

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-084

**XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX**

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 receiving the applicant's completed application on January 28, 2011, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 4, 2011, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, a commander (CDR) who retired from active duty on July 1, 2011, asked the Board to promote him to captain (CAPT) with an "appropriate date of rank and back pay and allowances" because he has not been selected for promotion following prior corrections to his record ordered by the Board in past decisions.

BACKGROUND

Pursuant to two prior applications, BCMR Docket Nos. 2006-085 and 2008-106, the Board ordered the Coast Guard to remove from the applicant's record two erroneous officer evaluation reports (OERs) that he received in 2003 and 2004 and to remove three non-selections for promotion to CAPT in 2006, 2007, and 2008 (by the promotion year (PY) 2007, 2008, and 2009 selection boards, respectively) from his record so that he would have two more chances for selection without the erroneous OERs in his record. The Coast Guard had recommended that the Board grant all of this relief. However, the applicant was not selected for promotion to CAPT in 2009 or 2010, and there is evidence in the record that the Coast Guard failed to correct his OERs in its electronic personnel database, Direct Access, which might have allowed the CAPT selection boards in 2009 and 2010 to see the poor numerical marks in the erroneous OERs even though the Board had ordered the OERs to be expunged. To clarify the events in these proceedings, a chronology appears below.

CHRONOLOGY

- April 2006—The applicant filed Docket No. 2006-085 seeking removal of his 2003 OER.
- July 2006—The applicant was not selected for promotion to CAPT (1st non-selection).
- December 2006—The BCMR issued the decision in 2006-085 ordering the removal of the 2003 OER and insertion of a Continuity OER, as recommended by the Coast Guard.
- July 2007—The applicant was not selected for promotion to CAPT (2nd non-selection).
- August 2007—The JAG asked the Board to amend its order in 2006-085 to include removal of the applicant's 1st non-selection in July 2006 because the 2003 OER was still in his record in July 2006. The Board issued the amendment as requested.
- April 2008—The applicant filed Docket No. 2008-106 seeking removal of his 2004 OER and non-selections for promotion in July 2007 and July 2008 (prospectively).
- July 2008—The applicant was not selected for promotion to CAPT (3rd non-selection counted as 2nd due to the removal of the 1st non-selection in July 2006).
- February 2009—The BCMR issued the decision in 2008-106 ordering the removal of the 2004 OER, insertion of a Continuity OER, and removal of his non-selections in 2007 and 2008, as recommended by the Coast Guard.
- July 2009—The applicant was not selected for promotion to CAPT (4th non-selection counted as 1st due to removal of 1st, 2nd, and 3rd non-selections in 2006, 2007, and 2008).
- July 2010—The applicant was not selected for promotion to CAPT (5th non-selection counted as 2nd), making the applicant subject to mandatory retirement as of July 1, 2011.
- November 2010—Commander, Personnel Service Center advised the applicant that “by law your service on active duty cannot extend beyond 1 July 2011.”
- January 2011—The applicant filed Docket No. BCMR 2011-084 seeking direct promotion to CAPT by the BCMR.
- March 2011—The applicant requested that his record reflect a voluntary retirement instead of a mandatory retirement as of July 1, 2011.
- June 2011—The applicant printed a Direct Access database summary of his OER marks showing that the Coast Guard never removed his 2003 and 2004 marks from the database.
- July 1, 2011—The applicant voluntarily retired on the day he would otherwise have been involuntarily retired because of his two non-selections and 26 years of commissioned service pursuant to 14 U.S.C. § 285.

APPLICANT'S ALLEGATIONS

The applicant asked the Board to “overturn the results of the Coast Guard PY10 and PY11 Selection Boards,” which convened in 2009 and 2010, respectively, by directly promoting him to captain. He alleged that a direct promotion “appears the only remaining equitable means to correct the irreparable damage to my career resulting from these procedural inconsistencies” in the Officer Evaluation System (OES) that caused the Board to remove two of his OERs. He alleged that the “appearance of two Continuity OERs in my record left too much in question for any Selection Board to fairly assess it when compared to the records of other candidates for O-6.” He alleged that he spoke with selection board members who would “not discuss specific actions of the Selection Board” but told him that the Continuity OERs “likely resulted in my non-selection for O-6.”¹ The applicant alleged that the Selection Board members would not provide him with statements but

indicated that the blank OERs created questions – especially when compared to records without gaps. While the Continuity OERs in and of themselves were viewed as neutral by the Selection Boards, it is my belief that the actual impact of their omission was perceived as negative because the missing information could not be reconciled against the other records appearing before the Selection Board. I strongly believe that my record, career assignment opportunities and prospects for promotion were irrefutably compromised by the missing OERs and by the substantial career fallout resulting from the earlier errors and injustices.

The members of the Selection Boards also indicated that my lack of an operational or command cadre assignment at the O-5 level put me at a disadvantage compared to others appearing before this board. My discussions with the Assignment Officers indicated that because of my career “bump in the road”, I was not considered competitive for Command Cadre or other highly desired positions which would have further enhanced my opportunities for promotion. As a result of the OERs from Training Center Yorktown, even after their removal by the BCMR, I was forced out of my career path as a cutterman. Having been told I would not compete for afloat assignment or command cadre ashore, I volunteered to fill an off-season assignment to the Department of Homeland Security. Following the very successful performance of my assignment at the Department, I was once again told by the Assignment Officers that I was not competitive for any of the afloat, command cadre, or other career enhancing assignments that I requested.

Although I have requested reassignment each of the past two years, I have not been able to compete due to the lingering negative effect that this “bump in the road” continues to have on my assignment opportunities. Remaining in the same assignment for an extended period of time can also be detrimental to promotion opportunity; as a result of not being competitive, I am in the fifth year of my current assignment. It is clear that the cumulative damage to my record and to my successful pursuit of promotion resulting from the ineffective administration of the OES at Training Center Yorktown has not been remedied, despite the relief heretofore granted by the BCMR.

The applicant alleged that the fact that his CDR date of rank was significantly earlier than the dates of rank of other CDRs eligible for promotion to CAPT in 2009 and 2010 was also apparent to the selection board members and factored into their decisionmaking.

¹ 14 U.S.C. § 261(d) (“the proceedings of a selection board shall not be disclosed to any person not a member of the board”) (originally enacted as Pub. L. 88-130, § 1(10)(C), 77 Stat. 181 (1963)).

The applicant alleged that before he served as a School Chief at Training Center Yorktown, his “record was outstanding enough to successfully screen for Command Afloat at the O-3 and O-4 levels and to be assigned as the Commanding Officer in two Coast Guard cutters.” He noted that he was selected for promotion to CDR following his second command afloat, while he was stationed at the Training Center, and that the CO of the Training Center supported his requests to remove OERs he received while assigned to the Training Center in both of his prior BCMR applications. The applicant stated that although he greatly appreciates the relief the BCMR has already granted, “it was not sufficient to negate the irreparable damage caused by the improper administration of the Coast Guard Officer Evaluation System which led to the removal of the OERs from my record.” The applicant listed many of his accomplishments during his last year at the Training Center, which “would have been available to the Selection Board[s] had my record been accurate and complete.” He alleged that if his 2003 and 2004 OERs had been accurate, he would have been selected for promotion to captain in 2006.

The applicant noted that in response to his prior request for direct promotion in response to the advisory opinion in BCMR Docket No. 2008-106, the Board pointed out that “officers can be selected for promotion with large gaps in their performance records” and cited BCMR Docket Nos. 2003-116 and 2005-058. He argued that his situation is distinguishable from the officer who was the applicant in those cases because that applicant was a lieutenant (LT) who was promoted to lieutenant commander (LCDR) despite a six-year gap in his OERs; the opportunity for selection for promotion to LCDR is normally around 89%, whereas the opportunity for selection for promotion to CAPT was 60%; and the applicant in those cases had been discharged and his status was retroactively corrected to show that he was a Reserve officer between his discharge and his return to active duty.

The applicant stated that he filed separate applications for the removal of the 2003 and 2004 OERs, not to get any advantage in the promotion process, but because of advice he received from the Officer Personnel Management (OPM) Division of the Personnel Command. He explained that when preparing his first BCMR application in early 2006, he considered requesting removal of both the 2003 and 2004 OERs but was told that the removal of two consecutive OERs from his record would be problematic, so he requested removal of only the worst one, the 2003 OER. However, when he was passed over for promotion in 2007 despite the removal of the 2003 OER from his record, he met with OPM staff again, and they told him that the 2004 OER had likely caused his non-selection. Therefore, he submitted his second BCMR application requesting removal of the 2004 OER and his non-selections for promotion.

The applicant stated that he is requesting direct promotion to captain through the BCMR because his non-selections for promotion in 2009 and 2010 show that the damage to his career caused by the 2003 and 2004 OERs “cannot be remedied within the confines of the Coast Guard’s evaluation and promotion system.” He noted that the other Armed Forces can convene special selection boards to review officers’ records when such errors have occurred, but the Coast Guard cannot. He stated that the “significant injustice resulting from the removal of two OERs and the resulting career disadvantages clearly distinguishes this case as one which warrants the Board’s recommendation for direct promotion.”

The applicant included with his application a letter to the Chair dated October 30, 2009, in which he requested reconsideration of his request for direct promotion; a letter to the Commandant requesting his recommendation for promotion; and a letter from Commander, Personnel Service Center, dated November 23, 2010, stating that

[w]hile the Commandant plays a significant role in establishing policy and providing guidance to selection boards, an officer cannot promote to the next higher grade without the recommendation of a board of officers. ... [O]ur promotion system renews our leadership ranks through the selection of officers deemed best-qualified for promotion to the next higher pay grade as determined by those specific members of each board composed. The unavoidable reality of our system is that many outstanding officers will not be afforded the opportunity for promotion, especially at the most senior levels of the organization. This year was no exception with reduced opportunities of selection across all selection boards. Although your desire to remain on active duty is commendable, by law your service on active duty cannot extend beyond 1 July 2011. ... [Y]our have the option to request review and relief through the Board for Correction of Military Records (BCMR).

Finally, the applicant noted that he had requested a voluntary retirement as of July 1, 2011, only because he was told “that if I did not request voluntary retirement, my DD 214 [discharge form] would reflect that I was involuntarily retired and could be construed negatively in the future.”

SUMMARY OF THE APPLICANT’S CAREER

The applicant, a graduate of the Coast Guard Academy, was commissioned an ensign in 1985. He began his career serving as the Food Services Division Officer and then the Operations Officer of a buoy tender with a crew of 50. He received mostly positive comments and marks of 4 and 5 in the various performance categories on the five officer evaluation reports (OERs) he received while assigned to this unit.² He was promoted to lieutenant junior grade in 1987.

In 1988, the applicant was assigned to Coast Guard Headquarters as the Leased Housing Program Manager. On the five OERs he received for this work, his marks gradually rose from marks of 4 and 5 to primarily marks of 6, including marks in the sixth spot on the comparison scale.³ He received an Achievement Medal at the end of this assignment.

In July 1990, the applicant was promoted to lieutenant and reported for duty as the Executive Officer of a buoy tender. On his OERs for this work, his marks gradually rose from mostly marks of 5 to mostly marks of 6, and he received marks in the fifth spot on the comparison scale.⁴ The applicant was recommended for command afloat and received an Achievement Medal for his service aboard the buoy tender.

² In OERs, officers are evaluated by a “rating chain,” including a supervisor, reporting officer, and reviewer, in a variety of performance categories, such as “Professional Competence,” “Teamwork,” and “Judgment,” on a scale of 1 to 7, with 7 being best.

³ On an OER, the reporting officer completes a “comparison scale” on which he compares the reported-on officer to all other officers of the same grade whom the reporting officer has known throughout his career. The 7 possible marks on the comparison scale range from a low of “[p]erformance unsatisfactory for grade or billet” to a high of “BEST OFFICER of this grade.” A mark in the sixth spot on the scale denoted an “exceptional officer.”

⁴ On a lieutenant’s OER, the fifth spot (of seven) on the comparison scale denoted a “distinguished performer; give tough, challenging, visible leadership assignments.”

In September 1992, the applicant was transferred to Headquarters to serve on a fleet development team in the Short Range Aids to Navigation Division. On his six OERs in this position, his marks rose gradually from primarily marks of 4 and 5 to primarily marks of 5 and 6, and he received marks in the fifth spot on the comparison scale. The applicant received two Achievement Medals while working at Headquarters.

In October 1995, the applicant took command of a 140-foot tugboat with a crew of eighteen members. On his two OERs in this position, he received primarily marks of 5 and 6 in the various performance categories and marks in the fifth spot on the comparison scale. The applicant received another Achievement Medal for his command of the tugboat, and in August 1996, he was promoted to lieutenant commander.

In June 1997, the applicant took command of a 180-foot buoy tender with a crew of 50. On the three annual OERs he received in this position, the applicant received primarily marks of 6 in the performance categories and marks in the fifth spot on the comparison scale.⁵ He received a Commendation Medal upon his departure from the buoy tender.

In July 2000, the applicant reported to the Coast Guard's Training Center in Yorktown, Virginia, to become Chief of the National Aids to Navigation (NATON) School. On his first OER in this position, dated April 30, 2001, he received primarily marks of 5 and 6 in the various performance categories and a mark in the fifth spot on the comparison scale. In September 2001, the applicant was promoted to commander (CDR). On his second OER as the NATON School Chief—his first as a CDR—the applicant received primarily marks of 4 and 5 in the various performance categories and a mark in the fourth spot on the comparison scale.⁶

BCMR Docket No. 2006-085

In BCMR Docket No. 2006-085, the applicant asked the Board to remove the third OER he received as the NATON School Chief, covering his service from April 1, 2002, to March 31, 2003 (hereinafter "2003 OER"). The 2003 OER contained five low marks of 3, ten marks of 4, and three marks of 5 in the various performance categories and a mark in the fourth spot on the comparison scale. The 2003 OER contained several very negative comments about the applicant's performance, such as "[w]ith O-5 filling O-4 billet for entire marking period, performance/growth of school and its stature in ATON community less than expected"; "[i]nability to think/act beyond scope of school sometimes limits effectiveness"; "[w]hen motivated, produces good product"; "[t]eamwork not usually visible"; and "produced mostly acceptable results but not what the CG expects from an O-5 filling an O-4 billet." Moreover, instead of recommending the applicant for promotion from commander (O-5) to captain (O-6), the reporting officer wrote that the applicant was not working up to his potential; "[p]roduces good work but appears content with O-4 level of responsibilities"; and was recommended only "for positions of responsibility within the ATON program such as District, Area, or Headquarters ATON staff."

⁵ On a lieutenant commander's OER, the fifth spot on the comparison scale denoted an "excellent performer; give toughest, most challenging leadership assignments."

⁶ On a lieutenant commander OER, the fourth spot on the comparison scale denoted a "good performer; give tough, challenging assignments."

The applicant alleged to the BCMR that the low marks and negative comments in the 2003 OER were inaccurate because his new supervisor and reporting officer did not know or appreciate how much he had accomplished during the evaluation period. He alleged that the OER would have been much better had it been completed by his properly designated rating chain for the evaluation period. In support of this allegation, he submitted a statement from the commanding officer (CO) of the Training Center, who signed the 2003 OER as the Reporting Officer, even though he was not a designated member of the applicant's rating chain:

After reviewing the statements of personnel directly involved with [the applicant's] performance during the marking period, I do not feel that the marks and comments in [his] OER for the above period accurately reflect his accomplishments during the period. The statements provide a substantially different picture than the information I was provided by [his] supervisor.

During the period, I do not believe [the applicant's] supervisor adequately conveyed the programmatic issues that [the applicant] was actively working to resolve. As a result, I was not made aware of [his] efforts to successfully resolve many of these issues. In addition, the supervisor failed to inform me of [the applicant's] efforts to standardize curriculum development within the Training Division.

Likewise, I do not believe the supervisor provided an accurate portrayal of [the applicant's] effort to support the [NATON] staff. The statements provided by the personnel who worked for [him] show that he encouraged and supported their professional growth and their personal needs. This again is inconsistent with the information provided in the OER.

In response to the application in Docket No. 2006-085, the JAG admitted, and the Board found, that the applicant's command had violated Article 10.A.3.a.2.b. of the Personnel Manual by failing to have the 2003 OER prepared by the applicant's designated Reporting Officer. In light of statements submitted by the applicant's rating officials, the Board found that the error in the composition of his rating chain was prejudicial to the 2003 OER and ordered the Coast Guard to remove the 2003 OER from his record and replace it with a Continuity OER.⁷

Subsequent OERs

In May 2003, the applicant was reassigned from his position as the NATON School Chief to be the Force Protection Officer (FPO) at the Training Center. Upon his departure from the Training Center at the end of February 2004, he received an OER documenting his continuing service as the NATON School Chief in April and May 2003 and his service as the FPO from June 2003 through February 2004. On this OER (hereinafter "2004 OER"), he received six marks of 4 and twelve marks of 5 in the various performance categories, a mark in the fourth spot on the comparison scale, and a recommendation for promotion "with peers." In addition, he received an Achievement Medal for his service as the FPO.

In March 2004, the applicant transferred from the Training Center to become an operations analyst for the Department. In December 2004, he earned a Master's degree in Public Administration from Troy State University. In his first OER as an operations analyst, which covers the period March 1, 2004, to March 31, 2005, the applicant received nine marks of 5,

⁷ A Continuity OER is one that includes a description of the officer's duties but does not contain any numerical marks or comments about his performance. Coast Guard Personnel Manual, Article 10.A.3.a.5.

seven marks of 6, and two marks of 7 in the various performance categories and a mark in the fifth spot on the comparison scale. His Reporting Officer, a rear admiral serving as the Deputy Director of Department's Operational Integration Staff, noted that the applicant had "made significant contributions to the development of DHS policies" and recommended him for promotion "with peers." On his second OER in this position, which covers his service from April 1, 2005, to October 18, 2005, the applicant received six marks of 5, ten marks of 6, and two marks of 7 in the performance categories and a mark in the fifth spot on the comparison scale. His Reporting Officer wrote that he "continues to make significant contributions to the development of DHS policies" and highly recommended him for promotion to CAPT. On the applicant's third OER in this position, which covers his service from October 19, 2005, to March 31, 2006, the applicant received four marks of 5, twelve marks of 6, and two marks of 7 in the performance categories and a mark in the fifth spot on the comparison scale. The Reporting Officer and Reviewer wrote that the applicant displayed exceptional operational knowledge and had their "highest recommendation for promotion to O-6" as well as for command afloat or ashore. The applicant received two Commendation Medals while assigned to the Department.

From April 1 to July 31, 2006, the applicant served as the Chief of the Readiness and Support Branch in the DHS Preparedness Directorate's Office of Infrastructure Protection. On his OER for this work, he received ten marks of 6 and eight marks of 7 in the performance categories and a mark in the sixth spot on the comparison scale, which indicates that he was "strongly recommended for accelerated promotion" by his Reporting Officer. Because his Reporting Officer was a civilian, the Reviewer added a comment page and assigned him a mark in the fifth spot on the comparison scale. The OER notes that the applicant received another Commendation Medal on May 26, 2006.

Non-Selections for Promotion in 2006 and 2007

In the summer of 2006, while his first BCMR application was pending and the erroneous 2003 OER was still in his record, the applicant became "in zone" for promotion to CAPT but was not selected for promotion by the promotion year (PY) 2007 selection board that convened in 2006.

In August 2006, the applicant began serving as Chief of the Waterways Management Branch for the Fifth District. In September 2006, he earned a Master's degree in Security Studies from the Naval Postgraduate School. On an OER covering his service from August 1, 2006, to March 31, 2007, the applicant received thirteen marks of 6 and five marks of 7 in the performance categories. Under a new officer comparison system, the applicant was marked as among the top 10% of all commanders and "one of the few distinguished performers" on the comparison scale, and on the promotion scale he received a mark of "definitely promote."

On June 8, 2007, the Commandant issued ALCGOFF 059/07 announcing the upcoming CAPT selection board in July 2007 for PY 2008 and stating that the selection board would be allowed to select 61 of 92 eligible commanders for promotion. Paragraph 16 of this bulletin advises all candidates for promotion to review their military records prior to the date of the

selection board.⁸ However, the applicant was passed over for promotion again in July 2007 even though the 2003 OER disputed in Docket No. 2006-085 had been ordered removed from his record and replaced with a Continuity OER pursuant to the Board's order.

Technical Amendment to the Final Decision in BCMR Docket No. 2006-085

In August 2007, following the applicant's second non-selection for promotion, the JAG asked the BCMR to amend its order in BCMR Docket No. 2006-085 to include removal of the applicant's non-selection for promotion in July 2006 because the erroneous OER had not yet been removed from the applicant's record when the selection board convened. The BCMR amended the order as requested.

Non-Selection for Promotion in 2008

On his second OER as Chief of a District Waterways Management Branch, covering his performance from April 1, 2007, to March 31, 2008, the applicant received nine marks of 6 and nine marks of 7 in the performance categories, and he was again assigned a mark in the top 10% of all commanders his reporting officer had known—i.e., “one of the few distinguished performers”—and a mark of “definitely promote” on the promotion scale. On July 11, 2008, the new commanding officer of the Training Center awarded the applicant a Commendation Medal for his work as the NATON School Chief from August 2000 to May 2003.

However, the applicant was passed over for promotion again in July 2008 by the PY 2009 CAPT selection board. The opportunity of selection by that board was 66% in that the board was allowed to select 89 of the 134 eligible candidates for promotion to CAPT.

BCMR Docket No. 2008-106

On April 18, 2008, the applicant filed another BCMR application, in which he asked the Board to remove the 2004 OER on which he had received mediocre marks for his performance as the FPO for the Training Center and to replace it with another Continuity OER. He also asked the Board to remove his non-selections for promotion in 2007 and 2008 by the PY 2008 and PY 2009 CAPT selection boards, respectively, because the 2004 OER had been in his record when those boards convened.⁹ In addition, he asked the Board to backdate his date of rank and award him back pay and allowances if he were selected for promotion after his record was corrected by removal of the 2004 OER and to take any additional actions that would alleviate any negative perceptions that a selection board might draw from the two consecutive Continuity OERs he would have in his record.

The applicant alleged that that the 2004 OER should be removed because he was only assigned to serve as the FPO because of the unfair 2003 OER, which the Board had found to be

⁸ This advice has long been standard in all ALCGOFFs announcing selection boards and eligible candidates for promotion.

⁹ The PY 2009 CAPT selection board had not yet met when the applicant submitted his application in April 2008. However, he requested this relief prospectively in case he again failed of selection. The applicant was not selected for promotion by the PY 2009 selection board, which convened on July 14, 2008.

erroneous in its Final Decision for BCMR Docket No. 2006-085. He alleged that the FPO position “did not afford the opportunity to perform at a level appropriate for [his] pay grade, resulting in [a] substandard OER for the period ending [February 29, 2004].” The applicant also alleged that his “reassignment was not within the authority of the Commanding Officer [CO] of Training Center Yorktown and was based on inaccurate information on [his] performance.”

In response to this new application, the JAG recommended that the Board grant relief. The JAG stated that the applicant’s CO’s “decision to relieve the applicant of his duties as the Chief of the [NATON School], placing him into a position of lesser responsibility and opportunity for leadership stemmed from information provided in an inaccurate OER.” The JAG also stated that the reassignment constituted “legal error” because the CO did not seek the Personnel Command’s approval before reassigning the applicant. The JAG concluded that the mediocrity and lack of leadership potential shown in the 2004 OER “is clearly evident and when viewed in comparison to Applicant’s OER history—is detrimental and could have been the cause of his non-selections.”

In response to the JAG’s recommendation, the applicant argued that because the JAG had admitted that it is not unlikely that the applicant would have been selected for promotion in 2007 and 2008 if the 2004 OER had not been in his record, the Board should order his promotion to CAPT directly rather than merely correcting his record and removing his prior non-selections. He noted that the removal of the 2004 OER would create a two-year gap in his performance record filled only with Continuity OERs. Therefore, he asked the Board to consider recommending that he be directly promoted to captain. The applicant argued that direct promotion, instead of merely removing his failures of selection, is appropriate “because it is impossible to see how [he] will ever be able to overcome the ruinous effect on his career opportunities as a result of the events underlying this case and the cumulative impact of two successive continuity OERs in his current grade.”

In the Final Decision for BCMR Docket No. 2008-106, the Board granted relief by ordering removal of the applicant’s 2004 OER and his non-selections for promotion in 2007 and 2008 by the PY 2008 and PY 2009 CAPT selection boards, respectively. In reaching that decision, the Board found that the applicant’s intra-unit reassignment to be the FPO was neither unlawful nor unjust. The Board noted that he was well qualified for the FPO position, which “was apparently an O-5 level position appropriate to the applicant’s O-5 rank with significant responsibility, as shown in block 2 of the 2004 OER, whereas the NATON School Chief position is an O-4 billet.” The Board also noted that the applicant had not challenged the 2004 OER in his first application and appeared to be “alleging errors in old records in piecemeal fashion so that he may have extra chances for promotion.” However, the Board granted relief based on the following finding:

The marks in the 2004 OER are mediocre for an O-5, but the Board is not persuaded that anything about the FPO duties *per se* prevented the applicant from earning higher marks. In their statements, the rating officials for the 2004 OER claimed that the applicant could have earned marks and comments that would have reflected well on his leadership, management, and professional skills, but that he did not earn exceptional marks. The JAG and the CO who made the reassignment insist that it was unfair and that the resulting 2004 OER should be removed. However, they do not expressly contradict the rating chain’s claim that it was an O-5 level position. It is not clear whether they believe the FPO assignment would have been unfair for any O-5, or whether they believe it was unfair for the applicant simply because the erroneous 2003 OER contributed to the

decision to choose him for the assignment. Nevertheless, because the JAG has found, contrary to the statements of the rating officials, that the reassignment was unfair because it gave the applicant little opportunity to demonstrate leadership, the Board will concur in his recommendation [for relief].

In response to the applicant's request for direct promotion, the Board stated the following:

The applicant asked the Board to recommend his direct promotion to captain because, he alleged, the effect of having two continuity OERs in his record is ruinous and cannot be overcome. In the Board's experience, however, officers can be selected for promotion with large gaps in their performance records.¹⁰ Nothing in the record distinguishes this case from the many others in which failures of selection have been removed. The Board is not persuaded that a direct promotion recommendation is warranted and will not usurp the role of the Coast Guard's selection boards, which are tasked with the difficult job of selecting for promotion to captain only the best candidates from among many exceptional commanders.

In response to the applicant's request that the Board take any action that might alleviate any negative perceptions that a selection board might draw from his two consecutive Continuity OERs, the Board ordered the inclusion of the following paragraph in the Continuity OER replacing the 2004 OER:

"[The applicant's] Personnel Data Record includes two continuity Officer Evaluation Reports covering his active duty service from April 1, 2002, to February 29, 2004. His record has been corrected by the Secretary in accordance with 10 U.S.C. § 1552, and no adverse inference of any kind is to be drawn from the lack of more substantive Officer Evaluation Reports during this period."

OERs and Non-Selections for Promotion in 2009 and 2010

On his second OER as Chief of a District Waterways Management Branch, covering his performance from April 1, 2008, to March 31, 2009, the applicant received nine marks of 6 and nine marks of 7 in the performance categories, and he was again assigned a mark in the top 10% of all commanders his reporting officer had known—i.e., "one of the few distinguished performers"—and a mark of "definitely promote" on the promotion scale. However, the applicant was not selected for promotion in 2009 by the PY 2010 CAPT selection board. Because the BCMR had removed his non-selections for promotion to CAPT in 2006, 2007, and 2008, this non-selection counted as his first.

On his third OER as Chief of a District Waterways Management Branch, covering his performance from April 1, 2009, to March 31, 2010, the applicant received nine marks of 6 and nine marks of 7 in the performance categories, and he was again assigned a mark in the top 10% of all commanders his reporting officer had known—i.e., "one of the few distinguished performers." On the promotion scale, he received a mark of "accelerated promotion/in-zone reordering." In addition, the applicant received another Commendation Medal for his work during this period. However, the applicant was not selected for promotion in 2010 by the PY 2011 CAPT selection board, which counted as his second opportunity for promotion to CAPT. Therefore and

¹⁰ See, e.g., BCMR Docket Nos. 2003-116 and 2005-058, in which the applicant was selected for promotion to O-4 less than a year after returning to active duty despite a six-year gap in his substantive OERs.

because the applicant had completed 26 years of commissioned service, he voluntarily retired from the Coast Guard on July 1, 2011.¹¹ Prior to his retirement, the applicant was awarded a Meritorious Service Medal for exceptionally meritorious service as Chief of the District Waterways Management Branch from August 2006 to June 2011.

VIEWS OF THE COAST GUARD

On June 2, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the BCMR deny the applicant's request for promotion.

The JAG stated that the applicant has failed to submit any evidence to overcome the presumption that the members of the CAPT selection boards carried out their duties correctly, lawfully, and in good faith.¹² The JAG noted that it "is well settled that [the BCMR's] policy is not to promote, but to remove a failure of selection if the applicant establishes a nexus between an error or injustice and his non-selection" so that the member may have another opportunity for selection for promotion before another selection board. The JAG argued that the BCMR should therefore interpret the applicant's request as a request to remove his non-selections for promotion in 2009 and 2010 and deny the request because he has not shown that his record was erroneous when it was reviewed by those selection boards.

The JAG stated that, as the BCMR noted in its final decision for BCMR Docket No. 2008-106, officers can be promoted with gaps in their OER record, and argued that the applicant's situation is "no different than the many others in which failures of selection have been removed" from applicants' records. The JAG argued that the BCMR should not "usurp the role of the CG's selection boards by providing a direct promotion recommendation in this particular case."

The JAG noted that any possible negative inference created by the two Continuity OERs in the applicant's record were addressed by the BCMR's explanatory paragraph. The JAG also noted that the applicant was allowed to submit a memorandum to the selection boards in accordance with policy and used the opportunity to provide "ample information on his performance accomplished during the period covered by the continuity OERs. For the applicant to now allege that his failures of selection from PY10 and PY11 Selection Boards are the result of his continuity OERs are speculative at best and do not carry his burden of production and persuasion." The JAG argued that the "Government does not have to disprove Applicant's contentions or allegations of error; instead, Applicant bears the burden of producing sufficient evidence to establish prima facie proof of the alleged error or injustice." The JAG alleged that the applicant's "allegations are speculative at best and are of no legal moment. The Applicant failed to submit any evidence, either legal or factual to support his allegations of error or injustice. As a result, the

¹¹ 14 U.S.C. § 285 (2010) (providing that an active duty CDR with two non-selections shall be retired, if eligible, on the June 30th following the second non-selection, unless the CDR is selected for continuation on active duty, but that no CDR not selected for promotion to CAPT may be continued on active duty beyond 26 years of commissioned service).

¹² *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

Applicant's allegations are insufficient as a matter of law to overcome the strong presumption of regularity afforded military officers."

The JAG noted that under Article 14.A. of the Personnel Manual, the selection boards' "results were based on at least two-thirds majority determination." He argued that the applicant "is in no position to 'second guess' the findings and actions of CG Selection Boards. ... The Applicant is not entitled to circumvent the CG's Promotion Board process and procedures by alleging the possibility of unsubstantiated errors or injustices with no evidence to prove such. Moreover, the Applicant has had every 'benefit of the doubt' regarding his several failures of selection."

In making his recommendation, the JAG adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC). Regarding the applicant's allegations that he had received less prestigious assignments as a result of the erroneous OERs, the PSC stated that the applicant "has been assigned duties commensurate with his rank during his tenure as a Commander." Regarding the applicant's claim that the Continuity OERs had prejudiced his record, the PSC noted that the BCMR had ordered that "no adverse inference of any kind is to be drawn from the lack of more substantive Officer Evaluation Reports during this Period" and that the selection board members had sworn an oath to perform their duties and make their selections "without prejudice or partiality, and having in view both the special fitness of officers and the efficiency of the Coast Guard." The PSC stated that it "is not possible to say what impact, if any, the gaps in the Applicant's record had on the proceedings of the Captain Selection Board; however, the Coast Guard agrees with the conclusions found in [the final decision in BCMR Docket No. 2008-106], specifically that 'officer can be selected for promotion with large gaps in their record.'" The PSC concluded that the applicant's record had been fairly reviewed by the CAPT selection boards in 2009 and 2010 and that he had failed to substantiate an error or injustice in his record.

The PSC submitted a copy of the applicant's communication to the PY 2011 CAPT selection board, dated July 7, 2010. The applicant wrote to the selection board that

[i]n reviewing my record, the Board will find two Continuity OERs covering the periods from April 1, 2002 to March 30, 2003 and April 1, 2003 to February 29, 2004. Recognizing that these OERs are to be considered neutral by the Promotion Board, I respectfully request that the Board members consider the other information available in my record which portrays my continued high performance and dedication throughout this period and my career. ...

The applicant pointed out that he had received medals for his work as the NATON School Chief and the FPO and asked the Board to read the citations for the medals for evidence of the quality of his performance during that period. He also provided two paragraphs about his accomplishments during the period and also descriptions of his subsequent work.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 28, 2011, the applicant submitted his response to the views of the Coast Guard. The applicant submitted an "OER Summary" printed from the Coast Guard's Direct Access personnel database on June 1, 2011. The OER Summary shows all of the poor marks from the applicant's 2003 and 2004 OERs, which the Board had ordered expunged in his two prior cases. Although the paper copy of the applicant's military record contains only the Continuity OERs, the OER Summary in Direct Access shows that the OERs were not removed from his electronic record. The applicant noted that in accordance with "Commandant Instruction 1410.2, Performance Data, including data maintained in Direct Access is permitted to be viewed by Active Duty Promotion Boards." The applicant alleged that the continuing damage to his record caused by the Coast Guard's errors has denied him promotion to captain even though

I was highly competitive for assignment and promotion prior to the contested OERs and I maintained a continued high level of performance. My ability to perform at the O-6 level in my assignment at the Department of Homeland Security and in my current assignment is well documented in my record and includes reference to my serving for extended periods as an acting Division Chief. Based upon my overall career performance, I believe that it is apparent that my record cannot be corrected to allow full and fair consideration by a selection board.

The applicant pointed out that in removing his non-selections for promotion in 2006, 2007, and 2008 pursuant to the final decisions in BCMR Docket Nos. 2006-085 and 2008-106, the Board found, in following the *Engels* test,¹³ that it was not unlikely that he would have been selected for promotion had the erroneous OERs not been in his record when it was reviewed by those selection boards.

The applicant noted that pursuant to Article 14.A.4.d. of the Personnel Manual, a selection board reviews an officer's entire record but "the most significant portion of the record evaluated for selection to Captain (O-6) is seven years of immediate previous service or all service in present grade, whichever is greater." He pointed out that his 2003 and 2004 OERs were both CDR OERs and were thus included in those the selection boards were supposed to consider most significant. In addition, he noted that because the content of communications to selection boards is limited to matters of record, "the information in my letter to the board was limited to performance that was already available elsewhere in my record. This communication could not replace the OERs which had been removed, nor could it provide ample information to cover my performance during the period covered by the continuity OERs."

The applicant repeated many of his arguments and allegations and cited two prior cases of the Air Force BCMR (AFBCMR 89-00431¹⁴ and 98-00076¹⁵) in which that board recom-

¹³ *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982) (holding that to determine if an applicant is entitled to the removal of his non-selection for promotion because of an error in his record, the Board must answer the following 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 [selected for promotion] in any event?").

¹⁴ AFBCMR BCMR Docket No. 89-00431 is not in the record before the Board. The decision is cited in AFBCMR Docket No. 98-00076 as one in which the AFBCMR directly promoted the applicant because it was impossible to correct his record in such a way that would give him a fair chance at promotion before a selection board.

mended the promotion of an officer because extraordinary circumstances prevented the officer's full and fair consideration by a selection board.

The applicant alleged that "my performance throughout my career has justified selection at a best qualified board, which indicates that the reason for my non-selections is a direct result of the errors committed by the Coast Guard." He asked the Board to "recognize the significant injustice resulting from the improper administration of the Officer Evaluation System while I was assigned to Coast Guard Training Center Yorktown and the resulting impacts which preclude full and fair consideration by a selection board."

SUBSEQUENT PROCEEDINGS

The BCMR staff forwarded the Coast Guard a copy of the applicant's new evidence—the June 1, 2011, print-out of his OER marks from the Direct Access database—and invited a written response. The PSC responded that "per COMDTINST 1410.2 - Documents Viewed by Coast Guard Officer Promotion and Special Boards, the attachment you reference below (Employee Summary of Marks) is not authorized to be viewed by an officer promotion board. Therefore, this issue should be moot." In addition, the PSC stated that the applicant's 2003 and 2004 OER marks have been removed from the Direct Access database. In reply, the BCMR staff pointed out that COMDTINST 1410.2 contains the following provisions authorizing selection boards to view electronic data sets of officers' OERs:

- Paragraph 7.b. of COMDTINST 1410.2 states that "Documents and data sets permitted to be viewed by ADPL promotion boards are outlined in the attached enclosure."
- The enclosure to COMDTINST 1410.2 contains a chart of the documents that may be viewed and a chart of the data sets that are "Permitted to Be Viewed" or "Masked from View." An officer's "performance data" is in the column of data sets that are "Permitted to Be Viewed."
- Paragraph 6.m. of COMDTINST 1410.2 defines "performance data" as "Data related to an officer's performance, currently captured in Officer Evaluation Reports (OERs), administrative remarks, punitive letters, etc."

The Chief of the Boards Section in the Officer Personnel Manage Branch of the PSC wrote the following in response:

¹⁵ In AFBCMR Docket No. 98-00076, the Air Force BCMR panel found that the applicant had not received a fair review by a special selection board (SSB) convened to review his record after it was corrected by the Air Force BCMR. The panel found that, because 99.2% of all candidates for promotion to O-5 with a mark of "definitely promote" on their latest evaluation were selected for promotion by the regular selection board, the SSB could not have fairly reviewed the applicant's record before non-selecting him. Therefore, the panel recommended that his record be corrected to show that he was promoted to O-5; that "action be initiated to obtain Senate confirmation" of the promotion; and that once promoted, the applicant's date of rank be backdated and he be paid back pay and allowances. However, the panel's recommendation was disapproved and relief was denied based on a finding that the statistic that 99.2% of all candidates for promotion to O-5 with a mark of "definitely promote" on their latest evaluation were selected for promotion by the regular selection board did not prove that the SSB failed to perform its review fairly.

While it could be interpreted that COMDTINST 1410.2 authorizes data sets for the promotion board to view, board member profiles in Direct Access do not have permissions for this view and we do not provide any additional information to the board members other than the imaged data record which has the complete OERs. In order for the board members to evaluate a member's marks, they must view the imaged OERs that are in the system.

The BCMR staff forwarded this emailed correspondence to the applicant and invited him to respond. In response, the applicant argued that the error of not deleting his 2003 and 2004 OER marks from Direct Access “is indicative of the improper administrative of the Officer Evaluation System” and “another example of the poor quality control within the system which creates further doubt in the Coast Guard’s ability to provide full and fair consideration by a selection board in my case.” He alleged that there is “uncertainty about the information actually provided to the Promotion Board.” Moreover, he noted, his OER marks in Direct Access could have been used in making other decisions that affected his career. He alleged that assignment officers, who had access to his marks in Direct Access, found that he was not competitive for command cadre and other highly desired assignments that would have enhanced his career and hence his chances for promotion. Therefore, the Coast Guard’s failure to remove the OER marks from Direct Access did in fact prevent his selection for promotion. He asked the Board to “recognize the extraordinary circumstances which have precluded full and fair consideration by a selection board and grant relief in the form of a directed promotion to O-6 and payment of appropriate back pay and allowances.”

APPLICABLE REGULATIONS AND GUIDANCE

Coast Guard Personnel Manual

Article 5.A.4.a.1. of the Personnel Manual states that a CDR becomes eligible for consideration for promotion by a CAPT selection board when he has served four full years as a CDR. Article 5.A.4.a.4. states that once an officer is eligible for consideration for promotion, he remains eligible as long as he continues to serve on active duty.

Article 5.A.4.e.1. states that an “officer eligible for consideration by a selection board may communicate with the board through the officer’s chain of command by letter arriving by the date the board convenes, inviting attention to any matter in his or her Coast Guard record that will be before the selection board. A letter sent under this paragraph may not criticize any officer or reflect on any officer’s character, conduct, or motive (14 U.S.C. 253(b)).”

Article 14.A.3.b. states that the basic criteria for selecting officers for promotion are performance evaluations; education; leadership; and professionalism (“[T]he Service expects each officer to have true professional competence in one occupational field and, from assignments outside it, experience in other fields. While technical specialization is essential in certain lower grades and for certain assignments, in the higher grades emphasis shifts to leadership skills.”).

Article 14.A.4.d. states that in reviewing CDRs’ records for promotion to CAPT, selection boards should consider to be most significant the CDRs’ “[s]even years of immediate previous service or all service in present grade, whichever is greater.”

Article 14.A.6.b. of the Personnel Manual states that selections boards shall select officers for promotion by making comparisons as follows:

In recommending, a board shall compare all officers submitted for consideration and base its recommendations on the extent to which they compare among themselves in accomplishing past assignments and potential for greater responsibility according to the overall criteria the board adopted; ...

1. Selection on a best-qualified basis embodies three elements; the board:

a. *First*, considers all officers impartially and equally.

b. *Second*, applies the same criteria to all.

c. *Third*, evaluates by comparison, with the most capable officers advancing to positions of higher responsibility.

2. Best-qualified boards consider officers' records, comparing past performance, their capacity to undertake successfully tasks of progressively greater difficulty involving broader responsibilities, their capability and inclination to study for further professional growth, and their potential to perform creditably those duties to which these officers might be assigned in the next higher grade.

Article 14.A.7.c.2.e. states that a selection board's report must include a "certification that, in the opinion of at least a majority of the members of the board, the officers recommended for promotion are fully qualified and the best qualified of those officers whose names have been furnished to the board."

Selection Board Precept and Guidance for 2009 (PY 2010)

On July 7, 2009, the PSC issued a precept convening a CAPT selection board composed of six captains on July 13, 2009, to select 64 of 96 eligible CDRs for promotion. An enclosure to the precept was the Commandant's Guidance to PY10 Officer Selection Boards and Panels, which stated the Coast Guard needs captains who assess and manage risk well; who are flexible, innovative, and capable of operating in a dynamic environment; who can "think on their feet"; who can build relationships with non-Coast Guard partners and agencies; who continually reinforce the Coast Guard's core values of honor, respect, and devotion to duty; who value diversity and are culturally attuned to people; who mentor subordinates; who have technical expertise and management skills; who understand the major issues facing the Coast Guard; and who can "make the leap from hands on management of the day-to-day details to empowering their people to perform those functions while they take a strategic view."

Selection Board Precept and Guidance for 2010 (PY 2011)

On July 6, 2010, the PSC issued a precept convening a CAPT selection board composed of six captains on July 12, 2010, to select 59 of 98 eligible CDRs for promotion. An enclosure to the precept was the Commandant's Guidance to PY11 Officer Selection Boards and Panels, which stated the Coast Guard needs captains who step forward to serve in positions accompanied by risk and rigorous accountability; who take broadening assignments; who create work climates

of environments of care, concern, and equity; who “set the bar high” and hold subordinates accountable; who are “mindful of the communities, industries, governments, and citizens that we serve”; “who can sustain key relationships to make our Service more capable and credible”; who can focus on safely and skillfully performing the Service’s missions while prioritizing demands and ensuring mission readiness; who represent a diverse array of professional backgrounds, academic skills, and career experience; who can innovate and incorporate new perspectives and approaches to recognize, manage and resolve problems; who have mastery of the specialty and demonstrate an overarching understanding of the Service; who have strong representational, oral, and written communications skills; who demonstrate the ability to complete major projects and initiatives; and who possess the acumen and savvy to navigate complex situations and ensure compliance with financial and legal requirements.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant’s military record and submissions, the Coast Guard’s submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. Although the application was not filed within three years of the applicant’s discovery of the alleged error or injustice, it is considered timely under *Detweiler v. Pena*, 38 F.3d 591 (D.C. Cir. 1994).¹⁶

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.¹⁷

3. 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.¹⁸ 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.”¹⁹

¹⁶ *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).

¹⁷ *See Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that “whether to grant such a hearing is a decision entirely within the discretion of the Board”); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) (“The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process.”); *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).

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

¹⁹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

4. The applicant alleged that the Board should promote him because the two consecutive Continuity OERs in his performance record prevented the CAPT selection board from selecting him for promotion since selection for CAPT is highly competitive and only the best 60% of eligible CDRs were selected. However, the Board is not persuaded that the two consecutive Continuity OERs prevented the applicant's selection for CAPT because the Board had entered in his record an instruction for the selection boards not to draw any adverse inference from the lack of substantive OERs for those two years. As noted in the Board's findings for Docket No. 2008-106, the applicant whose record was corrected in BCMR Docket Nos. 2002-110, 2003-116, and 2005-058 was selected for promotion to lieutenant commander with a six-year gap in his performance record, including more than two years of active duty with no substantive OER documenting his performance followed by almost four years of constructive inactive service in the Reserve with no substantive OERs. However, the Board entered in that applicant's record the instruction to selection boards to draw no adverse inference from the gap in his performance record resulting from its correction by the Secretary, and he was selected for promotion less than a year after he returned to active duty. Therefore, the Board concludes that selection boards are clearly able to refrain from drawing any adverse inference from a gap in an officer's record created by a BCMR decision, especially when instructed to do so.

5. The fact that CAPT selection boards normally select a smaller percentage of eligible candidates for promotion than do LCDR selection boards does not alter the Board's view. The applicant apparently believes that the selection boards considered the lack of substantive OERs in his record for 2003 and 2004 to be damaging, despite the BCMR instruction not to draw any adverse inference, and that while the damage was not enough to prevent another officer's selection when the selection rate was around 89%, it was enough to prevent his own selection when the selection rate was just 60%. However, the Board is not persuaded that selection board members are mentally unable to ignore the presence of two Continuity OERs in lieu of substantive OERs in an officer's record and to refrain from drawing adverse inferences. In the applicant's case in particular, his performance record was not thin or sparse because of the Continuity OERs when it was reviewed by the selection boards in 2009 and 2010. Under Article 5.A.4.a.1. of the Personnel Manual, a CDR becomes eligible for consideration for promotion by a CAPT selection board when he has served four full years as a CDR. Because CDRs normally receive OERs annually,²⁰ most CDRs have just four substantive CDR OERs documenting performance in two or three assignments in their records when they first become eligible for selection to CAPT. The applicant, on the other hand, had seven substantive CDR OERs (not all annual) when his record was reviewed by the CAPT selection board in 2009, and he had likewise served in several highly responsible CDR assignments. Although the applicant argues that his extra time in grade hurt his chances for selection, the Board is not convinced that a longer record of proven performance in highly responsible CDR-level positions with excellent OERs hurt the applicant's chance of selection for promotion.

6. The applicant submitted a print-out dated June 1, 2011, from the Coast Guard's Direct Access personnel database showing that the Coast Guard had failed to remove his 2003 and 2004 OER marks from the database. He pointed out that under COMDTINST 1410.2, selection boards are authorized to view performance data sets, but did not allege that selection boards actually see candidates' Direct Access marks summaries. The Chief of the Boards Section in the

²⁰ Personnel Manual, Article 10.A.3.a.1.

Officer Personnel Management Branch of PSC has stated that selection board members are not given the electronic “permission” needed to open candidates’ Direct Access records and are not “provided any additional information ... other than the imaged data record which has the complete OERs.” The Board has reviewed the imaged data record containing the applicant’s OERs, and it does not contain any of the numerical marks or comments from the 2003 and 2004 OERs, which the Board has ordered expunged. Instead, it contains the Continuity OERs that the Board ordered to be entered in his record to replace the expunged OERs. Therefore, although the Coast Guard clearly should have removed the 2003 and 2004 OER marks from the applicant’s Direct Access record and has agreed to do so, the failure to do so did not prejudice the applicant’s record before the CAPT selection boards in 2009 and 2010 because the CAPT selection boards did not see his Direct Access OER marks summary.

7. Whether the applicant would have been selected for promotion to CAPT had he received accurate OERs in 2003 and 2004 is unknowable. However, his record has been corrected and has been duly and fairly considered by two CAPT selection boards in 2009 and 2010 with ample substantive CDR OERs to review. He was not selected for promotion, but his non-selections do not prove his allegations that his Continuity OERs, assignments, and length of service ruined his chances to be selected for promotion. Unfortunately, many CDRs with excellent OERs are never selected for promotion to CAPT and, like the applicant, must retire as CDRs. There is no proof that the Continuity OERs or the applicant’s subsequent assignments prevented him from being selected for promotion to CAPT. The Board is not persuaded that a direct promotion recommendation is warranted and will not usurp the role of the Coast Guard’s selection boards, which are tasked with the difficult job of determining, based on the guidance provided in the Personnel Manual and by the Commandant, which of the many excellent CDRs should be promoted to CAPT.

8. Accordingly, the applicant’s request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxx, USCG Retired, for correction of his military record is denied.

Marion T. Cordova

Patrick B. Kernan

Jeffrey E. VanOverbeke