

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-097

**XXXXXXXXXXXXXX
XXXXXXXXXXXXXX**

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receipt of the applicant's completed application on January 3, 2010, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 23, 2011, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S INITIAL REQUEST AND ALLEGATIONS

The applicant asked the Board either to remove a prejudicial comment from his officer evaluation report (OER) covering his service from May 23, 2007, to June 30, 2008, or to remove the OER from his record in its entirety. The comment, which supports a low mark of 3 in the performance category "Responsibility,"¹ states the following: "Had to be counseled on several occasions to comply w/ own dependent support memo." The applicant alleged that the comment should be removed because it is prohibited under the Personnel Manual.²

VIEWS OF THE COAST GUARD

In response to the applicant's request, the Officer Personnel Management branch of the Personnel Service Center (PSC) advised the applicant on May 28, 2010, that his request had been approved administratively by the PSC pursuant to Article 14.B.3.h. of the Personnel Manual³ and that his OER had been corrected. PSC attached to this letter an amended version of the OER in which the phrase "dependent support" was removed so that the disputed comment now reads as

¹ In OERs, officers are evaluated in a variety of performance categories, such as "Professional Competence," "Teamwork," "Initiative," and "Responsibility," on a scale of 1 (worst) to 7 (best).

² Article 10.A.4.f.10. of the Personnel Manual states that in preparing OER comments, rating officials shall not "[r]efer to Reported-on Officer's marital or family status."

³ Article 14.B.3.h. states that when a member submits an application form DD 149, "[t]he Coast Guard Personnel Command or program manager responsible for the contested record will screen the application and take appropriate action within its authority."

follows: “Had to be counseled on several occasions to comply w/ own ... memo.” On June 18, 2010, the Judge Advocate General submitted an advisory opinion to the Board in which he recommended that the Chair close the case administratively because, he alleged, the PSC had already corrected the applicant’s OER.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 25, 2010, the Chair mailed the applicant a copy of the advisory opinion and noted that she would administratively close the case unless the applicant objected within 30 days. Initially, no objection was received. In response to an email from the BCMR staff on September 10, 2010, the applicant called and stated that he had never received the Chair’s mailing. Therefore, on September 14, 2010, the advisory opinion was emailed to the applicant. In response to the advisory opinion, the applicant called and stated that he objected to the incomplete correction of his OER and asked whether the Board would be backdating his date of rank if he was selected for promotion to CWO3 by the selection board slated to meet on October 18, 2010. The BCMR staff advised the applicant that there was no request for backdating his date of rank in his application. The applicant requested a 90-day extension of the time for responding to the advisory opinion.

On October 13, 2010, the applicant responded to the Coast Guard’s advisory opinion. He stated that the entire disputed comment should be removed from his OER because the Coast Guard’s memoranda stated that his request had been approved, and he had requested removal of the entire comment. The applicant also stated that he had thought a request for backdating his date of rank was included in his application, and he submitted a revised application form requesting backdating and a copy of a memorandum, dated December 15, 2009, addressed to the Personnel Records Review Board in which he asked that board to correct the prohibited comment in his OER and to consider backdating his CWO3 date of rank to January 1, 2010, and awarding him back pay and allowances if he were subsequently selected for promotion to CWO3. The BCMR staff advised the applicant that this new request for relief could stand alone as a separate application, in which case a decision on his original application would be issued promptly, or his requests for relief could be combined and decided together, in which case the Board’s ten-month clock for issuing a decision would be reset in accordance with the Board’s rules at 33 C.F.R. § 52.26(c). The applicant elected to have his requests for relief combined.

SUPPLEMENTAL ADVISORY OPINION

On November 3, 2010, the Chair sent the Coast Guard a copy of the applicant’s response to the advisory opinion with the new request for relief. The Chair invited the Coast Guard to submit a supplemental advisory opinion within 120 days, but no supplemental advisory opinion was received. However, when the Board ordered copies of the applicant’s official OERs from his Headquarters record, the copy of the disputed OER was found to have been further redacted by removal of the word “memo,” so that instead of saying, “Had to be counseled on several occasions to comply w/ own ... memo,” the comment now states, “Had to be counseled on several occasions to comply w/ own”

SUMMARY OF THE RECORD AND REGULATIONS

The written criteria for the numerical marks for “Responsibility” on an OER form appear below with the mark assigned by the applicant’s reporting officer, a 3, filled in:

STANDARDS FOR NUMERICAL MARKS IN “RESPONSIBILITY” ON AN OER FORM

<u>Responsibility</u>	1	3	5	7
Ability to act ethically, courageously, and dependably and inspire the same in others; accountability for own and subordinates’ actions.	<p>Actions demonstrated questionable ethics or lack of commitment. Tolerated indifference or failed to hold subordinates accountable. Allowed organization to absorb personnel problems rather than confronting them as required. Tended not to speak up or get involved. Provided minimal support for decisions counter to own ideas.</p> <p style="text-align: center;"><input type="radio"/></p>	<p>Held self and subordinates personally and professionally accountable. Spoke up when necessary even when expressing unpopular positions. Supported organizational policies and decisions which may have been counter to own ideas. Committed to the successful achievement of organizational goals.</p> <p style="text-align: center;"><input checked="" type="radio"/></p>	<p>Integrity and ethics beyond reproach. Always held self and subordinates to highest standards of personal and professional accountability. Did the right thing even when it was difficult. Succeeded in making even unpopular policies or decisions work. Actions demonstrated unwavering commitment to achievement of organizational goals.</p> <p style="text-align: center;"><input type="radio"/></p>	<p style="text-align: center;"><input type="radio"/></p>

Article 10.A.4.c.7. of the Personnel Manual instructs reporting officers to assign marks and write comments in their portion of an OER form as follows:

b. For this evaluation area, the Reporting Officer shall review the Reported-on Officer’s performance and qualities observed and noted during the reporting period. Then, for each performance dimension, the Reporting Officer shall carefully read the standards and compare the Reported-on Officer’s performance to the level of performance described by the standards. The Reporting Officer shall take care to compare the officer’s performance and qualities against the standards - not to other officers and not to the same officer in a previous reporting period. After determining which standard best describes the Reported-on Officer’s performance and qualities during the marking period, the Reporting Officer fills in the appropriate circle on the form in ink.

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d. In the “comments” block following this evaluation area, the Reporting Officer shall include comments citing specific aspects of the Reported-on Officer’s performance and behavior for each mark that deviates from a four. The Reporting Officer shall draw on his or her own observations, information provided by the Supervisor, and other information accumulated during the reporting period.

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Well-written comments must be sufficiently specific to paint a succinct picture of the officer’s performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area. Mere repetition or paraphrasing of the standards is not sufficient narrative justification for marks.

The reporting officer’s marks and comments in the disputed OER appear below with the contested comment highlighted:

REPORTING OFFICER'S MARKS AND COMMENTS IN THE DISPUTED OER

#	CATEGORY	MARK	WRITTEN COMMENTS
7	Reporting Officer Comments	NA	Concur [with supervisor's evaluation]. [The applicant] consistently performed well above & beyond the assigned role as a PE [port engineer]. [He] expertly managed 2 dry-dock availabilities & repair of several major casualties. Always asked for input during progress mtngs & briefs. Tech insight enabled all yard work to be completed on-time w/ no delays. Rapid understanding of PE challenges & mastery of PE skills was very useful in development of CG-wide training program for PEs. Promoted constant team participation; leadership ability boosted unit performance. Asked right questions; provided sound & seasoned advice.
8a	Initiative	5	Outstanding planning prior to cutter availability periods; ensured pending worklist documents always up to date to effectively prioritize work items. Set realistic goals & aggressive work schedules to improve cutter plant reliability & mission effectiveness. Utilized sound process improvement techniques during preps for cutter maintenance periods; allowed EPOs to keep ahead of casualties & concentrate on maintenance. Implemented alternate work plans during availability to keep work items IAW [in accordance with] time/spec requirements. Provided accurate feedback of previous material deficiencies & mandated submission of long term hull preservation CSMPs. Excellent steward of Coast Guard finances. Successfully negotiated contract chngs to cut costs. Provided accurate govt estimates [within] 3% of contractors bids to allow cutters to better prioritize AFC 30 funded work. Had to be counseled on several occasions to comply w/ own . Proficient at working w/ both military & civilians during all phases of cutter support. Very composed in stressful situations. Fitness level consistently better than standards. Regularly eliminated safety hazards. Meticulously reviewed ship yard docking plans & actions to protect personnel & equipment; no casualties.
8b	Judgment	5	
8c	Responsibility	3	
8d	Professional Presence	4	
8e	Health & Well-Being	5	
9	Comparison Scale	4	[This mark means that in comparison to all other CWO2s whom the Reporting Officer has ever known, the applicant ranked as "one of the many competent professionals who form the majority of this grade."]
10	Potential	NA	[The applicant] is a superb Naval Engineer who is prepared to take on the broader spectrum of technical & leadership responsibilities. [He] has demonstrated superior knowledge of cutter engineering. As the cutter fleet ages, [his] skills will be necessary to keep the current fleet of cutters fully operational. [He] has shown the willingness & ability to use his extensive experience & drive to significantly improve the readiness of the fleet as well as his own cutters. His ambition to expand his knowledge & improve his professional abilities will render him very well suited for NESU PE, type desk/platform manager, WLB EO, Sector EO, or MPA on a WMEC/WHEC.

The mark of 3 for "Responsibility" and the disputed comment are the only negative elements in the applicant's OERs, which are otherwise very laudatory. In 2009, with the disputed comment in his record, the applicant was not selected for promotion to CWO3 by the promotion year (PY) 2010 CWO selection board. However, in 2010, after the PSC had amended the OER by removing the phrase "dependent support memo" from the reporting officer's comments, the applicant was selected for promotion by the PY 2011 CWO selection board.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The applicant was timely.
2. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in her record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is

erroneous or unjust.⁴ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁵ When challenging an OER, an applicant cannot “merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense,” but must prove that the disputed OER was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.⁶

3. The applicant asked the Board to remove the disputed comment and alleged that it is prohibited. Although he did not explain why he believes the comment “Had to be counseled on several occasions to comply w/ own dependent support memo” is prohibited, Article 10.A.4.f.10. of the Personnel Manual states that rating officials may not “[r]efer to Reported-on Officer’s marital or family status.” Therefore, the reference to the applicant’s dependents in the disputed comment is prohibited. However, the Coast Guard has removed the prohibited reference by redacting the phrase “dependent support memo” from the comment. Without that phrase, there is no prohibited comment in the OER, and the remainder of the comment, which reveals that the applicant had to be counseled on several occasions because he failed to comply with something, is required to explain why the reporting officer assigned the applicant a mark of 3 for “Responsibility,”⁷ which the applicant has not challenged. The applicant has not proved by a preponderance of the evidence that his OER, as corrected by the PSC, contains any prohibited reference or any other error.

4. Although the applicant argued that the entire comment should be removed because the PSC stated that it had approved his request, which was to remove the entire comment, he has not shown that the partial redaction made by the PSC is not the actual correction that was approved.

5. The applicant was selected for promotion to CWO3 in 2010 by the PY 2011 CWO selection board after the PSC had corrected his OER by removing the phrase “dependent support memo.” He asked the Board to backdate his CWO3 date of rank to what it would have been had he been selected for promotion in 2009 by the PY 2010 CWO selection board. Under *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), to determine if the applicant is entitled to the removal of a 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 2009] in any event?” When an officer shows that his record was prejudiced before a selection board by error, “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” between the prejudicial error and the failure of selection.⁸ To void a failure of selection, the Board “need not find that the officer

⁴ 33 C.F.R. § 52.24(b).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁶ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

⁷ Personnel Manual, Article 10.A.4.c.7.d. (requiring comments to support any marks above or below a mark of 4).

⁸ *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003), citing *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982); *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005).

would in fact have actually been promoted in the absence of the error, but merely that promotion was not definitely unlikely or excluded.”⁹

6. The only error in the applicant’s record when it was reviewed by the CWO selection board in 2009 was the prohibited phrase “dependent support.” The phrase strongly implied to the selection board that the applicant was not financially supporting his children. Such an implication, whether or not true, is clearly very prejudicial and more prejudicial than a less specific substitute term, such as “financial obligations,” would have been. Therefore, the applicant has met the first prong of the *Engels* test.

7. With regard to the second prong of the *Engels* test, the Coast Guard has neither argued nor shown that even without the phrase “dependent support memo” in his OER in 2009 it is unlikely that the applicant would have been selected for promotion in any event. Although the applicant received a mark of 3 for “Responsibility,” the Board cannot determine without comparative data that one low mark would have precluded his selection for promotion in 2009, especially given the fact that he was selected for promotion in 2010 after the prohibited phrase was redacted from his OER but with the mark of 3 still in place. Therefore, the Board finds that the applicant has met both prongs of the *Engels* test and is entitled to the removal of his failure of selection in 2009 by the PY 2010 CWO selection board.

8. For the same reasons that the Board will remove the applicant’s 2009 failure of selection for promotion, the Board finds that he is entitled to have his CWO3 date of rank backdated to what it would have been had he been selected for promotion in 2009, as well as to back pay and allowances. Under 10 U.S.C. § 1552, an applicant is entitled to “placement in the same position [he] would have been had no error been made.”¹⁰ Although the Board cannot be certain that the applicant would have been promoted in 2009 had his OER not contained the prohibited phrase, the Board finds that he is entitled to full relief in this regard because it is not unlikely that he would have been promoted.¹¹

9. Accordingly, the Board will grant partial relief by removing the applicant’s failure of selection for promotion to CWO3 in 2009 by the PY 2010 selection board; by backdating his date of rank, after he is promoted, to what it would have been had he been selected for promotion by that selection board; and by awarding him corresponding back pay and allowances.

⁹ *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982).

¹⁰ *Denton v. United States*, 204 Ct. Cl. 188, 199-200, *cert. denied*, 421 U.S. 963 (1975), *cited in Bliss v. Johnson*, 279 F. Supp. 2d 29, 35 (D.D.C. 2003); *see Kimmel v. United States*, 196 Ct. Cl. 579, 591 (1971) (“The injustice was removed by placing plaintiff in the same position he would have been had no error been made. This was all that plaintiff was entitled to receive.”); *Hamrick v. United States*, 120 Ct. Cl. 17, 25, 96 F. Supp. 940, 943 (1951) (holding that “full correction of the error would require plaintiff’s being put in the same position he would be in had the erroneous determination not been made”), *cited in Ramsey v. United States*, 123 Ct. Cl. 504, 506 (1952), *cert. denied*, 345 U.S. 994 (1953).

¹¹ “[O]nce the Board decides to give a remedy, it should not be free to slice the relief illegally or arbitrarily, sending the claimant forth with half-a-legal-loaf or even less.” *DeBow v. United States*, 193 Ct. Cl. 499, 504 (1970), *cert. denied*, 404 U.S. 846 (1971); *see Bonen v. United States*, 229 Ct. Cl. 144, 149 (1981) (“The ‘half-a-loaf’ doctrine normally applies where a corrections board grants plaintiff’s claim, but stops short of awarding the full appropriate relief requested by plaintiff. Failure of the board to grant full relief where it is mandated by the records change results in ‘a new cause of action’ or ‘‘continuing’’ claim’ which revives the statute of limitations.”) (citing *Denton v. United States*, 204 Ct. Cl. 188, 195, *cert. denied*, 421 U.S. 963 (1975)).

ORDER

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

The Coast Guard shall remove his failure of selection for promotion to CWO3 by the PY 2010 selection board, and after he is promoted, the Coast Guard shall backdate his CWO3 date of rank to what it would have been had he been selected for promotion by the PY 2010 selection board and shall pay him any back pay and allowances he is due as a result of these corrections.

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