

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-095

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

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 BCMR docketed this case on April 15, 2004, upon receipt of the applicant's completed application.

This final decision, dated January 13, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, an ensign in the Coast Guard Reserve, asked the Board to correct his record by expunging his failure of selection to lieutenant junior grade (LTJG); ordering the Coast Guard to reconvene a selection board to consider him for promotion; and, if he is selected for promotion, backdate his date of rank and award him backpay and allowances.

The applicant alleged that when the LTJG selection board convened on August 25, 2003, an officer evaluation report (OER) was missing from his record. He alleged that he initiated timely preparation of an OER, but his rating chain did not believe one was due until September 2003. However, in August 2003, before the selection board convened, the Coast Guard Personnel Command's Reserve Personnel Management Division (CGPC-rpm) told his command to prepare the OER for him. He alleged that the OER was completed by his rating chain on August 22, 2003, and sent by Federal Express the same day to CGPC. However, on November 18, 2003, his commanding officer (CO) informed him that CGPC did not have the OER. His executive officer (XO) told him that CGPC had received the OER on August 26, 2003, but had misplaced it.

In support of his allegations, the applicant submitted a letter from his CO. The CO stated that prior to August 2003, the applicant had inquired about preparation of an OER but was told that one was not yet required. However, on August 20, 2003, CGPC-rpm contacted the command and stated that an OER for the applicant was missing. The CO stated that the rating chain completed the OER in two days and sent it to CGPC-rpm by Federal Express on August 22, 2003. However, on October 23, 2003, the command was informed by CGPC-rpm that the OER was still missing. The command contacted Federal Express to track the package and learned that it had been signed for by someone at CGPC on August 25, 2003. Since CGPC could not locate it, the command provided another copy. The CO further stated that

[t]he night before the November 19, 2003, convening of the LTJG Selection Board, [the applicant] was contacted by the Command at his home and told that CGPC-RPM still [had] not located his OER. ... [On November 19, 2003, the] Command contacted CGPC-RPM and found that his package was misplaced but had recently been located and informed [the applicant] accordingly. That was the last that [he] had heard regarding his OER and assumed that he would be on schedule for his upcoming promotion in January 2004.

However, the CO stated that on January 5, 2004, it was discovered that the OER had never been entered in the applicant's record.

The applicant also submitted an affidavit by an Administrative Assistant at his command. She stated that the OER was sent to CGPC-rpm by Federal Express on August 22, 2003; that she was told by CGPC-rpm on October 23, 2003, that the OER was still missing; that Federal Express advised her that it had been signed for at CGPC on August 25, 2003; and that she faxed another copy of the OER to CGPC-rpm on October 23, 2003.

The applicant also submitted a Federal Express tracking sheet, which confirms receipt of the OER package by CGPC on August 25, 2003, and a copy of the cover sheet by which the Administrative Assistant faxed the OER to CGPC-rpm on October 23, 2003. The applicant also submitted a copy of the OER, which shows that he completed his part of it on July 15, 2003, and that it was signed by his CO on August 22, 2003. The CO noted in the OER that the applicant was "highly recommended" for promotion to LTJG.

VIEWS OF THE COAST GUARD

On July 20, 2004, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant relief in this case. TJAG attached and adopted a memorandum on the case prepared by CGPC.

CGPC stated that a date stamp on its copy of the OER shows that it was received by CGPC-opm-3—which handles active duty officer promotions rather than Reserve officer promotions—on September 26, 2003, and that “CGPC-rpm validated the OER and processed it for inclusion in Applicant’s record on 28 Oct 2003.”

CGPC stated that paragraph 1.J.4 of ALCGPERSCOM 032/03 required the applicant’s command to submit an OER for him for a reporting period that began on August 1, 2002—when the applicant received his commission—and ended on June 30, 2003, but the command failed to do so. Because the OER was not entered timely in his record, there was no OER at all when his record was reviewed by the selection board in August 2003. CGPC stated that “it is likely that Applicant would have been selected for LTJG if his OER had been reviewed by the LTJG promotion board.” CGPC noted that LTJG selection boards select for promotion all officers “whose records indicate they are qualified to perform all duties to which they reasonably might be assigned in the grade for which they are being considered.”

CGPC recommended that the BCMR grant the applicant’s request and that a special selection board¹ be convened at the “earliest practical opportunity to consider Applicant for promotion to LTJG.” CGPC also recommended that, if the applicant is selected for promotion, his date of rank be backdated to what it would have been had he been selected for promotion in August 2003 and that backpay be authorized.

Upon inquiry by the Board staff on January 6, 2005, CGPC stated that the applicant was considered for promotion in November 2003, was selected for promotion, and was promoted to LTJG on September 29, 2004.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 20, 2004, the BCMR sent the applicant a copy of the Coast Guard’s advisory opinion and invited him to respond within 30 days. The applicant responded on July 28, 2004, indicating that he agreed with the recommended relief.

FINDINGS AND CONCLUSIONS

¹ Upon inquiry by the BCMR staff, TJAG stated that the advisory opinion was in error because the Coast Guard has no regulations for convening special selection boards. Heretofore, when this Board has removed an officer’s failure of selection, it has ordered the Coast Guard to place the officer’s record before the next regularly convened selection board and, if he is selected for promotion, to backdate the applicant’s date of rank to what it would have been had he been selected for promotion by the board that reviewed his record when it was incomplete or erroneous.

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant has proved by a preponderance of the evidence that the Coast Guard misplaced his OER and that his record therefore lacked the only OER that had been prepared for him since his appointment as a Reserve officer when he was considered for promotion to LTJG in August 2003. To determine whether his failure of selection should be removed because his record was incomplete when reviewed by the August 2003 LTJG selection board, the Board must answer two questions: "First, was [the applicant's] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?" *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982). The Board finds that the applicant's record was clearly prejudiced by the lack of the OER. Moreover, since his CO had highly recommended him for promotion in that OER, it is likely that he would have been promoted. Therefore, the applicant's failure of selection in August 2003 should be removed from his record.

3. The applicant has already been promoted to LTJG. The Board's policy in such cases is to backdate an applicant's date of rank to what it would have been had he been selected for promotion by the board that reviewed his record when it was incomplete or erroneous.² Accordingly, this is the relief that should be granted in this case.

4. Therefore, the applicant's record should be corrected by removing his failure of selection in August 2003. His date of rank as a LTJG should be corrected to what it would have been had he been selected for promotion in August 2003, and he should receive any backpay and allowances due.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

² See, e.g., BCMR Docket Nos. 2004-046, 2002-007, 2001-041, 2001-029, 2000-128, 2000-016, 1999-142, 1998-073, 1998-018.

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is granted as follows:

His failure of selection for promotion to LTJG by the Reserve (IDPL) selection board that convened in August 2003 shall be removed from his record. His date of rank as a LTJG shall be corrected to what it would have been had he been selected for promotion by the IDPL selection board that convened in August 2003, and he shall receive any backpay and allowances due as a result of this correction.

Nancy L. Friedman

William R. Kraus

Eric J. Young