

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

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Application for Correction  
of Coast Guard Record of:

BCMR Docket  
No. 2003-035

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**FINAL DECISION**

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was docketed on January 27, 2003, upon the Board's receipt of the applicant's complete application for further correction of his military record.

This final decision, dated January 22, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant is currently on active duty, having been recalled from his retired status with his consent on October 20, 200x. The applicant asked the Board to remove his failures of selection for promotion to Captain before the calendar year 1998 and 1999 Captain selection boards. He further requested reinstatement on active duty retroactive active to June 30, 2000, the date of his involuntary retirement, with back pay and allowances, subject to appropriate off-sets. He also requested to be given two additional opportunities to compete for promotion to Captain, and that if he is selected by either board his date of rank be adjusted to that he would have had if he had been selected by either the 1998 or 1999 captain selection boards, with back pay and allowances.

**Applicant's Allegation**

The applicant had an earlier BMCR case, Docket No. 55-95 (1995). On July 21, 1995, the Board issued a final decision in that case granting the applicant the following relief:

The [applicant's] military record shall be corrected by (1) removing his officer evaluation report (OER) for the period from August 4, 1990 to June 26, 1991, and replacing it with a report for continuity purposes only; (2) removing his failures of selection for promotion to commander (CDR) by the promotion year (PY) 1993, 1994, and 1995 CDR selection boards; (3) allowing him to go before the next two CDR selection boards with a corrected record. If selected by the PY 1996 CDR selection board, his date

of rank should be the date he would have been promoted had he been selected by the PY 1993 CDR selection board and he should receive all corresponding back pay and allowances subject to any appropriate offsets.

The applicant alleged that the Coast Guard failed to implement the Board's order in Docket No. 55-95 by not removing the erroneous OER for the period August 4, 1990 to June 26, 1991 from his military record. He claimed that the Coast Guard's failure to correct his record as ordered by the BMCR caused his failure to be selected for promotion to Captain by the 1998 and 1999 selection boards.

After the Board's final decision in BCMR No. 55-95, the applicant was selected for promotion to CDR by the PY (promotion year) 1996 CDR selection board and his CDR date of rank was adjusted retroactively to October 1, 1993. He stated that because of this retroactive date of rank adjustment he soon came to be considered for promotion to Captain by the 1998 and 1999 Captain selection boards. Neither board selected him for promotion to Captain and on June 30, 200x, he was involuntarily retired after having twice failed to be selected for promotion to Captain.

The applicant was recalled to active duty with his consent, on October 20, 200x. However, retired officers who are voluntarily recalled to active duty after having twice failed of selection for promotion to the next higher grade are not eligible for promotion. Article 5.A.8.a.3., Coast Guard Personnel Manual. The applicant stated that on January 14, 2003, he was reviewing his record and discovered that the OER the Board ordered removed from his record in 1995 had not been removed, despite his having received assurances from the Coast Guard in 1995 that it had been removed and replaced with a report for continuity purposes only.

The applicant asserted that he is entitled to relief in this case as a result of the Coast Guard's failure to implement the relief ordered by the Board in No. 55-95, unless the Coast Guard can show that he would have been passed over for Captain in any event. He cited Engels v. United States, 230 Ct. Cl. 465, 678 F. 2d 173, 175 (1982) in support of his position. He argued that the Coast Guard can not show that he would not have been promoted in any event because he has a strong record, with no adverse character notations, and with much that is favorable. He stated that he would not have been recalled to active duty from his retired status if there were any doubt as to his professional and personal strengths.

### **Pertinent Portions of the Applicant's Military Record**

The applicant's CDR performance evaluations contained mostly marks of 5s and 6s (on a scale of 1 to 7, with 7 being the highest). Except for his last observed OER, the applicant's other three CDR OERs contained at least one 4. The OER for the period May 2, 1996 to January 17, 1997, contained a 4 in human relations. The OER for the period January 18, 1997 to August 2, 1997 contained a 4 in human relations. The OER for the

period August 3, 1997 to March 29, 1998, contained three 4s: one in workplace climate, one in evaluations, and one in using resources. A Coast Guard Commendation Medal citation was attached to this OER. It was awarded to the applicant for his outstanding service while serving as a Coast Guard [REDACTED]

[REDACTED] The OER for the period March 30, 1998 to March 31, 1999 contained 5s and 6s, with a Navy and Marine Corps Commendation citation for the applicant's meritorious service as Coast Guard [REDACTED] [REDACTED] from August 1977 to March 1998. The OER for the period April 1, 1999 to June 30, 2000 was not observed due to the brevity of the reporting period caused by the applicant's retirement.

The reporting officers' marks in block 12 of the CDR OERs comparing the applicant with others of the same grade that the reporting officers have known through out their careers,<sup>1</sup> were 5, 6 & 5, 5, 6. However, the 6 in block 12 on the second CDR OER was tempered by the Coast Guard reviewer, who assigned the applicant a 5 in this category. The Coast Guard reviewer was required to prepare a separate block 12 rating because neither applicant's supervisor nor reporting officer were Coast Guard officers.

Including the erroneous OER, the applicant received 8 LCDR OERs. On his first two LCDR OERs he received no 4s. On the removed OER, his third, he received thirteen 4s, and nine 5s. On his fourth OER, he received one 4 in human relations, six 5s, thirteen 6s, and two 7s. On his fifth and sixth OERs for this grade, there were 5s, 6s, and 7s. On his seventh and eighth OERs for this grade, he received a 4 on each in the human relations category. The applicant's lieutenant commander (LCDR) comparison scale and distributions marks (block 12) 4, 4, 4<sup>2</sup>, 6 & 5<sup>3</sup>, 6, 5, 5, 5.

The applicant's paper military record contains the OER for continuity purposes, but not the erroneous OER.

## **Views of the Coast Guard**

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<sup>1</sup> The block 12 marks range from a low of 1 to a high of 7. A 1 describes an officer whose performance is unsatisfactory; a 2 describes an officer whose performance is marginal; a 3 describes a fair performer; a 4 described a good performer that should be given tough, challenging assignments; a 5 describes an excellent performer who should be given the toughest, most challenging leadership assignments; a 6 describes an officer who is strongly recommended for accelerated promotion; and a 7 describes the best officer of this grade.

<sup>2</sup> The Coast Guard stated that the erroneous OER for this period has been removed from the electronic file and replaced with a report for continuity purposes only, as directed by the Board in Docket No. 95-55.

<sup>3</sup> Although the reporting officer gave the applicant a 6 in block 12 on this report, the Coast Guard reviewer rated him a 5. Because the applicant's supervisor and reporting officer were not Coast Guard officers, the Coast Guard reviewer was required to rate the applicant on a separate page.

On June 24, 2003, the Chief Counsel recommended that the applicant's request for relief be denied. He further stated that he adopted the comments of the Commander, Coast Guard Personnel Command (CGPC) at Enclosure (1) to the advisory opinion as part of the Coast Guard's advisory opinion.

The Chief Counsel stated that after the Board ordered the applicant's record corrected in 1995, the erroneous OER was removed from his paper record but not from the electronic record. He stated that the 1998 selection board reviewed only paper records, but the 1999 selection board used the electronic record system, which contained the OER that should have been removed. (The Coast Guard submitted an email communication between CGPC and the recorder (CDR CT) for the 1998 selection board who verified that that board used paper military records that year.) Therefore, the Coast Guard asserted that the erroneous OER was not reviewed by the 1998 Captain selection because that board used paper records.

The Chief Counsel stated the applicant has failed to carry his burden of proving a nexus between the alleged error and his failure to be selected by the 1998 and 1999 Captain selection boards. The Chief Counsel stated that the test for determining nexus was established by the Court in Engels v. United States, 230 Ct. Cl. 465, 678 F.2d 173 (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. In answer to these questions, the Chief Counsel offered the following:

[T]he applicant may be successful in proving the first prong of the test with respect to the second (1999) selection board, but not the first (1998) board insofar as the first selection board never saw the OER in question. Moreover, based on the record evidence, the applicant has not proven that second prong [of the Engels test] by a preponderance of the evidence. In enclosure (1), CGPC provides compelling rationale, independent of the OER in question, why the applicant was not selected for promotion.

CGPC acknowledged that it was difficult to know with certainty whether a connection existed between any one OER and a person's non-selection for promotion, particularly with the selection boards operating under a law of confidentiality. He noted the extreme competitiveness of the Captain selection boards, where even a minor deficiency in performance could cause a candidate to be seriously considered for non-selection. He stated that the selection opportunity overall in 1999 was 66% of the total CDRs considered for promotion. He further stated that those officers selected for promotion to Captain consistently received marks of "5", "6", and "7" in all areas on

evaluations, had post graduate degrees, and had successfully completed commanding officer tours of duty.

CGPC stated that even though the 1998 Captain selection board did not view the 1991 OER in question, they still did not select the applicant for promotion based on his record. CGPC's opinion was that the "applicant's record would not have been strong enough to make him a viable candidate for selection at the 1999 Captain selection board even if the 1991 OER had been removed from his electronically imaged file. In asserting that a nexus does not exist between the expunged OER and the applicant's 1999 failure of selection for promotion to Captain, CGPC offered the following:

"NEXUS: The 1999 Captain Selection Board considered the applicant as one of 28 candidates who were not selected the previous year (1998). Only seven of these 28 were selected for promotion by the 1999 board resulting in an opportunity of selection of 25%. In order to justify granting relief to the Applicant, his record would have to be shown to be at least as good as one of those seven selected even if the 1991 OER had been removed. A thorough review of the seven officers selected above the zone by the 1999 board revealed the following:

- a. None of the seven selected received a mark of "4" on any dimension of their OER as a senior officer (CDR/O5). However, as a CDR the applicant received a 1998 OER containing marks of "4" in three areas (using resources, workplace climate, and evaluations). These marks were a significant blemish on his record when compared with the other officers considered for promotion to Captain who consistently received marks of "5", "6", and "7" in these areas. Receiving this unflattering evaluation as a CDR was particularly damaging considering it was his most recently documented performance prior to the 1999 Captain Selection Board.
- b. None of the seven selected had any expressly negative comments written in the comment block of their OERs. In contrast, the applicant received the following comment in block #7(a) from his reporting officer in his 1989 OER, ". . . I was disappointed that several projects/duties were not completed (i.e., Annex India Update, OPTAR reconciliation) prior to his departure."
- c. None of the seven officers selected had an established pattern of receiving a mark as low as "4" in successive OERs. In fact, none of them received more than one mark of "4" on evaluations in the previous five years. The applicant had a string of three consecutive marks of "4" in the area of human relations on his May 1996, January 1997, and August 1997 OERs. This sustained substandard performance relative to the others being considered was very detrimental to the applicant's chances of being selected, considering the competitive opportunity of selection.

- d. Four of the seven selected had earned postgraduate degrees that were documented in their records. The applicant had no postgraduate education.
- e. Three of the seven officers selected had previously held commanding officer positions. The applicant had no commanding officer experience."

### **Additional Information Sought by Applicant Prior to Responding to Advisory Opinion<sup>4</sup>**

After receipt of the Coast Guard's advisory opinion, the applicant filed a Freedom of Information Act (FOIA) request seeking additional information from the Coast Guard about the contents of its advisory opinion, as well as requesting the PDRs of the seven above-zone officers selected for promotion by the 1999 board. The Coast Guard withheld the seven PDRs under an exemption to FOIA. In responding the applicant's questions, the Coast Guard offered the following:

- 2. & 3. The records presented to the selection boards were not segregated between above-zone and in-zone officers. The comparison by CGPC was made years after-the-fact in response to the Applicant's BCMR case; and the comparison was made solely because those 7 individual were the most similarly situated to the Applicant (i.e. above-zone).
- 4. We do not know the date [the applicant's record] was imaged or by whom. The software does not track this info.
- 5. Out of the 35 CDR's selected within zone
  - A. Nine Records could not be pulled (no longer in the Service). The records have [been] forwarded to the National Archives Center.
  - B. Three Officers had no Advanced Degrees

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<sup>4</sup> Prior to submitting his reply to the advisory opinion, the Board requested certain information from the Coast Guard about the content of its advisory opinion under the Freedom of Information act (FOIA). On August 19, 2003, the Commander Coast Guard Personnel Command (CGPC) answered all of the applicant's questions but refused to provide sanitized copies of the 7 PDRs against which it compared the applicant's performance in the advisory opinion. On October 14, 2003, the applicant's FOIA request for the 7 PDRs was officially denied. The applicant appealed the denial on October 20, 2003 requesting expedited consideration. On November 26, 2003, the applicant's request for an expedited review of his FOIA appeal was denied. On December 5, 03, the Board received the applicant's rely to the advisory opinion

C. Nine Officers had not served as Commanding Officers

6. & 7. Out of 42 CDRs selected [overall by the 1999 board] (7 above zone & 35 in Zone)

A. Nine Records could not be pulled (no longer in the Service) . . .

B. Four Officers above zone had 4s on one or more OERs for CDR in the following categories: Evaluations, Human Relations, Work-Life Sensitivity/Expertise, Health & Well-Being, Workplace Environment, and Collateral Duties/Administrative Expertise.

C. Thirteen Officers in zone had 4s on one or more OER for CDR in the following categories: Evaluations, Human Relations, Work-Life Sensitivity/Expertise, Health & Well-Being, Military Bearing, Workplace Environment, and Collateral Duties/Administrative Expertise.

8. The 1998 Capt Board recorder (CDR CT) verified that that board viewed only paper records. Since the 1991 OER was properly removed from the Applicant's paper record, this board didn't see it.

9. The most recent documented performance [for the applicant] prior to the 1998 Captain Selection Board . . . was the 1998 OER dated: 1998 March 29. The most recent documented performance prior to the 1999 Captain Selection . . . was the 1999 OER dated: 1999 March 31.

10. [Telephone number for 1998 selection board recorder was provided to the applicant.]

11. [The] 1999 [selection board was] the [first] fully electronic board.

12. [There is] no record of [a selection board] using both [electronic and paper records].

13. [The PDR copy furnished to the applicant on January 14, 2003 was] dumped out of the Electronic Record

### **Applicant's Reply to the Views of the Coast Guard**

On December 5, 2003, the Board received the applicant's reply to the advisory opinion and he disagreed with the Chief Counsel that his case should be denied. He stated that there is no way to know whether the Coast Guard complied with the Board's

Order in 1998 to remove the subject OER from the applicant's record. In this regard he stated that the Coast Guard offered no evidence of when the applicant's record was put into electronic form. In contrast, he stated that the erroneous OER had remained in his record long enough to have been incorporated into the electronic version of his record. He argued that because the Coast Guard caused this resulting uncertainty, it must be resolved in favor of the applicant. In support of this contention he cited Day v. Matthews, 530 F.2d 1083, 1086 (D.C. Cir. 1976).

The applicant argued that the Coast Guard has failed to carry its burden of proving that the applicant would not have been promoted to Captain in any event. See Frizelle v. Slater, 111 F.3d 172 (D.C. Cir 1997). He argued that a nexus clearly existed between the OER that was ordered removed and the applicant's failure of selection. In this regard, he noted that OERs play a dominant role in the selection board process. Moreover, he argued that the erroneous OER had already been found to be prejudicial to the applicant's right to fair consideration for promotion in 1995. He asserted "It would be utterly arbitrary and capricious to hold that an OER that had a promotion nexus in 1995 did not have one in 1998 (the first Captain selection board under review in this case). With respect to the Coast Guard's failure to carry its burden, the applicant further stated the following:

[T]he Coast Guard argued that 4s on [the applicant's] 1998 OER were disqualifying for promotion. However, the data revealed by the Coast Guard show that 17, or more than one half, of the 33 officers for whom PDRs were readily available had one or more 4s in their record. . . . The Coast Guard could have secured the records of 9 officers who are now retired. It did not do so, and that failure should result in an adverse inference such that the BCMR would be entitled to conclude that an even higher percentage of the 42 officers had 4s in their PDRs. By the same token, the fragmentary data . . . show that absence of a graduate degree or service as a commanding officer is in no way disqualifying for promotion. And again, the BCMR would be justified in concluding that this would be even clearer had the 9 missing PDRs been considered. To the extent . . . that the Coast Guard theorizes that [the applicant] was passed over because he had not had command, acceptance of that theory would only exacerbate the injustice, because the offending OER, by remaining in [the applicant's] record at Headquarters, would have been influential in reducing his chances of selection for command. Because the OER remained in the record, it would be fundamentally unfair to hold against [the applicant] adverse personnel decisions that would have been influenced by it.

The applicant stated that the Coast Guard's contention that he would have been passed over even if the subject OER had been removed from his record because of a 1989 OER (containing an unflattering comment) is fallacious because the applicant had



been promoted to CDR and selected as executive officer of a high endurance cutter with the 1989 OER in his record. In addition, he argued that the 1989 OER was "older and hence more remote and less significant to a selection board than was the 1991 OER."

The applicant stated that the comparison of the applicant's PDR with those of the 7 officers selected for promotion to Captain above the zone is improper because the applicant competed against all of the commanders who were eligible for promotion to Captain, whether above or in the zone. The applicant alleged that this "cherry picking" of data by the Coast Guard distorts the selection board process rather than duplicates it. The applicant stated that although the Coast Guard clarified in a subsequent response to the advisory opinion that it did not intend to imply in the advisory opinion that the 1999 selection board distinguished between CDRs in and above the zone, it has refused to furnish the applicant with the sanitized records needed to support its claim. The applicant contended that under these circumstances an adverse inference is warranted. "Since that assertion in effect claims that [the applicant] would not have been selected in any event, the Coast Guard has the burden of proof under Frizelle, and its failure to adduce the needed evidence is fatal to its contention."

The applicant stated that contrary to the advisory opinion he did not claim that "but for" the inclusion of the OER that had been ordered expunged he would have been selected for promotion to Captain. He stated that he was not required to prove any such allegation, as the burden is on the Coast Guard to prove that he would have been passed over in any event. In conclusion, the applicant argued the following:

The allocation of burdens of proof is a matter of law; we have not altered it, and nothing in our submission relieves the Coast Guard of the burden the law imposes on it when it claims, in effect, that an error was harmless. Additionally, the Coast Guard maintains that the 1998 Board never saw the OER in question. But the Coast Guard has offered no evidence on this score. It has offered no evidence as to when that OER was scanned into electronic form, nor as to when the hard copy was destroyed. Indeed, the Coast Guard's email response to our questions recites that the service does not know when the hard copy was scanned or destroyed (assuming it was). Those evidentiary gaps, coupled with the fact that the offending document was in his electronic PDR a year later makes the Coast Guard's case unprovable and therefore unwinnable.

His attorney prepared much of the applicant's reply to the advisory opinion. However, the applicant also submitted a statement in which he argues many of the points already stressed by his attorney. He also stated "I refer the BCMR to the fact that even though the [erroneous OER] was still in my record in the spring of 1998, I was nonetheless selected as Executive Officer (XO) of a High Endurance Cutter." He argued that the only reason he would not have been selected for Captain after the XO assignment was poor performance, which does not describe his record of performance.

## SELECTED PROMOTION BOARD REGULATION

Selection for promotion to Captain on active duty is made on a best-qualified basis. Article 14-A-1c. of the Personnel Manual states in a best-qualified system the selection board is limited to a specific number it may select and makes its selection by comparing each officer to all others considered.

Article 14-A-3.a. speaks to selection criteria. Specifically it states the following:

1. Personnel boards recommend on either a best-qualified or fully-qualified basis as set forth in law and directed in the precept. . . . [E]ach board develops its own overall standards and selection criteria. The degree of significance a board assigns to each of the many factors it considers may vary according to the grade and type of selection the board is making. A board selecting officers for lieutenant may emphasize different factors than would a captain Continuation Board.

Section 14-A-3.b. lists the following basic criteria to be applied by selection boards: performance evaluations, professionalism, leadership, and education.

Article 14-A-4d. of the Personnel Manual states that “[a] board must consider an officer’s entire record; however, the following is considered most significant portion of the record evaluated: . . . Captain . . . seven years of immediate previous service or all service in present grade, whichever is greater.”

## FINDINGS AND CONCLUSIONS

The BCMR makes the following findings and conclusions on the basis of the applicant's record and submissions, the Coast Guard's submission, the final decision in BCMR Docket No. 1995-133, and applicable law:

1. The BCMR has jurisdiction of this case pursuant to section 1552 of title 10, United States Code. The application was timely.

2. The Coast Guard did not fully implement the relief ordered by the Board in BCMR No. 1995-55 because it failed to remove the OER for the period August 4, 1990 to June 26, 1991 from the applicant’s electronic military record. The Board is persuaded however that the erroneous OER was removed from the applicant's paper military record based on the statement from CGPC that it was removed, the fact that CGPC sent the applicant a letter dated August 16, 1995, along with a copy of the OER for continuity purposes only that was to replace the removed OER, advising him that the correction had been made to his PDR on July 24, 1995, and the fact that the current paper record contains only the continuity OER. Moreover, the applicant was selected for CDR (a

lower rank than Captain) immediately after corrective action was ordered in BCMR No. 95-55, after having failed for promotion to that grade the previous three times. In contrast to the applicant's assertion, the applicant's 1995 selection for promotion to CDR suggests that his paper record was corrected in 1995 prior to the convening of that board. The Board is further persuaded that the erroneous OER was not in his record in 1998 because the applicant was selected as XO of a High Endurance cutter in the spring of 1998. The applicant suggests the erroneous OER was in his record in 1998 but never offers proof that it was.

3. The applicant argued that the Coast Guard has produced no proof that the OER was not in his record when it was considered by the 1998 Captain selection board. However, it is not the Coast Guard's burden to establish the error; it is the applicant's. See Brooks v. United States, 213 Ct. Cl. 115 (1977) where the Court stated that it was the plaintiff's burden to show that an OER was not in his selection folder when the selection board met and considered his record. Establishment of the error must occur before a determination can be made as to any impact that error may have had on the applicant's selection opportunity.

4. The applicant has not met his burden of establishing that the 1998 Captain selection board considered the erroneous OER. He argued that since the erroneous OER was in his record when he reviewed it in 2003 and the Coast Guard admitted that it was in his electronic record in 1999, it must have been in his paper record in 1998. The Board is not persuaded by this argument. The paper record provided to the BCMR contains only the OER for continuity purposes and not the erroneous OER. The Board presumes that the Coast Guard acted to correct the applicant's paper record in accordance with the BCMR order in Docket No. 95-55, as reflected in its August 16, 1995 letter to the applicant. The applicant never stated whether he reviewed his record prior to the 1998 Captain selection board. If he had, he would have certainly discovered the erroneous OER if it had been there. The applicant does not address this lack of diligence on his part.

5. What happened or how the offending OER ended up in the electronic record, the Board will not speculate, except to say that this situation probably happened during a period when the Coast Guard was transitioning from paper to electronic records. The fact that the erroneous OER was discovered in the electronic record in 2003 is insufficient to establish by a preponderance of the evidence that the Coast Guard failed to remove it from the paper record system that it used in 1998. In this regard, the Coast Guard stated the applicant was given a copy of his electronic record to review in 2003. There is no evidence that the applicant ever reviewed the paper record. The Board notes that the Coast Guard stated that the 1998 selection board did not use electronic records, and the applicant has not submitted proof otherwise. The ultimate burden of persuasion on the issue of nexus between an error and a failure of selection rests with the Coast Guard; however, the initial burden of establishing an error or injustice on the part of the Coast Guard rests with the applicant. The applicant has not met his burden

with respect to the removal of his failure before the 1998 Captain selection board because he has not established that the erroneous OER was in his paper record when that board considered it.

6. The Coast Guard concedes, and the Board finds, that it committed an error by failing to remove the erroneous OER from the applicant's electronic record as required by the BCMR order in Docket No. 95-55. The Coast Guard further concedes that the erroneous OER was in the applicant's record when the 1999 Captain selection board considered it. Therefore, the question is whether a nexus existed between the erroneous OER and the applicant's 1999 failure of selection for promotion to Captain. 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.

8. With respect to the first prong of the Engels test, the applicant's record would look only marginally better with the erroneous OER removed and replaced with a report for continuity purposes only. The Board notes in this regard that the erroneous OER was not a derogatory report and had no marks lower than 4. However, it had more 4s than the two OERs immediately preceding it and the immediate subsequent OER. On each of the two preceding OERs, there were no 4s in the performance categories, but the applicant was given a 4 in block 12 on each report. On the immediate subsequent OER to the erroneous OER, the applicant had a 4 in the human relations category, but his block 12 mark was a 6 by a non-Coast Guard reporting officer and a 5 by the reviewer. At a glance, the erroneous OER does not seem to make the applicant's record appear worse, but if a mark-by-mark comparison is made, the 13 4s on the erroneous OER certainly lowered the average overall score for the subject OER (4.39) when compared with the average overall score for the two preceding OERs (5.41 & 5.45) and the subsequent OER (5.52). As stated above, the applicant's record appears marginally better with the erroneous OER removed.

9. Since we have determined there is some prejudice, although marginal, we must determine whether it is unlikely that the applicant would have been promoted in any event. We find that it is unlikely that the applicant would have been promoted in any event. First, we are persuaded by the Personnel Manual itself, which states at Article 14.A.4.d. that the seven years of immediate previous service is considered the most significant for an officer being considered by the Captain selection board. The applicant failed of selection in 1999 and the reporting period for the erroneous OER ended on June 26, 1991, falling outside of the seven-year period the Personnel Manual

considers the most significant. Therefore the erroneous OER should not have carried as much weight before the 1999 Captain selection board as the more recent OERs.

10. On the four CDR OERs considered by the 1999 selection board, the applicant received a 4, an average mark, in human relations/workplace environment<sup>5</sup> in all but the last OER. The selection board may well have had concerns about the applicant's ability to carry out the Commandant's human relations policies. The human relations factor measures "the degree to which this officer fulfilled the letter and spirit of the Commandant's Human Relations Policy in personal relationships and official actions." The workplace environment measures the "ability to value individual differences and promote an environment of involvement, innovation, open communication, and respect." While the applicant received a 5 in workplace environment on the last OER before the 1999 selection board, he had not established a trend of improving performance in this area. The Board notes that the applicant has similar marks in human relations off and on while a LCDR and certainly by the time he was ready for consideration for promotion to Captain, he should have gained some mark consistency in this area.

11. Also, of particular note are the 4s the applicant received in the evaluations and using resources categories in his next to last OER before the 1999 Captain selection board. In his earlier two CDR OERs the applicant received 6s in using resources and 5s in evaluations. Therefore the lower marks on the third CDR OER are evidence of a decline in performance. Again while the marks increased on the last OER that was considered by the 1999 selection board, an improving trend of performance was not established by the higher marks on this one OER. The applicant's overall average marks on his CDR OERs ranged from a 5.50 on the first, a 5.56 on the second, a 5.1 on third, and a 6.10 on his last OER. The Board finds however that the applicant's performance record before the 1999 Captain selection board was not one of steady improving or consistent performance with or without the erroneous OER. This coupled with the fact that the applicant's selection opportunity was already reduced because of his failure before the 1998 board, which did not consider the erroneous OER, makes it unlikely that the applicant would have been selected for promotion in any event. As CGPC stated, selection for Captain is the most competitive of the selection boards, and in 1999 there was only a 66% selection opportunity overall and only a 25% selection opportunity for those above the zone. It appears to the Board that the applicant would have needed a consistent and/or improving trend of performance to be competitive for promotion to Captain in 1999.

12. In light of the above, the Board finds that it is unlikely that the applicant would have been promoted to Captain in any event by the 1999 selection board, with or without the erroneous OER in his record. In reaching the findings in this case, the Board made an independent review of the applicant's military record.

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<sup>5</sup> The Coast Changed the OER from and the human relations category was removed.

13. Accordingly, the applicant is not entitled to relief.

**ORDER**

The application of [REDACTED] USCG (Ret.), for the correction of his military record is denied.

