

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2006-085**

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**TECHNICAL AMENDMENT**

This proceeding was conducted under the provisions of section 1552 of title 10 and in response to a request by the Judge Advocate General (JAG), dated August 15, 2007, to return the Final Decision in Docket No. 2006-085 to the Board for a technical amendment of the order in accordance with 33 C.F.R. § 52.73.

**BACKGROUND**

In the application for BCMR Docket No. 2006-085, the applicant asked the Board to remove from his record an officer evaluation report (OER) for the period April 1, 2002, to March 31, 2003, when he was serving as the xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx at a Coast Guard training center. The disputed OER contained five low marks of 3 (on a scale of 1 to 7, with 7 being best), ten marks of 4, and three marks of 5 in the various performance categories and a mark in the fourth spot on the comparison scale. While serving in the same billet, the applicant had previously received OERs with marks of 4, 5, and 6 from a prior supervisor and reporting officer. In support of his request, the applicant submitted substantial evidence of work that was not acknowledged in the OER and affidavits from other officers who highly praised his work during the evaluation period. The applicant also alleged that the members of his rating chain had been changed just three weeks before the end of the evaluation period.

In his advisory opinion for the case, the JAG recommended that the Board grant relief by replacing the disputed OER with one prepared "for continuity purposes only." The JAG stated that under Article 10.A.3.a.2. of the Personnel Manual, the officer who served as the applicant's reporting officer for all but the last three weeks of the evaluation period was required to prepare an OER for the applicant before leaving the unit but failed to do so. The JAG submitted affidavits showing that the departing reporting officer knew that he should have submitted an OER for the applicant and intended to do so but was thwarted by command, who required him to submit only comments for the OER. The departing reporting officer indicated that if he had prepared the OER as required by regulation, it would have been a significantly better.

The Board found that the applicant's record had been prejudiced by the violation of Article 10.A.3.a.2. of the Personnel Manual "in that marks and comments throughout the disputed



From September 26, 1995, through June 9, 1997, the applicant served as the commanding officer (CO) of a xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. He received primarily marks of 6 in the various performance categories and marks in the fifth spot on the comparison scale, which denotes a “distinguished performer” ready for challenging, leadership assignments. On August 1, 1996, he was promoted to lieutenant commander.

From June 10, 1997, through April 30, 2000, the applicant served as the CO of a xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. He received almost all 6s in the performance categories and marks in the fifth spot on the comparison scale.

From May 1, 2000, through March 31, 2003, the applicant served as the xxxxxxxxxxxx xxxxxxxxxxxx, supervising three officers and fourteen enlisted members. On his first annual OER in this billet, the applicant received nine marks of 5, nine marks of 6, and a mark in the fifth spot on the comparison scale. On September 1, 2001, he was promoted to commander. On his second annual OER in this billet and his first as a commander, the applicant received nine marks of 4, eight marks of 5, one mark of 6, and a mark in the fourth spot on the comparison scale, which denotes a “good performer” ready for challenging assignments. The applicant’s third and last OER in this billet was the OER disputed in Docket No. 2006-085, which the Board has already removed from his record.

From April 1, 2003, through February 29, 2004, the applicant served as a xxxxxxxxxxxx xxxxxxxxxxxx. On his OER for this service, he received primarily marks of 4 and 5 and a mark in the fourth spot on the comparison scale. He was “recommended for promotion with peers.”

From March 1, 2003, through March 31, 2006, the applicant was detailed to the Department of Homeland Security. He served as xxxxxxxxxxxx xxxxxxxxxxxx. In January 2006, he became the xxxxxxxxxxxx xxxxxxxxxxxx. On his first OER in this billet, he received nine marks of 5, seven marks of 6, two marks of 7, and a mark in the fifth spot on the comparison scale. He was “recommended for promotion with peers.” On his second OER, he received six marks of 5, ten marks of 6, two marks of 7, and a mark in the fifth spot on the comparison scale. He was “[h]ighly recommended for promotion to O-6 where his proven inter-departmental relationships and skill-sets can be leveraged.” On his third OER, the applicant received thirteen marks of 6, five marks of 7, and a mark in the sixth spot on the comparison scale, which denotes an officer who is “strongly recommended for accelerated promotion.” The reviewer added a comment page in which he wrote that the applicant had “distinguished himself as a leader in the Coast Guard and DHS and has my highest recommendation for promotion to O-6. He is well qualified for senior command and most highly recommended for command afloat or ashore.”

The applicant failed of selection for promotion to captain (O-6) in July 2006 while the disputed OER, which the Board ordered removed in the Final Decision for Docket No. 2006-085, was still in his record. The applicant received two more excellent OERs but failed of selection again in July 2007 after his record had been corrected pursuant to the Board’s Order in Docket No. 2006-085.

## 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 over this matter under 10 U.S.C. § 1552 and 33 C.F.R. § 52.73.

2. The JAG asked the Board to amend its Order to remove from the applicant's record his failure of selection for promotion in July 2006 before the PY 2007 captain selection board. The applicant's disputed OER, which was removed by order of this Board in January 2007, was still in his record in July 2006. Under *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), to determine if the applicant is entitled to the removal of his failure of selection, the Board must answer the following 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 [he] would have been [selected for promotion in 2006] in any event?"

3. The Board finds that the applicant's record was prejudiced by the presence of the disputed OER, which contained very low marks in comparison with his other OERs. Moreover, in the Final Decision in BCMR Docket No. 2006-085, the Board made the following findings:

4. The Board must also determine, however, whether the clear violation of Article 10.A.3.a.2.b. was prejudicial to the applicant's record—i.e., whether the change in the reporting officer caused the applicant to receive a worse OER than he otherwise would have—and, if so, whether the entire OER must be removed or just that portion prepared by the reporting officer, which is actually the best part of the disputed OER. In BCMR Docket No. 151-87, it was held that "an OER will not be ordered expunged unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect or unjust; or unless the Board finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material."

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8. Therefore, the Board finds that the violation of Article 10.A.2.3.2.b. was prejudicial to the applicant's record in that marks and comments throughout the disputed OER would likely have been better had the correct officer exercised his full authority as the applicant's reporting officer. Moreover, as stated in BCMR Docket No. 151-87, the entire OER appears to have been "infected" by the error and it is "impossible or impractical to sever the incorrect/unjust material from the appropriate material."

4. To determine whether it is "unlikely that [the applicant] would have been [selected for promotion in July 2006] in any event,"<sup>1</sup> the Board must consider the remainder of the applicant's performance record before the selection board to determine whether he could have been a competitive candidate for selection.<sup>2</sup> However, the Court of Federal Claims has held that when an officer shows that his record was prejudiced before a selection board by error, "the end-

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<sup>1</sup> *Engels* at 176.

<sup>2</sup> *But see Quinton v. United States*, 64 Fed. Cl. 118, 126 (2005) (holding that "[i]t is not enough, in determining that plaintiff was not likely to have been promoted, to comment only on his record. Without comparing an officer to the other contestants, no reasonable mind can say how any particular individual would fare in a competition in which not everyone can prevail").

burden of persuasion falls to the Government to show harmlessness—that ... there was no substantial nexus or connection” between the prejudicial error and the failure of selection.<sup>3</sup> In requesting the technical amendment, the Coast Guard apparently concedes that there was a nexus between the erroneous OER and the applicant’s failure of selection in 2006.

5. Under Article 14.A.3.b. of the Personnel Manual, the basic criteria that selection boards must consider in making selections for promotion include an officer’s performance evaluations, professionalism, leadership, and education, as well as any negative entries, such as documentation of alcohol incidents or civil arrests. Article 14.A.4.d. states that a captain selection board should pay most attention to the “[s]even years of immediate previous service or all service in present grade, whichever is greater.” The applicant’s record includes many Commendation Medals and Achievement Medals and no alcohol incidents or other negative entries. During the seven years prior to his failure of selection in 2006, the applicant received very high OER marks while in command of a vessel and while serving on detail to DHS. Although he received a couple of mediocre OERs during those seven years, he was strongly recommended for accelerated promotion and for command ashore and afloat on his last two OERs before the selection board met.

6. The Board notes that the applicant failed of selection in July 2007 even after the disputed OER was removed, but this failure does not prove that he would have failed in 2006 had the disputed OER not been in his record because each selection board is composed of different officers; each pool of candidates for selection is different; and each pool has a different opportunity for selection.<sup>4</sup> In light of the excellence of most of the applicant’s performance record—especially his OERs while in command and his most recent OERs<sup>5</sup>—the Board finds that it is not unlikely that the applicant would have been selected for promotion in July 2006 had the disputed OER not been in his record before the selection board. Moreover, under 14 U.S.C. § 285, Congress provided that each commander should have two chances to be considered for promotion to captain, and justice requires that an officer’s record should be substantially correct when it is reviewed by a selection board.<sup>6</sup> Therefore, the applicant’s failure of selection for promotion in July 2006 before the PY 2007 CAPT selection board should be removed from his record.

7. In accordance with the JAG’s request and the above findings, the Board should amend its Order in Docket No. 2006-085 to include removal of the applicant’s failure of selection for promotion by the PY 2007 CAPT selection board so that he will have another opportunity to be selected by the next CAPT selection board.

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<sup>3</sup> *Quinton* at 125, citing *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982).

<sup>4</sup> The “opportunity for selection” for a particular selection board is calculated as the number of promotions the board is allowed to make divided by the number of officers “in the zone” for promotion.

<sup>5</sup> *Godwin v. United States*, 338 F.3d 1374, 1381 (Fed. Cir. 2003) (holding that “among all prior OERs, the most recent assessment of the officer’s performance is particularly informative as to the officer’s current capabilities and future potential”).

<sup>6</sup> *Sanders v. United States*, 219 Ct. Cl. 285, 302 (1979) (holding that “a substantially complete and fair record is a necessary requirement of proper consideration by a selection board”).

**ORDER**

The Board's Order in Docket No. 2006-085 is amended to require the following additional correction of the military record of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx:

The Coast Guard shall remove from his record his failure of selection for promotion by the PY 2007 CAPT selection board, which convened in July 2006.

October 4, 2007  
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Date

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