

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2011-241**

**XXXXXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXXX**

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**FINAL DECISION**

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 application upon receipt of the applicant's completed application on August 26, 2011, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated May 17, 2012, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST AND ALLEGATIONS**

The applicant asked the Board to correct his record by removing his non-selection for promotion to lieutenant (LT) before the Promotion year (PY) 2011 LT selection board. He also requested that if selected by the PY 2012 LT selection board that his LT date of rank be backdated to the date he would have received if he had been selected by the PY 2011 board.

The applicant alleged that his electronic record (EI), which was reviewed by the PY 2011 selection board, improperly contained extraneous adverse documents, some in duplicate, that should not have been reviewed by the selection board. He alleged that these documents related to and highlighted a citation that he received on June 19, 2009, for operating a vehicle under the influence of alcohol. The extraneous documents were: Letter of Recognizance, BAC DataMaster Evidence Ticket, Traffic Citation, Ohio Bureau of Motor Vehicle License Suspension document, and a CG-5588 (Personnel Security Action Form). The applicant argued that these extraneous documents unnecessarily emphasized an alcohol incident and directly contributed to his non-selection for promotion before the PY 2011 promotion board.

The applicant stated that he became aware of the error on December 21, 2010, and began an effort to have the documents removed from his record. Four of the documents and duplicates have been removed from the applicant's record and the CG-5588 has been relabeled from "SERV" to "ADMIN NO BRD," which prohibits its review by the selection board.

## SERVICE RECORD DOCUMENTS

### *Applicant's Alcohol Incident and Related Documents*

Although the applicant's electronic record contained the extraneous documents mentioned by the applicant, it also properly contained the following documents.

1. Letter of Counseling—First Documented Alcohol Incident. This letter noted that the applicant received an alcohol incident “when alcohol was determined to be a factor in his behavior resulting in his being pulled over and arrested by the Fairveiw Park Police Department at 0319 on June 19, 2009 for speeding and driving under the influence of alcohol.” The letter also stated that the applicant “failed a sobriety test and a breath-test measured the applicant's alcohol level at 0.159, which was above Ohio's legal limit of 0.08%.”

2. Alcohol Screening Results. The letter notes that the applicant was screened on July 2, 2009, to determine his relationship with alcohol. The screening determined that the applicant met the criteria for alcohol abuse and a treatment plan was established that consisted of several counseling sessions.

3. Special Officer Evaluation Report (SOER). A SOER was submitted for the period from May 9, 2009, to August 6, 2009, to document the applicant's removal from his primary duty as executive officer on June 22, 2009, and to document his non-judicial punishment (NJP) on August 6, 2009, where an oral admonition was given for violating Article 111 (drunk or reckless driving) of the Uniform Code of Military Justice (UCMJ).

On the SOER, the applicant was given below standard marks of 2 in judgment and health and well-being and 3 in responsibility and professional presence.<sup>1</sup> The comments supporting the marks were similar to those in the alcohol incident letter. The comments supporting the marks also stated, “As a member of the command cadre, his actions set an unacceptable example for the crew, undermined his ability to perform his duties, and brought discredit onto the Coast Guard. He was found to have committed Article 111: Drunken or reckless operation of a vehicle at NJP, an oral admonition was given.”

On the comparison scale in block 9 of the SOER, the reporting officer rated the applicant in the lowest of 7 categories as an unsatisfactory officer. The reporting officer did not recommend the applicant for promotion in block 10.

The applicant submitted an addendum to the SOER wherein he accepted full responsibility for his situation.

### *Applicant's Other OERS*

The applicant's other OERS were those of an average to above average officer who performed his duties in an excellent manner.

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<sup>1</sup> OER marks range from a low of 1 to a high of 7.

## VIEWS OF THE COAST GUARD

On January 11, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant partial relief by removing the applicant's non-selection by the PY 2011 selection board, in accordance with a memorandum submitted by the Commander, Personnel Service Center (PSC).

The JAG noted that the applicant failed to be selected for promotion by the PY 2012 selection board even though the extraneous material had been removed from his electronic record. The JAG stated that although selection board proceedings are not disclosed, it is the Coast Guard's opinion that the applicant's misconduct—as properly documented in his service record—was more likely than not the cause of his non-selections for promotion before both the PY 2011 and 2012 selection boards. In this regard, the JAG noted the following information in the applicant's military record:

On 22 June 2009, the applicant was awarded a counseling letter documenting [his] first alcohol incident. The applicant's misconduct . . . resulted in the applicant receiving non-judicial punishment (NJP) for violating Article 111 [drunk or reckless driving] of the Uniform Code of Military Justice (UCMJ) and removal from his primary duties (Executive Officer/second in command of USCG NEAH BAY.) The applicant was awarded a [SOER] documenting his misconduct and not recommending [him] for promotion. It is the Coast Guard's opinion that the applicant's probability of selection for promotion based on the inclusion of the SOER is more likely than not the reason why he was not selected for promotion during PY 2012. However, the Coast Guard concurs with CG PSC's assessment in that the applicant should have his PY 2011 failure of selection for promotion removed from his record. The applicant's failure of selection for promotion during PY 2012 should not be removed and should be considered his first failure of selection for promotion. The applicant should have his mandatory separation status removed from his record and be allowed to have his record reviewed for promotion by the PY 13 selection board. If not selected by the PY 13 selection board, the applicant will be considered twice not selected for promotion and placed in a mandatory separation status as per 14 U.S.C. § 282.

### *PSC Memorandum*

PSC admitted that the Coast Guard committed an error by improperly including the extraneous documents in the applicant's electronic record. PSC stated that it is not possible to say what impact, if any, the disputed documents may have had on the selection board proceedings because such proceedings are secret under 14 U.S.C. 261. PSC also stated:

The Coast Guard officer promotion system is designed to provide each candidate at least two impartial opportunities to compete for promotion. In this case, [the applicant's] record was viewed by two promotion Boards; however, one of the two Boards had access to information that did not comply with policy. [The

applicant's non-selection by the PY 11 Board should be expunged and [his record should] be placed before the PY 13 LT selection board.

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

On February 2, 2012, the Board received the applicant's response to the views of the Coast Guard. He agreed with them, except that he disagreed that his PY 2012 failure of selection should not be removed. He argued that it was the record of his PY 2011 failure that caused his PY 2012 non-selection instead of the misconduct documented in his record, as argued by the Coast Guard. He stated that the Coast Guard's presumption that he was not selected because of the documented misconduct in his record is unfair and adversely impacts his status as an officer in the Coast Guard.

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

2. As the advisory opinion stated, each officer is entitled to two opportunities to compete for promotion with an accurate record. However, the Coast Guard admitted, and the Board finds, that the applicant's record before the PY 2011 LT selection board improperly contained extraneous documents that related to his arrest for driving under the influence of alcohol. The Coast Guard recommended, and the Board agrees, that as a result of this error, the applicant's PY 2011 failure of selection for promotion to LT should be removed from his record and that the applicant should have one additional opportunity to compete for promotion before the PY 2013 LT selection board.

3. With respect to the removal of the applicant's PY 2012 non-selection for promotion to LT, the Board agrees with the Coast Guard that the PY 2012 non-selection should not be removed from the applicant's record and should be considered his first non-selection for promotion to LT. In this regard, the Board notes that the applicant had a corrected record when he was considered by the PY 2012 selection board and he was still not selected for promotion. The applicant argued that contrary to the advisory opinion it was not the misconduct noted in the derogatory SOER or the alcohol incident letter that contributed to his PY 2012 non-selection. He argued that it was the fact that he had already failed once when the PY 2012 selection board considered his record that resulted in his non-selection.

4. The question before the Board is whether the applicant has established a nexus between his above zone status before the PY 2012 selection board and his non-selection by that board. In determining whether a nexus existed between the error and the applicant's failure of selection for promotion, the Board applies the standards set out in *Engels v. United States*, 230 Ct. Cl. 465 (1982). In *Engels*, the United States Court of Claims established two "separate but interrelated standards" to determine the issue of nexus. The standards are as follows: "First, was

the claimant'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?" Id. at 470.

5. With respect to the first prong of the Engels test, the Board finds that the applicant's record did not appear worse before the PY 2012 selection board due to his above the zone status. In this regard, the applicant has provided no evidence that the Coast Guard places information in the military records that identifies officers who have failed once and those who have not. Moreover, after removal of the extraneous documents from his EI, the applicant's record still contained the alcohol incident letter noting the applicant's arrest for driving under the influence of alcohol, his alcohol screening letter stating that he met the criteria for alcohol abuse, and his derogatory SOER noting his NJP for drunken or reckless driving and his removal from his primary duty as the executive officer. Therefore, the Board is not persuaded that the applicant's PY 2011 non-selection for promotion made his record appear worse before the PY 2012 selection board.

6. The Board further finds that even if evidence of the applicant's non-selection by the PY 2011 selection board had been in his record, it is unlikely in any event that the applicant would have been selected for promotion by the PY 2012 selection board. The Board is persuaded in this finding by the fact that although the extraneous documents had been removed from his electronic record when it was considered by the PY 2012 selection board, he still was not selected for promotion even though his other OERs were average to above average. Therefore, the Board concludes that with a performance record that contained an alcohol incident letter, an alcohol screening letter indicating alcohol abuse, a derogatory SOER documenting his NJP for drunk or reckless driving, removal from executive officer duty, and non-recommendation for promotion, the PY 2012 selection board was unlikely to select the applicant whether or not his record indicated he was above the zone. The applicant has not established a nexus between his above the zone status and his non-selection by the PY 2012 selection board.

7. Accordingly, the applicant is entitled to the partial relief recommended by the JAG.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

**ORDER**

The application of XXXXXXXXXXXXX USCG, for correction of his military record is granted in part as follows:

The Coast Guard shall correct his record by removing his PY 2011 failure of selection for promotion to LT. His PY 2012 failure of selection for promotion to LT shall not be removed from his record and shall be considered his first failure of selection for promotion to LT. If he is selected for promotion to LT by the PY 2013 selection board, his date of rank shall be backdated to what it would have been had he been selected for promotion by the PY 2012 selection board. He shall be retained on active duty until he has had one more opportunity to compete for promotion to LT.

No other relief is granted.

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Lillian Cheng

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Thomas H. Van Horn

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Barbara Walthers