

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-070

XXXX XXXXXXXX
xxxxxxxxxxxxx, Ensign

FINAL DECISION

AUTHOR: Ulmer, D.

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on March 10, 2006, upon receipt of the applicant's completed application and military records.

This final decision, dated December 14, 2006 is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his military record by removing his promotion year [PY] 2005 failure of selection for promotion to lieutenant junior (LTJG) and that his date of rank be adjusted retroactively if selected by the first LTJG selection board to consider him for promotion to that grade based on a corrected record. The applicant submitted this request during the processing of an earlier application (BCMR No. 2005-162), in which he requested the removal of an OER for the period October 1, 2004 to March 31, 2005. The request for removal of the failure of selection was treated as a new case because processing it as a part of BCMR No. 2005-162 would have caused a delay in issuing a final decision in that case possibly past the convening date for the 2006 LTJG selection board.¹

¹ The Board was not informed during the processing of BCMR No. 2005-162 that the applicant's commission was being revoked and that he would not appear before the 2006 selection board.

The applicant asserted in this application that if granted relief by the Board in Docket No. 2005-162, which was the removal of an adverse erroneous OER, his 2005 failure of selection to LTJG should also be removed. The applicant did not have a second opportunity to be considered for promotion to LTJG because his officer commission was revoked prior to the convening of the 2006 LTJG selection board. As a result of the revocation, he was discharged on June 1, 2006.

BCMR No. 2005-162 (Prior Case)

In BCMR No. 2005-162, the applicant asked the Board to correct his military record by removing the OER for the period October 1, 2004 to March 31, 2005, which the Board granted on April 26, 2006. On the removed OER, the applicant received marks of 4 in initiative and well-being, marks of 3 in judgment and professional presence, and a mark of 2 in responsibility. The comments supporting the below average marks were as follows:

In March 2005, [the applicant] was involved in an altercation with bouncers at a local nightclub resulting in his being held by city police. Demonstrated poor judgment and avoided responsibility for his actions when he did not contact the command; provided no information about the incident until approached by his supervisor two days after it had been reported to the unit. This command determined that alcohol was not a factor in the incident. However, [the applicant's] negative involvement with local police reflected poorly on the Coast Guard and the officer corps.

The reporting officer rated the applicant as a qualified officer (the second of seven blocks, with the seventh block being the highest) when he compared him with other ensigns the reporting officer has known throughout his career.

The reporting officer evaluated the applicant's potential for future service as follows:

While [the applicant's] performance of duties was satisfactory during the reporting period, his personal conduct while off-duty was questionable and demonstrates a reluctance to acknowledge his responsibilities as an officer when he is not at work or on duty. He has not earned the confidence of this command to resume law enforcement duties or be granted access to classified materials & weapons. His potential for assuming positions of increased authority and responsibility remains poor. [The applicant] is not recommended for promotion with his peers.

The applicant alleged that certain of the reporting officer's marks and comments were erroneous and inaccurate because they were based on an incident that a command investigation determined to be the result of racial discrimination and not from the applicant's misuse of alcohol. In this regard the applicant stated the following:

An investigation was done and the result stated that the incident was racially motivated and alcohol was not a contributing factor. On the night in question the [civilian police] officer assured me that the incident was confidential and there was no need to inform my command. Understanding that this was a confidential situation and realizing that I had done nothing wrong I felt as though there wasn't any significant information to report. After all, I wasn't drunk. I didn't fight with anyone and I did the responsible thing by taking a taxi out that night. In retrospect, even though I felt I was the victim I should have informed my command. By doing so my character would not be in question. Although, I did not inform my command I do not feel this level of punishment is appropriate.

In BCMR No. 2005-162, the Board agreed with the Coast Guard and made the following findings:

2. The Coast Guard recommends, and the Board agrees, that the disputed OER should be removed from the applicant's record and replaced with a report for continuity purposes only. The Board also agrees with the Coast Guard that the applicant's rating chain violated the Personnel Manual by failing to prepare an objective and fair evaluation of the applicant's performance during the period covered by the disputed OER. In this regard, the reporting officer gave the applicant below average marks and comments without taking into consideration the findings of the IO that racial discrimination against the applicant by the bouncers and civilian police officer, rather than any misbehavior by the applicant, probably caused the incident on March 18 and 19, 2005.

3. The Coast Guard also found that the reviewer probably had a prejudice against the applicant because of his involvement in a similar incident during an earlier reporting period. For the reviewer to reach a conclusion about the applicant's performance based on performance during another reporting period violates Article 10.A.4.c.11.g. of the Personnel Manual, which states, "the Reviewer shall limit comments to performance or behavior observed during the reporting period and/or discussions of the Reported-on Officer's potential." Based on the reviewer's declaration to CGPC, the Board agrees with the Coast Guard's assessment on this issue.

On April 26, 2006, the Board ordered the applicant's record corrected by removing the OER for the period October 1, 2004, to March 31, 2005, from his record and replacing it with a report for continuity purposes only. Based upon that correction the applicant is now asking the Board to remove his 2005 failure of selection for promotion to LTJG.

Applicant's Other Performance

The applicant's military record still contains a derogatory OER² for the period March 10, 2003 to September 30, 2004. In the reporting officer's section of this OER, which was before the 2005 LTJG selection board along with the removed OER, the applicant received a below average mark of 1 responsibility, a below average mark of 2 in professional presence, below average marks of 3 in judgment and health and well-being, and an average mark of 4 in initiative. In the comments section, the reporting officer wrote the following:

Self-starter. Developed comms plan for 4 LE/SAR agencies enforcing a marine security zone during POTUS visit; used plan to ID need and secure extra radios for other agencies to use. Developed computer spreadsheets to facilitate tracking HIV/random security boardings & closely monitored progress of unit LE training & BTM/BO quals; significant time savings when completing weekly scorecard & adjusting LE training curriculum. Demonstrated singularly poor judgment & brought discredit to CG after involvement in a bar brawl in which alcohol & use of personal weapon was a contributing factor; subsequent detainment by local authorities only discovered by supervisor when police were called after member was absent without authorized leave. Unwilling to take responsibility for actions, placed blame on others to explain own situation. Failed to meet sobriety standards; use of alcohol and mild intoxication led to a bar fight and arrest. Fit, trim appearance in uniform, w/polished brass & shoes. Polite, professional demeanor/seniors, peers & subordinates at all times.

On the comparison scale in block 9. where the reporting officer compared the applicant with all other ensigns he has known during his career, he rated the applicant as unsatisfactory, the farthest category to the left. In support of this mark, the reporting officer wrote the following:

² Article 10.A.4.h.1. of the Personnel Manual defines derogatory OERs as those that contain a numerical mark of one in any performance dimension, contains an unsatisfactory mark by the reporting officer in section 9, or documents adverse performance or conduct that results in the removal of a member from his or her primary duty or position.

[The applicant's] initial performance indicated a promising future in the Coast Guard. However, his disreputable conduct made it necessary for this command to revoke his security clearance, suspend his BTM qualification and prohibit his weapons & armory access. These constraints make it impossible for him to continue performing any LE function that requires a security clearance or an ability to use lethal force. He has lost the confidence of this command to assume any responsibility other than completing administrative tasks. His potential for assuming positions of increased authority & responsibility is poor. [The applicant] is not recommended for promotion with his peers.

The applicant submitted an addendum to the OER, wherein he accepted full responsibility for his actions and poor judgment in the September 16, 2004, bar brawl. He stated that he recognized that he had brought discredit to the Coast Guard. He also pointed to the following:

Prior to the [September 2004] incident . . . I behaved and performed in a manner that exhibited great potential for promotion and leadership. I quickly became actively involved in my unit and its activities. I feel that I have demonstrated the ability to be successful as an officer in the Coast Guard. I realize this in no way minimizes neither the impact nor the consequences of my actions; however, please take into consideration that this was an isolated incident and not a true reflection of my overall character.

The applicant's military record also contains a page 7 documenting his involvement in the September 2004 incident described in the derogatory OER as his first alcohol incident.

VIEWS OF THE COAST GUARD

On July 26, 2006, the Board received the views of the Coast Guard in which the Judge Advocate General (JAG) recommended that the applicant be granted the following relief as recommended by Commander, Coast Guard Personnel Command (CGPC):

[Coast Guard should offer] to reinstate the applicant on active duty at a different unit than Coast Guard Sector Portland where he was first assigned.

Upon reinstatement, allow the applicant to appear before the next LTJG selection Board:

If selected, offer the applicant the opportunity to select a date of rank commensurate with selection by that board or a date no earlier than if selected by the PY [2005] June LTJG Selection Board.

If non-selected, the applicant will be considered as having twice failed of selection and be discharged from active duty.

The JAG also asked the Board to accept the comments from CGPC as a part of the advisory opinion. CGPC stated that the applicant was not selected for promotion to LTJG by the PY 2005 selection board that met on June 6, 2005. In addition to not selecting the applicant, the selection board recommended the revocation of his commission because of his unsatisfactory performance. In this regard, the selection board wrote the following in its report:

[The applicant's] failure to adhere to Coast Guard Core Values in that on two separate occasions he acted in such a manner as to bring discredit on the Service. The first incident in November 2004 was a documented alcohol incident involving a personal weapon, resulting in detainment by local authorities. The second incident in March 2005 involved an altercation with bouncers at a nightclub resulting in being held by police.

[The applicant's] failure to immediately inform his command of either incident which is indicative of a lack of the character required by the Coast Guard's Core Values. His OER reply to the first incident indicated a clear understanding of the service notification expectations. However, following the second incident, he again neglected to notify his command.

[The applicant is not able] to perform his primary law enforcement duties as a result of these incidents.

CGPC stated that approximately two months after the applicant learned that the 2005 selection board had not selected him for promotion, he filed an application for correction of his military record asking the Board to remove an adverse OER³ that was the subject of the earlier BCMR case Docket No. 2005-162. According to CGPC, the applicant's commission was revoked pursuant to 10 USC § 12681⁴, and he was discharged on June 1, 2006.

³ The applicant's request for relief was granted. His request for removal of his 2005 failure of selection was treated as a new case because it was a new issue that was submitted well after the initial application and it would not have been feasible to delay the request in the original application to process the new request.

⁴ This provision of title 10 states, "Subject to other provisions of this title, reserve commissioned officers may be discharged at the pleasure of the President. Other Reserves may be discharged under regulations prescribed by the Secretary concerned." Article 5.A.5.d.2. of the Personnel Manual states that the

In recommending the relief mentioned above, CGPC stated that if the OER ordered removed by the BCMR in Docket No. 2005-162 had not been in the applicant's record, the selection board may not have recommended the revocation of his commission as his record may not have shown a consistent pattern of unsatisfactory performance.

APPLICANT'S REPLY TO THE VIEWS OF THE COAST GUARD

On July 26, 2006, the Board sent the applicant a copy of the Coast Guard views to his address of record. The Board did not receive a reply from the applicant to the advisory opinion. On December 6, 2006, a BCMR staff member contacted the applicant by telephone and he indicated that he had not received the advisory opinion. The applicant was informed of the Coast Guard's recommendation. On December 7, 2006, he faxed his reply to the advisory opinion, stating that he agreed with the Coast Guard's recommendation. He asked the Board to allow him to earn one additional OER upon his return to active duty before going before the LTJG selection board.

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 asked the Board to remove his 2005 failure of selection for promotion to LTJG because when that selection board reviewed his record, it contained the erroneous OER ordered removed by the BCMR. In the prior case, BCMR No. 2005-162, the Board made the following findings with respect to the removed OER.

The Board . . . agrees with the Coast Guard that the applicant's rating chain violated the Personnel Manual by failing to prepare an objective and fair evaluation of the applicant's performance during the period covered by the disputed OER. In this regard, the reporting officer gave the applicant below average marks and comments without taking into consideration the findings of the IO that racial discrimination against the applicant by the bouncers and civilian police officer, rather than any

Commandant will revoke the commissions or vacate the temporary appointments of ensigns who, in their first three years of commissioned, fail of selection for promotion to LTJG and whom the selection board determines are performing unsatisfactorily in grade.

misbehavior by the applicant, probably caused the incident on March 18 and 19, 2005.

The Coast Guard also found that the reviewer probably had a prejudice against the applicant because of his involvement in a similar incident during an earlier reporting period. For the reviewer to reach a conclusion about the applicant's performance based on performance during another reporting period violates Article 10.A.4.c.11.g. of the Personnel Manual, which states, "the Reviewer shall limit comments to performance or behavior observed during the reporting period and/or discussions of the Reported-on Officer's potential." Based on the reviewer's declaration to CGPC the Board agrees with the Coast Guard's assessment on this issue.

3. In light of the correction to the applicant's record as ordered by the BCMR in No. 2005-162, the applicant now requests that his 2005 failure of selection for promotion to LTJG be removed from his record. The Board must decide in the current case whether a nexus existed between the erroneous OER and the applicant's 2005 failure of selection for promotion to LTJG. 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.

4. With respect to the first prong of the Engels test, the applicant's performance record would look somewhat better with the erroneous OER removed and replaced with a report for continuity purposes only. In this regard, the Board notes that the removed OER contained below average marks of 3 in judgment and professional presence, and a below average mark of 2 in responsibility. In addition it contained unflattering comments about the applicant's lack of good judgment in not reporting his involvement in an altercation at a local nightclub that ended with his spending the night in a detoxification center. Therefore, the Board finds that the removal of that OER, with its below average grades and unflattering comments and recommendation against promotion would cause the applicant's record to appear somewhat better.

5. However, despite the prejudice caused to the applicant's record by the inclusion of the removed OER, the Board finds that it was unlikely that he would have been promoted in any event. In this regard, the Board finds that the applicant's performance record contained a derogatory OER, with grades lower than those on the removed OER. The derogatory OER, which is still in the applicant's record, contains a below average mark of 1 in responsibility, a below average mark of 2 in professional

presence, and below average marks of 3 in judgment and health and well-being. The applicant was given a below average mark of 1 (unsatisfactory performer) in block 9. of the derogatory OER. The reporting officer commented that the applicant's use of poor judgment and behavior in the September 2004 incident brought discredit upon the Coast Guard. He further stated that as a result of the applicant's conduct, he revoked his security clearance and prohibited the applicant from weapons and armory access, which prevented the applicant from performing his law enforcement duties. The reporting officer did not recommend the applicant for promotion on the derogatory OER and stated that the applicant's potential for assuming positions of increased authority and responsibility was poor. In addition, the applicant's military record contains a page 7 documenting the September 2004 incident as the applicant's first alcohol-related incident. Therefore, the Board finds that although the applicant performed some of his assigned duties satisfactorily, his documented poor judgment and behavior that brought discredit upon the Coast Guard, his loss of his security clearance and access to weapons, his lack of a recommendation for promotion and increased responsibility, and his documented alcohol-related incident make it unlikely that he would have been selected for promotion in any event in 2005, even if the removed erroneous OER had not been in his record when it was considered by the selection in 2005.

6. Although the Coast Guard did not directly address the removal of the applicant's 2005 failure of selection for promotion, the Board interprets the following Coast Guard comment as a recommendation not to remove the applicant's failure of selection: if the applicant is reinstated and if he is not selected for promotion to LTJG by the first selection to consider him based on a corrected record, he will be considered to have twice failed of selection and discharged from active duty. Since the Board will not remove the applicant's 2005 failure, the Board agrees that his failure to be selected by the next LTJG selection board to properly consider his record will constitute the applicant's second failure of selection for promotion to LTJG.

7. Although, the JAG did not recommend removing the applicant's failure of selection for promotion, he did recommend reinstating the applicant to active duty because it was likely that had the removed OER not been in the applicant's record, the selection board may not have found that he had exhibited a pattern of unsatisfactory performance and therefore may not have recommended the revocation of his commission. The Board agrees with the JAG and is persuaded in this finding by the wording in the selection board report itself, which states that in two instances the applicant acted to bring discredit upon the Coast Guard. One incident was reported in the derogatory OER and the other was reported in the removed OER. The Board concludes that the applicant's involvement in the incident mentioned in the erroneous OER played a significant role in the selection board's finding that the applicant had performed unsatisfactorily as an ensign. To cure this error, the Board agrees with the Coast Guard that the applicant should be reinstated to active duty and allowed another

opportunity to be considered for promotion to LTJG. If the applicant is selected for promotion by the next board to consider him with a corrected record, he shall receive a date of rank commensurate with that Board or the date of rank no earlier than that he would have received if selected by the 2006 board. (Since the Board is not removing the 2005 failure of selection, the applicant would not be entitled to a date of rank as if selected by the 2005 board.)

8. It is not a contradiction for the Coast Guard to not recommend removal of the applicant's 2005 failure while recommending his reinstatement to active duty, thereby undoing the revocation of his commission. An ensign who fails to be selected for promotion is not necessarily synonymous with an ensign who has performed unsatisfactorily in grade such that his commission should be revoked. In this regard, Article 5.A.5.d. of the Personnel Manual states that ensigns whom a board does not recommend and whose commissions are not revoked shall be placed out of line for promotion for at least nine months, beginning on the date the board report which did not recommend them for promotion is approved. An ensign who fails of selection but whose commission is not revoked gets a second opportunity before the LTJG selection board, which is essentially what the Coast Guard is recommending for the applicant.

9. The applicant has asked the Board to direct that he be allowed to earn one additional OER before his record is placed before the next selection board. This is a reasonable request since he has no observed OER for the period October 1, 2004 to March 31, 2005, due to Coast Guard error. The Board will direct that he be allowed the opportunity to earn one additional OER before being considered by a selection board.

10. Accordingly, the Board finds that the applicant is entitled to the relief recommended by the Coast Guard.

ORDER

The application of Ensign XXXXXXXX., xxxxxxxx, USCG, for correction of his military record is granted as follows:

Within a reasonable time, but not to exceed sixty days from the date of this decision, the Coast Guard shall offer the applicant the opportunity to be reinstated on active duty at a unit other than Coast Guard Sector Portland. Such reinstatement shall be at a time convenient to the applicant and Coast Guard, but must be completed within six months from the date of this decision. The applicant's record shall be further corrected to show that he was never discharged from active duty and that his commission was never revoked. He shall receive back pay and allowances, subject to appropriate off-sets.

If the applicant returns to active duty, he shall be given the opportunity to earn one additional OER before his record is placed before a selection board for promotion to LTJG.

Once the applicant has earned one additional OER after his reinstatement to active duty, his record shall be placed before the next LTJG selection board. If the applicant is selected for promotion to LTJG by that board, he shall receive the date of rank commensurate with that board or a date of rank no earlier than if selected by the 2006 selection board at his discretion. If the applicant is not selected for promotion by that board, he shall be considered to have twice failed of selection for promotion to LTJG.

No other relief is granted.

Randall J. Kaplan

Donald A. Pedersen

Adrian Sevier

