

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-007

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

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 October 18, 2011, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated June 7, 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 a March 18, 1993 Arrest Report for public intoxication, by removing his non-selection for promotion to captain (Capt) before the promotion year (PY) 2012 Capt selection board, and by placing his record before the PY 2013 Capt selection board as an in-zone officer. He also requested that if selected by the PY 2013 Capt selection board, his Capt date of rank be backdated to the date he would have received if he had been selected by the PY 2012 selection board.

The applicant alleged that his record before the PY 2012 Capt selection board improperly contained a 1993 Arrest Report that should have been removed in accordance with a January 30, 1995 final decision from the Personnel Records Review Board (PRRB) in Case No. 0039-94. The applicant submitted a copy of the PRRB decision in which he requested that all references to his 1993 arrest be removed from his military record. The PRRB decision stated that there were no references to the 1993 arrest in the applicant's record except for a comment in an officer evaluation report (OER) covering the period from October 1, 1992 to May 31, 1993. In granting relief to the applicant, the PRRB ordered the comment about the arrest removed from the OER because the underlying offense for the arrest was dismissed shortly after the arrest occurred. The PRRB stated that under Article 10-A-4g(1) of the Personnel Manual, it was improper for the rating chain to have commented on the arrest. The applicant submitted a 1995 letter from the Commander, Military Personnel Command informing the applicant that his headquarters personal data record had been corrected in accordance with the PRRB decision.

The applicant stated that in the years following his PRRB decision, he experienced a very successful and enjoyable Coast Guard career and there was no reason to believe that the unwarranted arrest report was in his official record. Indeed, since the PRRB decision, he has been promoted from lieutenant junior grade (LTJG) to CDR. He also screened for command and served as a commanding officer of a Coast Guard cutter and was selected for the Coast Guard Academy Instructor Program.

The applicant stated that after notification of his non-selection for promotion to Capt in August 2011, he reviewed his personnel record and discovered that the Arrest Report was included in his record that was reviewed by the selection board. The applicant stated that he was told by Coast Guard Personnel Service Center (PSC) personnel that the "Report of Arrest automatically triggered an adverse 'conduct' mark on the record summary page used by the selection board." The applicant also stated the same person told him that it appeared that the Arrest Report somehow appeared in his official personnel record when the records were scanned into an electronic format in January 2006.

The applicant argued that he has suffered a grievous injustice by the Coast Guard's wrongful inclusion of the Arrest Report in his military record. He argued that the erroneous document was prejudicial and left him at a severe disadvantage during the PY 2012 Capt selection board and directly contributed to his non-selection for promotion.

VIEWS OF THE COAST GUARD

On January 25, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant the relief requested by the applicant, as recommended by the Commander, Personnel Service Center (PSC).

In recommending relief, PSC stated that the PRRB failed to locate and remove the Arrest Report dated March 18, 1993. PSC stated that the Arrest Report would have been ordered removed just like the comment referencing the arrest was ordered removed from the OER, if the PRRB had located it in the 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. However PSC conceded that the error has the effect of making the applicant's overall record appear worse than it would in the absence of the error. 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 [selection] board had access to a document that should have been removed in 1995 . . .

[The applicant's] non-selection by the PY 12 Capt selection board should be expunged and he should be considered as an in-zone candidate for promotion . . . before the PY 13 LT selection board.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 1, 2012, the Board received the applicant's response to the views of the Coast Guard. He agreed with them.

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. The 1993 Arrest Report should be removed from the applicant's record. The Coast Guard admitted in the advisory opinion, and the Board agrees, that this document should have been removed in 1995 in accordance with the final decision in PRRB Case no. 0039-94.

3. The Coast Guard also admitted in the advisory opinion that the Arrest Report was improperly included in the applicant's military record when his record was reviewed by the PY 2012 Capt selection board. The advisory opinion stated each officer is entitled to two opportunities to compete for promotion with an accurate record. However, the applicant did not have an accurate record before the PY 2012 Capt selection board.

4. In determining whether a nexus existed between the error in the applicant's record and the his PY 2012 failure of selection for promotion to Capt, 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. The advisory opinion stated, and the Board agrees, that the inclusion of the arrest report was prejudicial to the applicant before the PY 2012 Capt selection board because it made his overall record appear worse. With regard to the second prong of the test, whether it is unlikely that the applicant would have been promoted in any event, the Board finds no evidence in the record to support a finding that the applicant's selection for promotion to Capt was unlikely with a corrected record. Nor has the Coast Guard offered any evidence to support a conclusion that the applicant's selection for promotion was unlikely with a corrected record

5. Therefore because of the prejudicial error caused by improperly including the Arrest Report in the applicant's record before the PY 2012 Capt selection board, that failure of selection for promotion to Capt should be removed from his record and his record should be placed before the PY 2013 Capt selection board as an in-zone officer.

6. Accordingly, the applicant is entitled to the relief.

ORDER

The application of XXXXXXXXXXXXXXXXXXXXXXXX, for correction of his military record is granted. The Coast Guard shall correct his record as follows:

- Removing the March 18, 1993 Report of Arrest;
- Removing his PY 2012 failure of selection for promotion to captain;
- Placing his record before the PY 2013 captain selection board; and
- Adjusting his date of rank, if he is selected for promotion to captain by the PY 2013 selection board, to what it would have been had he been selected for promotion by the PY 2012 captain selection board, and paying him corresponding back pay and allowances.

No other relief is granted.

Donna M. Bivona

Randall J. Kaplan

Paul B. Oman