

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-161

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on July 27, 2007, upon receipt of the applicant's completed application and military records, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 27, 2008, 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 an Officer Evaluation Report (OER) for the period August 1, 2001, to June 1, 2002 (disputed OER) and by replacing it with the draft OER he submitted as an enclosure to his application. He further requested that if the disputed OER was "the determining factor for [his] non-selection to [LCDR] in PY (promotion year) [2007], then [he] requested immediate reconsideration for [LCDR], any [back pay], and correction to time in rank."

APPLICANT'S ALLEGATIONS

The applicant alleged that the OER for the period under review was written on the wrong OER form for evaluating lieutenants (LTs), which he was at the time. He stated that although he was and is a LT, the disputed OER is written on the form for evaluating warrant officers (W2s and lieutenants junior grade (O2s). He argued that as a consequence of this error, his mark of 5 in section 9¹ on the disputed OER is rendered less significant than a mark of 5 would be on the correct form. He also complained about the amount of white space left unused in the comment sections of the disputed OER.

¹ Section 9 of an OER is the comparison scale where a reporting officer rates officers in grade W2-O5 with others of the same grade that the reporting officer has known through out his career. The section 9 blocks and corresponding description is somewhat different on the forms for W2s-O2s than the form for O3s-O5s.

The applicant provided the draft OER that he submitted to the rating chain in 2002 and asked the Board to direct that it replace the disputed OER. This draft OER was never signed or adopted by the rating chain. Apparently, the applicant has encountered some difficulty in getting an acceptable OER for the period under review placed into his record. The first OER that was prepared by the rating chain and presented to the applicant had significant spelling errors. The rating chain corrected the spelling errors but in doing so, placed the applicant's evaluated performance on the wrong OER form which is the subject of this BCMR application.

The applicant stated that he discovered the error on March 1, 2003, and attempted to correct it as late as March/April 2005. He stated that he did not become aware that he could request correction through the BCMR until February 2007.

Applicant's LT OERs

The disputed OER is the applicant's first after his promotion to LT. The marks on this OER are two 4s, eleven 5s, and five 6s. The applicant was given a mark in the fifth of seven blocks on the comparison scale in section 9 as "one of the many competent professionals who form the majority of this grade."

The OER for the period June 1, 2002 to May 31, 2004 evaluates the applicant's performance as a command center duty officer for the Ninth Coast Guard District. The marks are four 4s, twelve 5s, and two 6s. In section 9, the applicant was rated as a "good performer; give tough, challenging leadership assignments," which is a mark in the fourth block of 7.

The OER for the period June 1, 2004, to May 31, 2005, evaluated the applicant's performance as a command center duty officer for the Ninth Coast Guard District. His marks are three 4s, twelve 5s, and three 6s. In section 9, the applicant was rated in the fourth block as a "good performer; give tough, challenging leadership assignments."

The OER for the period June 1, 2005, to May 31, 2006, lists the applicant's major duty was as command center duty officer and SAR controller. His marks are three 4s, ten 5s, and five 6s. His comparison scale mark in section 9 was in the fourth block, which describes a "good performer; give tough, challenging leadership assignments."

The OER for the period June 1, 2006, to May 31, 2007, lists the applicant's major duty was as command center duty officer and SAR controller. His marks are four 4s, ten 5s, and four 6s. His comparison scale mark in section 9 was in the fourth block, which describes a "good performer; give tough, challenging leadership assignments."

Difference between Incorrect and Correct OER Forms

The only significant difference between the W2 OER form and the LT OER form is the variation in the wording for the comparison scale in section 9. The incorrect form states in section 9 that it is for W2s -O2s and it lists the following rating categories: unsatisfactory (block 1), a qualified officer (block 2), one of the many professionals who form the majority of this

grade (covers blocks 3, 4, and 5), an exceptional officer (block 6), and a distinguished officer (block 7). On this form, the applicant, a LT, received a mark in block 5.

The correct OER form states in section 9 that it is to be used for grades LT- CDR. It lists the following rating categories: Performance unsatisfactory for grade or billet (block 1), marginal performer (block 2), fair performer; recommended for increase responsibility (block 3), excellent performer; give tough, challenging assignments (block 4); excellent performer; give toughest, most challenging leadership assignments (block 5), strongly recommended for accelerated promotion (block 6), and best officer of this grade (block 7). If the correct form had been used for the disputed OER, the applicant's mark of 5 in block 9 would have identified him as an excellent performer who should be given the toughest and most challenging leadership positions.

VIEWS OF THE COAST GUARD

On December 18, 2007, the Judge Advocate General of the Coast Guard submitted an advisory opinion recommending that the Board grant the following partial relief to the applicant: “[T]hat the current OER form (W2-O2) found in his service record for the period August 1, 2001 through May 31, 2002 be replaced with the correct OER form (O3-O5), utilizing all information and marks from the current OER and submitted signatures by the original rating chain using original dates. Upon receipt, this corrected OER should be validated by CGPC-rpm and replace the current validated OER in the member's permanent record.”

The JAG admitted that the rating chain used the wrong form in evaluating the applicant's performance for the period under review. However, the JAG argued that the applicant has not carried his burden of proving that the Coast Guard committed legal error when it provided the disputed OER with unused white space to the PY 2007 selection board. In reaching this conclusion, the Coast Guard applied the analytical framework in *Engels v. United States*, 678 F. 2d. 173 (Ct. Cl. 1982), which states that before addressing a failure of selection, “an applicant must first show that the service committed a legal error.” After which, the next question is whether the error is causally linked with the passover, i.e. whether it is harmless or prejudicial. According to *Engels*, if the applicant meets his burden of proving a causal connection between the alleged error and the failure of selection for promotion, the “end-burden of persuasion falls to the government to show harmlessness – despite the applicant's prima facie case, there was no substantial nexus or connection.” *Id.*

The JAG stated that with respect to the first step under *Engels*, the mere fact that an officer submits OER input to the rating chain, or even turns in a completed draft OER, does not compel the rating chain to submit, use, or even agree with that input. Moreover, the JAG stated that there is no requirement to fill all white space in the comment blocks of an OER. The JAG admitted that the applicant has proved that the incorrect OER form was used, but he failed to prove that the error resulted in his failure of selection. Therefore, the JAG argued that the applicant has not met his burden of proving legal error. In this regard, the JAG argued that under *Engels*, there is a distinction between form and substance and that according to the applicant's own admission, the form is at issue here and not the marks and comments. Although on the incorrect form, the applicant's evaluated performance for the period under review was available

to the selection board and therefore the applicant had a substantially complete and fair record before the PY 2007 LCDR selection board.

The JAG argued with respect to step two under *Engels*, the applicant has not made a prima facie case establishing a substantial connection between the wrong OER form and his failure to selection before the PY 2007 selection board, even if legal error were proven with respect to the first step. The JAG stated that in determining whether a nexus exists between the alleged error and the failure of selection, *Engels* applies a two part test: “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?” *Id.* at 176. The JAG stated that the wrong OER form made the applicant’s record appear worse before the selection board. However, the JAG stated that the applicant had failed to prove that the error contributed substantially to his failure of selection. In this regard, the JAG argued that the applicant was selected by the 2007 selection board with the disputed OER in his record.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 21, 2007, a copy of the views of the Coast Guard was sent to the applicant for a reply. The Board did not receive a response from the applicant.

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 JAG admitted, and the Board finds that the applicant’s rating chain prepared and submitted the evaluation of his performance for the disputed period on the wrong OER form. The rating chain used the form for W2s-O2s, when it should have used the OER form for O3s-O5s. There is evidence in the record that the applicant received a 5 in block 9 on the first OER prepared for this period that he returned to the rating chain for correction of typographical errors. However in the process of correcting these typographical errors, the rating chain used the wrong form. Therefore, the Board agrees with the Coast Guard that the applicant’s record should be corrected to replace the disputed OER with one prepared on the correct OER form with no modifications to the marks and comments. The Board will not direct the disputed OER be replaced by the draft OER prepared and submitted by the applicant, since it was never signed or adopted by the rating chain as their evaluation of the applicant’s performance.

3. The applicant asked for an adjustment of his date of rank and back pay and allowances if the error was the causative factor in failure of selection. The Board notes that the applicant failed to make any arguments or present any evidence to show a connection between the error and his failure of selection for promotion. It is the applicant’s responsibility to prove his case by a preponderance of the evidence and a mere request for relief or an allegation is not sufficient

proof of a connection between the error and his PY 2007 failure of selection for promotion to LCDR.

4. Regardless of the applicant's failure to submit argument and evidence on the issue of the connection between the error and his PY 2007 failure of selection, the Board will address it. In deciding this issue, the Board applies the standard in *Engels v. United States*, 678 F.2d 173, 175-76 (Ct. Cl. 1982). In *Engels*, the Court of Claims held that, if the Board finds that an officer's record contained an error when it was reviewed by a selection board, the Board should decide whether the officer's failure of selection for promotion should be removed by answering 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?"

5. With respect to the first prong, the Board agrees with the Coast Guard that the error made the applicant's record appear somewhat worse than it would have in the absence of the error. In this regard, the Board notes that section 9 on the disputed OER clearly states that the reporting officer is to rate and compare W2s through LTJGs, when the applicant was a LT. Therefore, some confusion could have been created in the minds of the members of the selection board as to the applicant's rank. Also, if he had been rated on the correct form, his record would have appeared better because his section 9 rating on that form would have described him as "an excellent performer; give toughest, most challenging leadership assignments," rather than as "one of the many professionals who form the majority of this grade" that was on the incorrect form. The former is a stronger endorsement of the applicant's abilities than the latter.

6. With respect to the second prong of the *Engels* test, the Board finds that even with the minimal prejudice described above, it is unlikely that the applicant would have been selected for promotion in any event with a corrected record. The applicant's record before the PY 2007 selection board was substantially complete and fair portrayal of the applicant's career. In this regard, none of the marks and comments on the disputed OER was shown to be in error, and the applicant did not challenge them as such. Even, the comparison scale mark in section 9 would have been the same (a 5) if the correct form had been used, albeit the description for the mark would have been somewhat different. The Board further finds that the applicant's record contained all other of his OERs and awards and medals when it was considered by the selection board, as nothing indicates otherwise. Finally, the applicant was selected for LCDR in PY 2008 with the incorrect OER in his record, which persuades the Board that the disputed OER was not a significant factor in the applicant not being selected for promotion in PY 2007.

7. Also, page one of the disputed OER lists the applicant as a LT and states the date on which he was promoted to that grade. Any confusion that might have been existed in the minds of selection board members was resolved easily by referring to page one of the disputed OER. In addition, the Board is satisfied that the selection board was aware of the applicant's rank since his record was before the LCDR selection board. In light of the above, the Board finds that it is unlikely that the applicant would have been promoted in any event with a corrected record.

8. The applicant's argument that the disputed OER had too much white space left in the comment blocks is without merit. The Board having reviewed the OER finds that very little

white space is left in any of the comment blocks on the disputed OER. Even if significant white space had been left unused, the Personnel Manual does not require that all available space be used. More importantly, the applicant does not argue that any significant accomplishments were omitted from the comment blocks.

9. Accordingly, the applicant should be granted partial relief as recommended by the Coast Guard.

[ORDER AND SIGNATURES APPEAR ON FOLLOWING PAGE]

ORDER

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

The OER currently in his service record for the period August 1, 2001, through May 31, 2002, shall be replaced with an OER for lieutenants, using only the marks and comments from the OER currently in his record covering the period under review, with the original dates and rating chain signatures. The action directed by this Order shall be completed within 180 days from the date of this final decision.

No other relief is granted.

Philip B. Busch

Dorothy J. Ulmer

George A. Weller