

**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. 2005-101**

XXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXX, CDR

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**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 application was docketed on April 29, 2005, upon receipt of the applicant's completed application and military records.

This final decision, dated March 8, 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 as follows: "(1) Expunge from his record the 2003 non-selection for promotion to Commander; (2) Adjust his date of rank as a Commander to 01 September 2004; (3) Award him the appropriate back pay and allowances corresponding to a 01 September 2004 promotion to Commander, for those drills and active duty days served since that date as a Lieutenant Commander (LCDR); (4) Offer him the opportunity to integrate into the regular forces; (5) If he integrates, award him the rank-appropriate active duty back pay and allowances and active duty credit for the periods he was demobilized, as if he was serving on active duty on those days."

**BACKGROUND**

The applicant graduated from the Coast Guard Academy and was commissioned as a regular officer in the grade of ensign on May 24, 1989. He served continuously on

active duty until voluntarily resigning his commission on August 4, 2001, having attained the rank of LCDR.

On August 5, 2001, the applicant accepted a Reserve commission in the same grade, LCDR. He served in the Individual Ready Reserve (IRR) until June 24, 2002. On May 21, 2002, the applicant signed a three-year active duty agreement, which called for active duty service to begin June 25, 2002 and terminate on June 30, 2005. The contract stated that the applicant would remain on active duty for the term of the contract unless the Coast Guard agreed to a request by the applicant to be released from the active duty obligation, or until the applicant was involuntarily released after review by a board of officers. The agreement further stated, "A Contractor who is involuntarily released from active duty prior to the expiration of the period of service under this agreement [limited exceptions noted], is entitled to receive an amount equal to one month's pay and allowances multiplied by the unexpired number of years remaining under this agreement. Such amount to be in addition to any pay and allowances, which [the applicant] may otherwise be entitled to receive . . ."

On August 3, 2003, the applicant was considered for promotion to CDR on the ADPL, but was not selected for promotion to that grade. In February 2004, the applicant filed a request with the Personnel Records Review Board (PRRB) challenging the two officer performance reports (OERs) discussed below.

On May 18, 2004, the applicant was voluntarily released from active duty back into the Reserve, as evidenced by a DD Form 214, having served one year, ten months, and twenty-four days of his three-year active duty agreement. On August 2, 2004, he was selected for promotion to CDR by the inactive duty promotion list (IDPL) Reserve Board. Subsequently, the applicant was involuntarily recalled to active duty on August 9, 2004, and served until March 31, 2005.

### ***PRRB Proceedings***

The applicant's requests before this Board are based on the relief granted to him on May 17, 2004, by the PRRB.

#### *Contested OER No. 1*

Prior to corrective action by the PRRB, the OER for the period June 9, 2001 to August 4, 2001 (hereafter referred to as the terminal leave OER), covering only 57 days of terminal leave, was marked as a "Detachment of Officer" OER, with all performance categories marked as non-observed. Block 2., description of duties contained the following comments: "Legal Advisor, Office of Law Enforcement. Report submitted for continuity only. [The applicant] on leave the entire period in conjunction with his release from active duty."

The applicant asked that the terminal leave continuity OER be expunged from his record and that the time covered by that OER be reflected in the regular OER for the period August 1, 2000 to June 8, 2001 by changing the end date of the regular OER to August 4, 2001. He also asked that the occasion for the regular OER be changed to "Detachment of Officer" and the commendation medal dated June 19, 2001 be attached to the regular OER.

The PRRB granted the applicant's request and concluded that two OERs (the regular OER and the terminal leave continuity OER) incorrectly accounted for the applicant's performance during what personnel policy dictated should have been one reporting period, from August 1, 2000 to August 4, 2001.

#### *Contested OER No. 2*

The applicant challenged the OER for the period August 5, 2001 to June 24, 2002 (hereafter referred to as the IRR OER). Prior to corrective action by the PRRB, this OER showed CG Group Moriches as the applicant's unit, was marked as a detachment of officer OER, showed non-observed performance marks, and contained the following comment in block 2., description of duties: "Reserve Officer: Report submitted for continuity only. Member did not drill with unit during the reporting period. Member transferred 2002/06/24 to begin 3 year Extended Active Duty contract."

The Applicant asked the PRRB to remove the Reserve OER and replace it with a new continuity OER for the same period, to include a corrected reporting date of May 16, 2002 rather than August 5, 2001 and to enhance the comment "Member did not drill with unit during the reporting period" in block 2., description of duties with the following:

Report is for continuity purposes only. Chronology: 05Aug01-MBr accepted Reserve Commission. 06 Aug01 - Mbr began Actively seeking RSV assignment via cognizant ISC (FOT). 18DEC01 - Not having been assigned a RSV billet, Mbr submitted EAD request via nearest unit CO (GP Moriches). 28 March02 - Never having been assigned a RSV billet, Mbr issued 3 year EAD orders to report in July to GP LA-LB. 16 May02 - ISC (FOT) admin-assigned MBR to GP Moriches for processing of EAD PCS paperwork/advances. 24Jun02 - Mbr began EAD service and PCS travel. 04Jul02 - Mbr reported to Extended Active Duty as Ops at GP LALB.

The PRRB removed the IRR OER and replaced it with a new IRR continuity OER that showed the IRR as the applicant's unit, showed annual/semiannual as the occasion for the OER, and revised comments in block 2., description of duties as follows:

"Submitted for continuity purposes only IAW Article 10.A.3.a.5.a. ROO is in IRR. Chronology: 05 Aug 01 - Member Accepted Reserve Commission. 16 May 02 - Member administratively assigned to CG GP Moriches. 25 Jun02 - member entered into EAD contract. IDT drills scheduled: 0/0; ADT:0/0; ADSW: 0 days." The PRRB did not change the starting date as requested by the applicant.

In granting relief on the IRR OER, the PRRB found that the OER contained an incorrect reporting date and discovered upon further review that it was prepared by the wrong rating chain. Apparently, CG Moriches should not have prepared an OER at all because the applicant was still in the IRR even though he was administratively assigned to Coast Guard Moriches for a portion of the reporting period. With respect to these errors the PRRB stated, "[the applicant] has met his burden of presenting evidence of clear material errors of objective fact." The PRRB further concluded that the "Description of Duties" on the Reserve OER "could be subject to misinterpretation by any selection board and should be replaced." Elaborating, the PRRB stated that although the description of duties as written in the OER is permissible, for those unfamiliar with Reserve policy, particularly as it relates to an IRR officer, the comment could be misinterpreted as the applicant alleged. The applicant alleged the original comment could have been misinterpreted as him being AWOL during drills.

#### **APPLICANT'S CURRENT ALLEGATIONS**

The applicant alleged that his 2003 ADPL failure of selection for promotion to CDR should be removed from his record. He argued that the circumstances of his non-selection by the 2003 ADPL board, the record correction by the PRRB, and his subsequent selection for promotion by the 2004 IDPL selection board satisfy the two-step standard set out in Engels v. United States, 68 F.2d 173, 175 (Ct. Cl. 1982), for determining whether an officer is entitled to relief for being wrongfully passed over for promotion. The applicant stated that in Engels the Court articulated that standard to be:

Applicant "must first show that the service committed a legal error. For those cases, like this one, in which the challenge rests on defective OERs or an incomplete or inadequate military record, the next question for us is whether the error is causally linked with the passover [sic] - in summary terms, was it prejudicial or harmless?"

The applicant stated that once error has been established, in order to prevail, Engels requires that he makes a prima facie showing of a causal connection between the error and the failure of selection. In making this point, he continued to quote from Engels, as follows:

On the second step-the causal nexus- \* \* \* plaintiff [here the applicant], to prevail, must make at least a prima facie showing of a substantial connection between the error and the passover [sic]. But the end-burden of persuasion falls to the Government to show harmlessness-that, despite the plaintiff's prima facie case, there was no substantial nexus or connection. Engels at 175.

The applicant stated that in evaluating whether a causal link or nexus exists between the error and the failure of selection, the Engels Court subdivided this step into two prongs, applying

two separate but interrelated standards: 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? Engels at 176 citing e.g., Hary v. United States, 618 F.2d 704, 710 (Ct. Cl. 1976).

With respect to the above standard, the applicant argued that he has shown by a preponderance of the evidence, as concurred in by the PRRB, that his record contained errors when the 2003 ADPL selection board considered it. In support of this contention, he quoted from the Findings of the PRRB decision that the terminal leave OER for the period June 9, 2001 to August 4, 2001, "conflicted with Personnel Manual policy on accounting for terminal leave," and concluded that "[t]wo OERs incorrectly accounted for applicant's performance during what Personnel Policy dictates as one reporting period [from August 1, 2000 to August 4, 2001]. The applicant further stated that the PRRB found that the IRR OER for the period August 5, 2001 to June 24, 2002, "conflicts with Personnel Manual Policy for continuity OERs" and concluded

*"Applicant is correct in his assertion that the OER was not properly prepared in accordance with OER guidance describe [in the Personnel Manual]. He has met his burden of presenting evidence of clear, material errors of objective fact . . . In addition, as a result of staff review of his request to the PRRB, the Board finds material error in submittal of a report by the wrong reporting chain." . . . [Emphasis in applicant's brief].*

The applicant further alleged that the PRRB recognized that he did not have "a substantially and complete and fair record" before the 2003 selection. In this regard, he quoted the following from Horn v. United States. 671 F.2d 1328, 1330 (Ct. Cl. 1982) citing Sanders v. United States, 594 F.2d 804, 814 (Ct. Cl. 1979): "Regulations prescribe that OERs are to be objective and prepared in a certain way. If a particular officer's OER has not been so prepared and that defect *could have resulted* in his nonselection for promotion followed by discharge, *this is legal and factual error and an injustice to the officer*

*as well.*" Sanders at 814 [emphasis added by applicant]. The applicant stated that the PRRB conceded that the IRR OER "*could have* resulted in [his] nonselection," because it could have been misinterpreted as an accusation that the applicant was AWOL from drills at Group Moriches, when in fact, as a member of the IRR, he was not assigned to drill at all.

In applying the first prong of the Engels test to determine prejudice, the applicant argued that he has shown that his record before the 2003 ADPL selection board looked worse than it would have in the absence of the errors. In this regard, he argued that the IRR OER comment "member did not drill with unit during the reporting period" in the block 2. (description of duties) combined with the inaccurate reporting date, was subject to misinterpretation by a promotion board. As previously stated, he argued that one could infer that he was AWOL during this period. He argued the following PRRB opinions, conclusions, and recommendations support his contention that the uncorrected IRR OER made his record appear worse: "[f]or those unfamiliar with OER policy as it applies to Reserve officers, particularly to IRR officer who have no training requirement, [the comment] could be misinterpreted as the applicant claims"; and "the description of duties on [the uncorrected OER] as written could be subject to misinterpretation by any selection board and should be replaced."

In addition, the applicant contended that the terminal leave OER covering only 57 days of terminal leave created unnecessary white space in his record. He argued that conventional wisdom holds that the unnecessary white space has the potential for being misinterpreted, giving unfavorable implications to a promotion board. He stated that the Chief, Reserve Personnel Management Division of the Coast Guard Personnel Command confirmed his assessment of "white space" by writing an article in the Coast Guard Reservist magazine indicating that commands should "endeavor 'to prepare an OER that is substantive, minimizes white space . . . and yet still captures meaningful impact.'" The applicant argued that he has shown that the alleged extraneous "white space" caused his record to appear worse before the 2003 ADPL selection board.

With respect to the second prong of the Engels test, the applicant argued that it is not unlikely that he would have been promoted in any event by the 2003 ADPL selection board with a corrected record and the Coast Guard cannot carry its burden of proving otherwise. In support of his contention, he offered the following proof: (1) he was considered by a selection board based on a record that the Coast Guard admitted contained prejudicial error; (2) he was passed over for promotion by that board; (3) the Coast Guard corrected his record by removing or repairing the prejudicial errors; and (4) he was selected for promotion by the first board to consider him based on a corrected record.

Moreover, the applicant stated that it is an indisputable fact that his corrected record was strong enough to earn selection for promotion to CDR, as evidenced by his

actual selection after his record was corrected. In addition he argued that the second selection had a lower "stated in-zone opportunity for selection" and a lower "actual in-zone opportunity for selection" than the first board. The actual opportunity of selection for the first (ADPL) board was 69.9%% and the actual opportunity of selection for the second (IDPL) board was 62.5%. Therefore, the applicant argued that he overcame greater odds in being selected by the second board than those selected by the first board. He argued again that his actual selection by the second board constitutes a prima facie showing that his selection by the first board (with an untainted record) was not improbable.

The applicant stated that this is an unusual case that calls for integration into the regular forces, in addition to the other relief listed on page one of this decision. He noted the differences in pay between that of a retired active duty officer and a retired reserve officer. The applicant explained the basis of his request for his integration in the regular Coast Guard as follows:

At the time of the first promotion board, Applicant was a reserve officer serving on an extended active duty contract. When the Coast Guard Personnel Command wrote to inform Applicant of his recall to active duty under that contract, it also notified him that "[I]f selected for promotion under a best-qualified criterion on the ADPL, you will be offered the opportunity to integrate and remain on active duty as a permanent regular officer" . . . Applicant was no longer serving under that contract when he was selected for promotion by the second board, and therefore has never been afforded the opportunity to integrate.

The applicant argued that to make him whole, the Board should grant his request for integration in addition to the usual relief granted upon the removal of his failure of selection. He stated that the U.S. Court of Claims has "said that where an applicant has convinced a correction board to correct his record it must not grant him 'half-a-loaf' of relief. He must be made whole.' Sanders at 813."

### **Overview of the Applicant's Military Record**

The applicant graduated from the Coast Guard Academy with a degree in Civil Engineering and was commissioned as an ensign on May 23, 1989. As an ensign he was assigned to a Coast Guard cutter as a deck watch officer, and in addition also served at different times as communications officer and administrative supply officer. Most of his ensign performance marks were above average (with 4 being an average mark). As a lieutenant junior grade (LTJG), he served as the combat systems officer on a Coast Guard cutter. His performance marks were mostly 6s and 5s with an occasional 4 or 7.

From May 22, 1993, through July 31, 1996, the applicant was attending law school and received non-observed duty under instruction OERs (DUINS). Comments by the reviewer on the DUINS OERs tout his successful law school career. The last one noted that he graduated and passed the bar in 1996. Subsequently, he earned three additional LT OERs. His marks on these three OERs consisted of mostly 5s and 6s, with an occasional 4 or 7. He is described in these OERs as "an exceptionally capable and well rounded CG officer."

The applicant had three observed LCDR OERs prior to the 2003 ADPL selection board. The first two were earned prior to his release from active duty and contained no performance marks below 5. The comments were of equally high caliber. One reporting officer wrote, "Advice implicitly trusted at all levels" Another wrote, "He earned my full trust and confidence" and assisted in "reduc[ing] FOIA backlog by 30%." He was highly recommended for promotion in each OER. Prior to the 2003 ADPL selection board, the applicant earned one observed OER after returning to active duty on June 25, 2002, under an active duty contract. In that OER, the reporting officer stated that the applicant's "[h]igh initiative is unmatched," that he had "high intellect and sound judgment," and that he was "enthusiastic and hard working." The reporting officer recommended the applicant for promotion to CDR with the best of his peers, integration back into the regular forces, and selection to senior service school. The applicant's record contained three Coast Guard Commendation Medals and a Navy Achievement Medal.

### **VIEWS OF THE COAST GUARD**

On September 14, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. He also asked the Board to accept the comments from the Commander, Coast Guard Personnel Command (CGPC) attached as Enclosure (1) as part of the Coast Guard's advisory opinion.

The JAG argued that the applicant failed to make a prima facie showing of a substantial connection between the error and the non-selection because the errors in the applicant's record involved technical administrative corrections to the accounting of time not observed and not the substance of the applicant's record. The JAG stated the applicant has failed to carry his burden of proving a nexus between the alleged error and his failure to be selected. The JAG stated that the test for determining whether a substantial connection exists between the error and the non-selection was established in Engels v. United States, 678 F.2d 173 (Ct. Cl. 1982). In that case, the Court required that two questions be answered to establish the "substantial connection or Nexus" between the error or injustice and the applicant's failure of selection. 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 promoted in any event. Id at 176. In answer to these questions in this case, the JAG offered the following:

(a) Applicant's record prior to the changes does not appear worse than it does in the absence of the technical administrative corrections. The corrections made to Applicant's record all address the accounting for time not observed. The corrections do not, in any way, change the substance of Applicant's record; therefore Applicant's record is the same both before and after the technical corrections. As stated in the precept for the PY04 Selection Board the four factors that a selection board considers when developing the selection criteria are: performance, professionalism, leadership, and education. These factors are set out in greater detail in Personnel Manual COMDTINST M1000.6A Art. 14.A.3. The focus on performance is also prevalent throughout the Commandant's Guidance to the PY04 Officer Selection Board (stating "By the time officers compete for promotion to these ranks [O-5 and O-6], they are generally top performers in specialty.") The technical corrections to Applicant's record do not change the substance of Applicant's record -- the documentation of Applicant's performance is exactly the same. Applicant's record was not prejudiced by the administrative error accounting for time not observed; the substance of his record does not appear any different after the correction of the administrative errors.

(b) It is unlikely that Applicant would have been promoted by the PY04 Active Duty Commander Selection Board even with the technical changes reflecting time not observed. First, Applicant's statistical analysis is flawed. Applicant asserts that the opportunity for selection in the PY 05 Reserve CDR Selection Board was lower than that of the PY 04 Active Duty CDR Selection Board. However . . . the comparison is inaccurate. The Reserve Selection Boards, unlike the Active Duty Selection Boards, do not distinguish between in-zone and above-zone candidates. When this distinction is taken into account, the opportunity for selection before the PY04 Active Duty CDR Selection Board is lower than the PY05 Reserve CDR Selection Board. Second, as stated above, the technical corrections made to Applicant's record only amend the manner in which the time not observed is recorded in applicant's record. The changes do not affect the substance of Applicant's record nor do they change the fact that Applicant has unobserved time due to terminal leave when resigning active duty commission and his time in the IRR . . . It is most likely that applicant's record before the PY04 Active Duty CDR Selection Board was burdened by Applicant's voluntary decision to leave active duty and his time not observed while in the IRR. These facts are not changed by the manner in which the time is recorded in Applicant's record.

According to CGPC, applicant's use of his selection by the PY 05 IDPL as proof that the errors cited by the PRRB prejudiced his record before he ADPL board is flawed for the following reasons:

"a. Best-qualified boards base selections on the strength of an individual's record relative to others considered by that same board . . . And while they operate within legal and policy limits set in a precept, each board devises its own selection criteria and its members are legally bound by their oath to maintain the confidentiality of their deliberations. Each board's results therefore cannot be compared to other boards within the same component, and certainly not between the Active and Reserve Components. The PY04 ADPL CDR board considered officers who, in the predominant number of cases, served continuously 365 days per year over a 14-year period. Reserve boards consider officers who, by the nature of their Reserve status, typically accrue far fewer periods of unbroken, active duty service.

"b. While it is not unusual for Reserve officer records to include continuity OERs in Reserve selection boards, it is more unusual for their Regular counterparts to do so at ADPL boards. In PY 05, when applicant competed successfully for CDR on the Reserve selection board, nine out of 40 Reserve officers had at least one continuity OER in their record -- 22.5% of the in-zone Reserve CDR board population. While comparable data on PY04 ADPL CDR board candidates is not available, the number is believed to be far below the 22.5% registered by the PY 05 Reserve board to which applicant refers.

"c. Unlike ADPL boards, Reserve boards do not distinguish in-zone and above-zone board populations: both types of officer are considered "in the zone" on Reserve boards, and opportunity of selection is based on this consolidated number. If the PY 05 Reserve zone methodology were applied to the PY04 ADPL CDR board, the rate of selection for in-zone plus above-zone ADPL officers would have been 52.5%. At 52.5%, the PY04 ADPL CDR board reflected a statistically lower opportunity for selection than did the FY05 Reserve CDR board, which selected 62.5% Reserve officers from within the zone ..."

CGPC concluded that even if the applicant's record, corrected by the PRRB, had gone before the PY04 ADPL CDR selection board, his selection for CDR on the ADPL was still improbable. CGPC noted that the applicant's voluntary decision to leave active duty in 2001 and his failure to perform paid or unpaid duty while assigned to the IRR would have sharply distinguished his record from ADPL peers on a highly competitive ADPL board. Applicant's record, burdened by 10 months, 21 days with no observable performance in the IRR placed him at a disadvantage relative to his continuously serving active duty peers at the PY04 ADPL CDR selection board. While errors in the applicant's record did exist, their effect was harmless: it was the 10 months, 21 days of time "not observed" in the IRR that likely resulted in his failure of

selection, and not the erroneously prepared continuity OER documenting just 57 days of terminal leave.

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

On November 30, 2005, the BCMR received the applicant's reply to the views of the Coast Guard. He disagreed with the Coast Guard that the errors identified by the PRRB were merely technical. He characterized them as material. In this regard, he stated that the PRRB concluded that the applicant "has met his burden by presenting evidence of clear, material errors of objective fact" and "as a result of staff review of his request to the PRRB, the Board finds material error " in that the OERs were prepared by the wrong rating chain. Further, the applicant stated that the PRRB concluded that the errors "could be misinterpreted" and "as written, could be subject to misinterpretation by any selection board and should be replaced."

With respect to a causal connection between the error and his failure of selection, the applicant again pointed to the PRRB conclusion in support of his argument that the errors caused his record to appear worse than it would have in the absence of the errors. The applicant also stated that the Coast Guard completely ignored the issue that the unnecessary "white space" created by the terminal leave OER had on the appearance of his record. The applicant stated that although the Coast Guard recognized the correct standard in testing for prejudice (whether the record appeared worse), it attempted to change that standard by stating, "the substance of the applicant's record was not changed by the corrections." According to the applicant, "Whether the changes are substantive (or technical, or accounting, or administrative) is not the legal issue. The issue is whether the record appeared worse before the corrections were made." The applicant stated that his claims are based upon improper inclusion of prejudicial "white space" via the terminal leave OER and the inclusion of a mischaracterizing phrase in the IRR OER that was susceptible to misinterpretation by the promotion board.

The applicant stated that the author of CGPC's program input also served on the PRRB. He argued that that person should not be allowed to abandon his prior findings of prejudice and take on a new position; nor should the Board permit the Coast Guard to avoid its previous admissions and concessions of the prejudice resulting from the errors in this case. He argued that he has met his burden of proving prejudice by showing that his record appeared worse than it would in the absence of the errors. The applicant further asserted that he has provided sufficient evidence to prove that his selection before the PY04 ADPL board was not unlikely and that the burden now shifts to the Coast Guard to show that it is unlikely that he would have been promoted with an untainted record.

In this regard, the applicant argued that the Coast Guard has presented no evidence to prove its claim that it is unlikely that he would have been promoted in any

event. In addition, he noted that the Coast Guard did not thoroughly discuss his fifteen years of service, including his thirteen years of active duty, his top performance, his tours afloat and ashore and his legal assignments. Rather, he stated that the Coast Guard mischaracterized his first year in the Reserve by stating that he performed no duty when in fact he earned 15 gratuitous points and 41 active duty points for a total of 56 points, equating to a satisfactory year of service.<sup>1</sup>

The applicant also challenged the Coast Guard's assertion that a promotion board will view his time away from active duty negatively. The applicant stated that the Coast Guard has programs that permit temporary separation, such as the temporary separation for up to two years to "pursue growth or other opportunities out side the service", detailed in Article 12.f. of the Personnel Manual. Having such programs illustrates that boards will not automatically cast temporary separations in a negative light. He stated, "When a promotion board evaluates [his] expertise and potential for continued success within the legal specialty, the experience he gained in his time away from active duty may be considered a benefit, rather than the burden that the [advisory opinion] suggests."

The applicant stated that the Coast Guard's assessment of the presence of continuity OERs in records is flawed. He stated that Coast Guard endeavors to show in its opinion that continuity OERs are rare among active duty officer records and their presence would work against an officer's likelihood of promotion on the ADPL. "Though the [Coast Guard] may be over stating the rarity, its effort does serve to illustrate the colloquial prejudice against 'white space'". With respect to the Coast Guard's contention that the IRR continuity OER, even in its correct form would work against the applicant, the applicant stated there is a major difference between a blank OER that was improperly created, and improperly included in the record and one that by regulation properly accounts for unobserved time. The applicant disagreed with the Coast Guard's assertion that the percentage of active duty officers with continuity OERs is "far below" that of reservists.

The applicant stated that the advisory opinion contains a mistake of policy when it says that one board cannot be compared with another. He stated that Article 7.A.7. of the Personnel Manual states that a failure of selection of a Reserve officer serving on active duty or inactive duty shall count for all purposes as a failure of selections. In comparison, he states that 14 USC § 728(d) states that a failure of selection for

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<sup>1</sup> The applicant's retirement points statement dated November 22, 2002 states that the applicant performed no duty between 8/8/2001 through 8/7/2002. It also shows that the applicant earned 15 gratuitous points, also known as membership points, which are awarded to each member of the Ready Reserve. The retirement points statement shows further that the applicant earned 44 active duty points. The active duty points were earned from June 25, 2002 through August 7, 2002, under the applicant's active duty contract. For the period covered by the IRR OER, 8/5/2001 to 6/24/2002, the applicant did not perform any Reserve duty.

promotion to the next higher grade occurring under the subchapter (Reserve) or under chapter 11 [regulars] of this title shall count for all purposes. He argues that both Congress and the Coast Guard treat these board results as equivalents for all purposes.

In objecting to the Coast Guard's assessment of his 2004 release from active duty as voluntary, the applicant stated that his decision was made after "mild duress" through calls, emails and a letter appealing to him to volunteer to shift from EAD to ADSW,<sup>2</sup> as the Coast Guard Personnel Command's goal was to achieve 100% participation. The emails offered by the applicant show that the Coast Guard indeed asked reservists on extended duty contracts to accept administrative assignment to ADSW and the goal of having 100% participation. However, information in these emails noted that the change was an administrative one and would not interrupt active service, pay, leave, or credit toward an active duty retirement. The applicant also submitted a February 24, 2004 letter to CGPC entitled "REQUEST FOR RELEASE FROM ACTIVE DUTY AGREEMENT." He noted that he had been extended the opportunity to be transferred to ADSW status at his current unit for a period of 140 days or more followed by an additional EAD contract. He thanked the Coast Guard for its efforts in developing the offer but declined it. He further stated in his letter the following: "I am making this request because in my private capacity as an attorney and businessman, I've been presented with certain professional opportunities in South Florida upon which I desire to capitalize in a timely manner . . . If the Coast Guard is in need of active duty service in South Florida, . . . I would be willing to evaluate an offer along those lines. Otherwise, please consider this to be a plain request for release from our 21 May 02 active duty agreement."

## 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 is seeking the removal of his 2003 ADPL failure of selection for promotion to CDR and other relief. It is the applicant's burden to prove the existence of an error in his record when the ADPL selection board reviewed it and to make a prima

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<sup>2</sup> Article 3.A.4.a. of the Reserve Policy Manual defines Active Duty Special Work (ADSW) as a category of active duty other than for training to support either an active component or Reserve component. It provides the necessary skilled manpower assets to temporarily support existing or emerging requirements.

facie showing of a nexus between the error and his failure to be selected for promotion, at which point the burden shifts to the Coast Guard to show that it is unlikely that the applicant would have been promoted in any event.

3. The Board agrees with the applicant that the approved PRRB decision is persuasive proof that his record contained errors when the 2003 ADPL selection board reviewed it. In this regard, the PRRB directed that the applicant's record be corrected by removing the terminal leave continuity OER and by removing and replacing the IRR continuity OER. With respect to the terminal leave OER, the PRRB concluded that under personnel policy the 57 days of terminal leave should have been accounted for in the prior regular OER by extending the reporting period for the regular OER from June 8, 2001 to August 4, 2001 and by changing the designation of that OER from "annual-semi/annual" to "detachment of officer."

4. The PRRB also removed and replaced an IRR continuity OER for the period August 5, 2001 to June 24, 2002. The PRRB found that the removed OER had been prepared by the wrong rating chain and the comments in block 2., "description of duties" were not consistent with Article 10.A.3.a.5.a of the Personnel Manual. A new IRR continuity OER was prepared showing the applicant to be a member of the IRR rather than Coast Guard Moriches and designating "annual/semiannual" as the occasion for the OER. Further, the comments in block 2., description of duties were revised in the new OER as follows: "Submitted for continuity purposes only IAW Article 10.A.3.a.5.a. ROO is in IRR. Chronology: 05 Aug 01 - Member accepted Reserve Commission. 16 May 02 - Member administratively assigned to CG GP Moriches. 25Jun02 - [member] entered into EAD contract. IDT drills scheduled: 0/0; ADT:0/0; ADSW: 0 days." (The comment on the removed OER read: "Reserve Officer: Report submitted for continuity only. Member did not drill with unit during the reporting period. Member transferred 2002/06/24 to begin 3 year extended Active Duty Contract.") With respect to the comments in the removed OER, the PRRB stated that although the description of duties as written in the original OER was permissible, for those unfamiliar with Reserve policy, particularly as it relates to an IRR officer, the comment could have been misinterpreted as the applicant having been AWOL during drills, as he alleged.

5. The errors having been established, the Board must now decide whether there was a causal connection between the applicant's 2003 ADPL failure of selection and the errors corrected by the PRRB. 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.

6. The Board is not persuaded by the applicant's argument that the 57-day terminal leave OER removed by the PRRB, caused his record to appear worse by creating unnecessary "white space." The Board notes that the PRRB did not find that the applicant had suffered an injustice by the inclusion of the extra OER in his record; rather, it found that the 57 days accounted for in the terminal leave OER should have been included in the prior regular OER. Moreover, the Personnel Manual envisioned the presence of "white space" in a record by permitting continuity OERs, which account only for time. Continuity OERs contain only administrative data and an explanation for the OER in block 2., description of duties. They do not contain evaluated performance marks or comments. Article 10.A.3.a. of the Personnel Manual states that continuity OERs may be submitted in cases where an OER is required but full documentation is impractical, impossible to obtain or does not meet officer evaluation system goals. Therefore, the term "white space" is more appropriate when discussing substantive OERs. Partially filled comment blocks in substantive OERs may be interpreted as an officer having few accomplishments during a reporting period. However, the Personnel Manual even allows for this "white space" by not mandating that a rating chain completely fill each comment block in an observed substantive OER. Articles 10.A.4.c.4.d. & g. and 10.A.4.c.7.d. of the Personnel Manual only require comments for each mark that deviates from a 4.

7. Although the terminal leave OER was erroneous, it did not create the kind of "white space" discouraged by the Coast Guard. Nor is the Board persuaded that having the erroneous 57-day terminal leave OER in the applicant's record worsened it. The erroneous OER contained no evaluation marks or comments, but noted that the applicant had received the Coast Guard Commendation Medal dated June 19, 2001 and the United States Commendation medal dated July 13, 2000, and November 10, 1998, which was information favorable to the applicant. Accounting for the 57 days of terminal leave on a separate continuity OER was harmless error.

8. With respect to the erroneous IRR continuity OER, which was removed and replaced by the PRRB, the applicant argued that it caused his record to appear worse because the comment in block 2., "member did not drill with unit during reporting period," could have been misinterpreted as an accusation that he was AWOL from drills at Group Moriches, when in fact he was not assigned to drill at any unit. In support of this contention, he asserted that the Coast Guard, through the PRRB's opinions and conclusions, conceded that the comment worsened his record by opining that "[f]or those unfamiliar with OER policy as it applies to Reserve officers, particularly to IRR officers who have no training requirement, [the comment] could be misinterpreted as the applicant claims"; and concluding that "the description of duties as written [on the

removed OER] could be subject to misinterpretation by any selection board and should be replaced."

9. The Board is not persuaded that the PRRB opinions and conclusions are admissions by the Coast Guard of what effect, if any, the errors on the removed IRR OER might have had on the applicant's failure before the 2003 ADPL selection board. In this regard, the PRRB was not asked to decide, nor could they, whether the applicant's failure of selection should be removed since the removal of failures of selection, back dating dates of rank, reinstatement to active duty, and awarding back pay are not within purview of the PRRB. Therefore, any comments made in the PRRB decision cannot be taken as persuasive proof of a matter that is beyond their authority to decide. The Board disagrees with the PRRB opinion that "[f]or those unfamiliar with OER policy as it applies to Reserve officers, particularly to IRR officers who have no training requirement, [the comment in the removed OER] could be misinterpreted as the applicant claims [that he was AWOL]" and its conclusion that the "Description of Duties" on the [erroneous continuity OER . . . could be subject to misinterpretation by any selection board . . ." In this regard, the Board notes that the 2003 CDR ADPL selection board was composed of senior Coast Guard officers holding a rank no lower than CDR (O-5) and as such these officers should have been familiar with the Reserve and its various components and policies. In addition, the applicant, or any reservists, who failed to perform obligated drills and did not reschedule or make up those drills would have that negative information documented in an OER or elsewhere in the military record. The PRRB findings go only to establishing an error in the applicant's record that required corrective action to the challenged OERs.

10. Despite the above findings and for reasons discussed herein, the Board finds that the corrected IRR continuity OER made the applicant's record appear only slightly better than it did with the erroneous IRR OER. The applicant's military record appeared better because the revised OER showed the applicant was a member of the IRR for the entire reporting period rather than a member of a drilling unit, Coast Guard Moriches. The corrected OER clarified that the applicant had no assigned drills, whereas the erroneous OER stated only that he did not drill with unit Coast Guard Moriches. Further, it provided a chronology of events during the year covered by the OER, such as the applicant's acceptance of his Reserve commission on August 5, 2001, his administrative assignment to a unit on May 16, 2002, and his commencement of travel and service under his three-year active duty contract on June 24, 2002.

11. Although the minor errors resulted in slight prejudice to the applicant's record, he has not made a prima facie showing of a substantial connection between the minor errors in his record and his failure to be selected by the 2003 ADPL board. In this regard, he relied on the fact that the IDPL board selected him for promotion after his record was corrected. However, the applicant's overall record of performance remained virtually the same before and after the corrections by the PRRB. While the applicant

argued that the comment in block 2. of the removed OER could have been interpreted as him having been AWOL from drills, we would point out that the rating chain made no such comment in that OER. In fact the comment read as follows: "Reserve Officer: Report submitted for continuity only. Member did not drill with unit during reporting period. Member transferred 2002/0624 to begin 3 year extended Active Duty Contract." The Board fails to see how this comment could have reasonably been a significant factor in the applicant's non-selection for promotion by the 2003 ADPL board. In Engels, the plaintiff established that his record would have been substantially improved if a defective substantive OER had been removed and a favorable substantive evaluation letter had been included in his record prior to consideration by the selection board. The errors in the applicant's record were of a minor administrative type and do not come close to those described in Engels.

12. However, even if the applicant had made a prima facie case of a connection between the error and his 2003 failure of selection, the Board finds that it is unlikely that he would have been promoted in any event. In reaching this finding, the Board agrees with the advisory opinion that the corrections to the applicant's record did not in any way change the caliber of his above-average performance. The ADPL selection board considered and saw a performance record that was unchanged by the corrections ordered by the PRRB. In this regard, we note that the applicant's record showed an officer who graduated from the Coast Guard Academy and became a regular Coast Guard officer. He served successfully both afloat and ashore. He was selected for the law education program and spent three years attending law school. He had a very successful law school career and graduated and passed the bar in 1996. His subsequent LT OERs were well above average, consisting mostly of 5s and 6s, with only two 4s. He is described in these OERs as "an exceptionally capable and well rounded CG officer." The record shows that he had three observed LCDR OERs prior to the 2003 ADPL selection board. The first two were well above average and earned prior to his release from active duty in 2001. He had no marks below 5 and the comments were of equally high caliber. One reporting officer wrote, "Advice implicitly trusted at all levels." Another wrote "He earned my full trust and confidence" and assisted in "reduc[ing] FOIA backlog by 30%." He was highly recommended for promotion in each OER. The applicant earned one observed OER after returning to active duty on June 25, 2002, under an active duty contract. In that OER, the reporting officer stated that the applicant's "[h]igh initiative is unmatched," that he had "high intellect and sound judgment" and that he was "enthusiastic and hard working." The reporting officer recommended the applicant for promotion to CDR with the best of his peers, integration back into the regular forces, and selection to senior service school. In addition, the applicant's record contained all medals and awards to which he was entitled as well as his resignation of his regular commission with an effective date of August 4, 2001. The record also showed his acceptance of a Reserve commission in the same grade (LCDR) on August 5, 2001 and his three-year active duty contract. As the Coast Guard argued, the applicant's ADPL failure of selection probably resulted from

his recent resignation of his regular commission rather than the minor administrative errors in the continuity OERs.

13. Since the applicant's performance record was virtually unchanged by the corrections made by the PRRB, factors other than the minor corrections by the PRRB, probably explain his subsequent selection in 2004 by the IDPL board. For instance, the applicant was selected for promotion by the IDPL (Reserve) promotion board and not by a subsequent ADPL (active duty) promotion board. As such the applicant was not required to compete in 2004 with regular officers who served continuously on active duty 365 days per year, twenty-four hours per day and therefore had more of an opportunity to showcase their skills and potential than most reservists who normally perform one weekend drill per month and short periods of active duty. At the time the applicant was considered by the ADPL board, he had only three observed LCDR OERs, whereas his active duty counterparts, who had spent four to five years in grade, had at least that many LCDR OERs in which to demonstrate their performance and potential for serving in the next higher grade. Reservists are valuable members of the Coast Guard, but more often than not their active duty service is broken service, just like the applicant's. Therefore, it is difficult for a reservist who may be on an active duty contract, and therefore on the ADPL, to compete successfully on a best qualified basis with regular active duty officers.

While the applicant argued that there is no difference between the IDPL and ADPL selection boards because each is a best qualified board and both operate under the same or similar precepts, the fact is they are separate boards. Active duty and Reserve are different components of the Coast Guard under Title 14 of the United States Code; they have separate personnel policy manuals; and the selection boards are convened separately and at different times for each component. Articles 5.A.2. of the Personnel Manual and 7.A.3 of the Reserve Policy Manual mandate that the Commandant maintain separate lists of ADPL and IDPL officers from which officers on a particular list compete for promotion only against each other. For further emphasis in recognition of the difference between the ADPL and IDPL, COMDTINST 1401.5A. issued on April 28, 2005, gives Reserve officers serving on extended duty the option of returning to the IDPL to compete against other reserve offices rather than remaining on the ADPL list, after which a new EAD contract can be executed. If the active duty and Reserve components were not separate and distinct, there would be no logic in holding separate selection boards.

Additionally, the applicant's improved performance record was probably instrumental in his subsequent selection by the 2004 IDPL board. At the time the applicant was considered by the 2004 IDPL selection board, he had earned another highly favorable OER with marks of 6s and 7s and a recommendation for immediate promotion to CDR.

14. Although there is no way to know for certain why the applicant was not selected for CDR by the ADPL board because deliberations are secret, the Board is persuaded that he had a complete performance record that fairly described his skills, leadership, professionalism, and education, as required by law. The corrected IRR continuity OER adds nothing, either negatively or positively, to these essential elements considered most important by a selection board. See, Article 14.A.3. of the Personnel Manual. Accordingly, the Board finds that it is unlikely that the applicant would have been promoted in any event by the 2003 ADPL board with a corrected record.

15. Even if the Board were to remove the applicant's non-selection by the 2003 ADPL board, it would not grant any of the other relief requested by the applicant because he voluntarily left active duty before he would have been promoted if selected by the ADPL board. In fact, the applicant was released at his own request. In arguing for back dating of his rank, for back pay and allowances, integration, and constructive service credit as if selected by the 2003 ADPL board, the applicant quotes the following from Sanders v. United States, 594 F.2d 804, 814 (Ct. Cl. 1979): When "[r]egulations prescribe that OERs are to be objective and prepared in a certain way[, if] a particular officer's OER has not been so prepared and that defect could have resulted in his nonselection for promotion followed by discharge, this is legal and factual error and an injustice to the officer as well." However, the Court is not speaking about a voluntary discharge. In fact, the Court stated in Sanders, "The predicate for recovery . . . is the invalidity of plaintiff's termination. Only if the authority to terminate plaintiff was improperly exercised can he recover." Id. at 309. Moreover, in Osborn v. United States, 47 Fed. Cl. 224 (2000), *citing* Thomas v. United States, 42 Fed. Cl. 449, 452 (1998), the Court of Federal Claims stated that when a plaintiff has retired by choice, "it follows as a matter of logic that his final separation and retirement were not unlawful and, consequently, he is not entitled to reinstatement to active duty." In Tippett v. United States, 185 F.3d 1250, 1255 (Fed. Cir. 1999), the United States Court of Appeals for the Federal Circuit stated that if that plaintiff's discharge was involuntary and improper, his statutory right to pay was not extinguished, but if his discharge was voluntary, his right to pay ended upon discharge and he would not have retained a statutory right to compensation. The applicant's loss of any pay and other benefits were the result of his own actions, not those of the Coast Guard.

16. The applicant offered emails from Coast Guard personnel in an attempt to show that his early release from active duty was due to duress from the Coast Guard, on reservists like himself, to accept a temporary administrative change in their duty status from extended active duty to ASDW. The emails show that the Coast Guard asked reservists, including the applicant, on extended duty contracts to accept administrative assignment to ADSW, but stated that the change in status would occur whether or not the reservists expressed acceptance. However, the emails also show that in answering members' questions about the change, the Coast Guard stated that accepting a change to ASDW would not interrupt active service, pay, leave, or credit

toward an active duty retirement. The Coast Guard offered the applicant an opportunity to remain on active duty and he chose not to accept. The fact that the applicant disliked the alternative offered and chose to ask for release from active duty does not cause his release to be involuntary. See Longhofer v. United States, 29 Fed. Cl. 595 (1993). Apparently, after failing to engineer a transfer from his then current California assignment to Florida, the applicant submitted a February 24, 2004 letter to CGPC entitled "REQUEST FOR RELEASE FROM ACTIVE DUTY AGREEMENT." He noted that he had been extended the opportunity to be transferred to ADSW status at his current unit for a period of 140 days or more followed by an additional EAD contract. He thanked the Coast Guard for its efforts in developing the offer but declined it. He further stated in his letter the following: "I am making this request because in my private capacity as an attorney and businessman, I've been presented with certain professional opportunities in South Florida upon which I desire to capitalize in a timely manner . . . If the Coast Guard is in need of active duty service in South Florida, under terms . . . I would be willing to evaluate an offer along those lines. Otherwise, please consider this to be a plain request for release from our 21 May 02 active duty agreement."

The Board sees no way that the applicant's letter can be interpreted as anything but a voluntary request for termination of his active duty contract and release from active duty. Therefore, since the applicant was not wrongfully released from active duty, he would not be entitled to a date of rank adjustment or back pay and allowances, as if selected by the 2003 ADPL selection board. Moreover, the applicant certainly would not be entitled to integration because a best-qualified ADPL selection board never selected him (subsequent to the resignation of his regular commission). Under Article 1.A.8. of the Personnel Manual, the integration of Reserve officers requires selection by a best qualified ADPL selection board. The applicant admitted in his brief that he was told that he would be expected to integrate if he were selected for promotion to CDR by a best-qualified ADPL board. He was never so selected.

17. The applicant made several other complaints that are not addressed within these findings and conclusions because they are either without merit or not dispositive of this case.

18. Accordingly, the applicant's request should be denied.

**ORDER**

The application of CDR xxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is denied.

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Philip B. Busch

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George J. Jordan

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Adrian Sevier