is selected for promotion by the next such selection board to review his record as corrected. *See Sanders v. United States*, 219 Ct. Cl. 285 (1979). Because the applicant was selected for promotion in 2006, the Coast Guard recommended that the Board directly promote the applicant to captain with a date of rank of July 1, 2006, and award him back pay and allowances. However, the Board has since learned that the Coast Guard already promoted the applicant as of September 29, 2006.

4. Accordingly, relief should be granted by backdating the applicant's date of rank to July 1, 2006, and awarding him the back pay and allowances that would be due as a result of this correction.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

¹ Under *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), to determine whether an applicant's failure of selection should be removed, the Board must answer 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 [he] would have been promoted in any event?"

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is granted. Upon promotion to captain (O-6) as a result of his selection by the IDPL captain selection board that convened in 2006, his date of rank as a captain shall be backdated to July 1, 2006. The Coast Guard shall pay him the back pay and allowances due as a result of this correction.

Philip B. Busch

Francis H. Esposito

Steven J. Pecinovsky