

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:



BCMR Docket
No. 127-97

FINAL DECISION ON REMAND



This is a proceeding under the provisions of section 1552 of title 10, United States Code. On May 12, 1997, this case was remanded to the BCMR by the United States District Court, [REDACTED] pursuant to a judgment from the United States Court of Appeals for [REDACTED]. This is the second remand of this case to the BCMR. This first remand occurred on December 30, 1993.

This current remand has been docketed by the Board as BCMR No. 127-97. This decision on remand is dated July 11, 1997. It is signed by three duly appointed members who were designated to serve as the Board in this case.

The applicant requested that the Board correct his military record by the removal or revision of his Officer Evaluation Report (disputed OER) for the period October 1, 1987, to March 31, 1988, removal of his failures of selection for promotion to the grade of lieutenant (LT) by the 1990 and 1991 LT selection boards, consideration by the next two LT selection boards, and if selected for promotion, a retroactive date of rank and back pay. The applicant also asked for any other relief that the Board found just and proper.

BACKGROUND

On December 13, 1991, the applicant filed an application with the Board that was docketed as BCMR No. 61-92. On December 16, 1992, the Board issued a Final Decision denying relief.

The applicant filed suit in the United States District Court for [REDACTED] seeking review of the Board's decision. [REDACTED]

[REDACTED] the district court issued a memorandum opinion in which it found that the Board's decision did not adequately explain its reasoning and was therefore "arbitrary and capricious." The court issued an order vacating the Board's Final Decision in BCMR No. 61-92 and remanding the matter to the Board "for further proceedings consistent with this opinion." (For administrative purposes and to avoid confusion, the first remand was docketed as 162-94.)

On October 26, 1994, the BCMR issued a final decision in Docket No. 162-94 denying relief, except for ordering minor corrections to the applicant's record as follows:

1. By changing the Comments (Personal Qualities) section (section 9.f.) of the OER for the period October 1, 1987, to March 31, 1988, as follows:

a. In the third sentence, replace the word "mainframe" with the word "system."

b. Delete the fifth sentence: "much time spent pursuing air shipment of 32' PWB only to find prohibitive cost factor ignored."

2. All other requests for relief are denied.

The applicant again appealed the BCMR's decision in No. 162-94 to the district court. That court granted summary judgment in favor of the Secretary of Transportation. The applicant then appealed to the United States Court of Appeals for [REDACTED]. On [REDACTED] the Court of Appeals issued its decision affirming the BCMR in most respects, but remanding the case to the BCMR for consideration of those issues discussed below.

Issues Considered on Current Remand

1. The disputed OER indicated that the applicant had missed a deadline in responding to an inquiry from the Commandant. The applicant argued that this comment was unfair, because it related to a matter beyond his control and because it occurred prior to the reporting period covered by the OER. He contended that the task of responding to the inquiry had been given to a subordinate who subsequently retired from the Coast Guard without completing his assignment.

With regard to this issue, the BCMR originally found that the applicant "has not shown the comment was inaccurate . . . since [the applicant], according to a member of the rating chain, 'inherited' those projects that the [subordinate] did not complete. The performance described in the OER is a description of how [the applicant] pursued these projects."

In remanding this issue to the BCMR, the Court agreed with the applicant that the BCMR's comments failed to respond to the applicant's contention that the missed deadline did not occur within the reporting period. The Court also stated that with respect to the applicant's challenge that the incident was beyond his control, the Board has not given "a reason that a court can measure" for its decision.

2. The applicant alleged before the BCMR that he did not receive any counseling during the reporting period covered by the disputed OER, contrary to the requirements of the Personnel Manual. The applicant contended that the only

counseling he received was during the prior reporting period, which consisted of a meeting with the Chief of the Reserve Branch concerning the missed deadline.

In its decision in Docket No. 162-94, the BCMR stated that the applicant had "failed to prove that he was not counseled," noting that the reporting officer had stated in the OER that the applicant had been "counseled midway through this reporting period regarding his specific responsibilities, his performance, projects he was expected to accomplish and aspects of his performance that needed attention." The Board also noted as follows:

[The applicant] did not submit the OSF [Officer Support Form] for the Board to review. [The Personnel Manual] provides that supervisors "shall conduct" beginning and end of period meetings and are required to maintain an OSF on all reported-on officers in the grades of ensign and lieutenant (junior grade). Although the Board does not have the OSF to review, the OER itself shows that the applicant was counseled.

The court concluded that the Board's decision did not adequately respond to the applicant's allegations. The Court further stated as follows:

Normally, the Board is entitled to presume that statements in an OER are fair and accurate unless an applicant presents specific evidence to rebut that presumption. . . . The Board could not reasonably expect [the applicant] to support his claim by producing an OSF if in fact his supervisor never prepared the form, however. Furthermore, on its face the OER suggests that the officers in [the applicant's] rating chain did not follow proper procedure. The OER refers to counseling "midway through this reporting period," whereas the Personnel Manual requires counseling at the beginning and at the end of the reporting period. Furthermore, the statement in the OER relating to counseling came from the Chief of the Reserve Branch, who functioned as [the applicant's] reporting officer, one step higher in the rating chain than his immediate supervisor. The Personnel Manual requires that the supervisor conduct the meetings and maintain the OSF. In sum, the OER itself, in combination with [the applicant's] assertion that he did not receive counseling, suggests a deviation from Coast Guard policy. Again, in citing the Personnel Manual in its decision, the Board indicated that it treated the Manual rules as binding upon the Coast Guard.

The court opinion continued that absent any discussion of these matters by the Board, it could not "conclude that these apparent deviations from Coast Guard policy were trivial. The Personnel Manual contemplates a higher level of supervision and monitoring for junior officers than for more experienced officers. The requirement of counseling at the beginning and end of each period would appear to serve this function."

3. The last issue the court directed the BCMR to consider was whether the applicant's failures of selection for promotion to LT should be removed. The court stated that "even if the Board decides not to strike the OER or redact it further, it still must reconsider the decision not to void the passovers, giving appropriate weight to the significant differences between the disputed OER and [the applicant's] other OERs. Whatever the Board decides to be done to the OERs, it must apply the Engels test." The court in Engels v. United States, 230 Ct. Cl. 465, 470, established the following standards to determine the nexus between errors and failures of selection: "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?"

With regard to the BCMR's refusal to remove the applicant's failures of selection, the court stated the following:

[W]e note that the Board's decision not to void [the applicant's] passovers for promotion may have been influenced by its conclusion that "[t]he disputed OER is consistent with all of the other substantive OERs in the applicant's record." This conclusion is contrary to substantial evidence that [the applicant] produced. In comparing the disputed OER to [the applicant's] marks on the other OERs, the Board focused exclusively on his overall numerical ranking. . . . The Board overlooked the fact that [the applicant's] numerical marks in the individual categories rated on the second OER were equal to or lower than his marks on other OERs in virtually every instance. More importantly, the Board's focus failed to take into account the particularly damaging effect that disparaging written comments have on an evaluation. . . .

4. The BCMR became aware that the applicant wanted to submit additional material for the Board's consideration on remand. On May 16, 1997, it asked each party to submit a memorandum on the issue of whether the BCMR should accept new material on remand as well as any other arguments each wished to make.

EXCERPTS FROM THE RECORD SUBMISSIONS

Applicant's Submission Following Remand

On May 27, 1997, the applicant submitted additional evidence consisting of a statement, a blank Officer Support Form (OSF), promotion rate data, and correspondence concerning the Coast Guard's refusal to release the data on the distribution of OER marks.

The applicant argued that 10 U.S.C. § 1552 is a remedial statute, and it should be given a broad and generous, rather than a narrow, reading. The applicant stated that any material that leads to a fair and correct result should be received.

The applicant asserted that there is nothing remarkable about accepting additional submissions on a remand. Further he claimed that the Board should accept additional submissions on the second remand because in the first remand it received additional materials. The applicant stated that nothing in the BCMR's regulations precludes the receipt of additional evidence upon remand.

The applicant set out a number of cases that, he argued, support the view that additional evidence can be submitted on remand to an agency. Quarles v. Derwinski, 3 Vet. App. 129, 141 (1992); Bridge v. U.S. Parole Comm'n, 981 F2d 97, 104-05 (3d Cir. 1992); and Haber v. United States, 200 Ct. Cl. 749, 752 (1973).

The applicant addressed each of the remanded issues. He stated that the evidence he presented which supported his allegation that the missed deadline did not occur within the reporting period, was beyond his control and has not been rebutted. He argued that the evidence is clear that the deadline was missed by a CWO3 (chief warrant officer, W-3). The applicant further stated that the official Register of Officers shows that this CWO3 retired on July 1, 1987. This date was three months before the reporting period covered by the disputed OER began.

On the issue of counseling, the applicant stated that the administrative record shows that the applicant was not provided with counseling in the manner and at the time required by the Personnel Manual.

The applicant argued that the supervisor's failure to use the OSF was highly prejudicial because it denied the applicant the kind of clear, timely, and fair notice of any shortcoming on his part envisioned by the Personnel Manual. The applicant further stated as follows:

The OSF is a very detailed, lengthy form, Article 10-A-2d. of the Personnel Manual requires that the OSF cover "significant events, problems, achievements, failures, or personal qualities." Requiring specifics in this regard was not an idle act on the part of the Coast Guard, and its omission here cannot be held nonprejudicial, LTJGs have the right to beginning-and end-of-period [sic] counseling on an OSF. To use the . . . end-of-period OER as a "change agent," as the Reporting Officer admitted in [para.] 5 of his letter of April 1, 1991, comes too late, and defeats the protections prescribed by the Commandant. The Reporting Officer's claim in § 8 of the disputed OER that [the applicant] was "counseled midway through" the reporting period is contradicted not only by the Reporting Officer's reference to the OER as the "change agent" but also by the statement in [para.] 6 of the Supervisor's letter of June 13, 1991, that [the applicant]

-6-

"reacted very professionally and was very concerned about the OER during our counseling session."

The applicant argued that on its face, the disputed OER suggested that the officers in the applicant's rating chain did not follow proper procedure because the counseling the applicant received occurred midway through the reporting period and was performed by an individual other than the supervisor. The Personnel Manual requires that LTJGs be counseled at the beginning and end of the reporting period. The Personnel Manual also requires that the supervisor conduct this counseling and not the reporting officer.

Finally, the applicant argued that the promotion data that he submitted on remand was obtained from the Coast Guard and pertained to the first promotion board that failed to select the applicant for promotion to LT. The applicant interpreted this data in the following manner:

[T]hat nearly 85% of the officers who were considered on a within-the-zone [not previously passed over] basis were selected. Obviously, with a promotion rate this high, and in light of the confidentiality of selection board proceedings and the Coast Guard's continuing refusal to release data on the distribution (or "curve") of OER marks, there is no way the Coast Guard can prove that [the applicant] would have been passed over even if his record had not contained the errors and injustices the BCMR has already ordered to be corrected. Nor, for the reasons noted by the court of Appeals (at 10-11), is it proper to refuse to void his passovers on the notion that "[t]he disputed OER is consistent with all of the other substantive OERs in the applicant's record."

The applicant argued that he is entitled to relief from his passovers on the basis of the corrections the BCMR has already made to his PDR (Personnel Data Record) and because, as the record shows, there should have been further corrections.

Coast Guard Views Following Remand

The Coast Guard argued that the BCMR is constrained from considering new evidence by the Secretary's regulations governing the BCMR. Under these regulations, it is the responsibility of the applicant to procure such evidence as the applicant desires to present in support of his case. 33 CFR § 52.21. The Coast Guard stated that the rules require the Chairman to accept additional evidence from the applicant at any time prior to final action; provided that the applicant waives the 10-month requirement for final action. 33 CFR § 52.61(c). The Coast Guard asserted that after final action, submission of new matter is governed by the more restrictive rules regarding reconsideration in 33 CFR § 52.67.

The Coast Guard stated that the remand order has narrowed the issues before the BCMR. It noted that the applicant no longer has the right to broaden those issues by submitting new evidence. The Service stated that the cases cited by the applicant do not appear to hold otherwise. The Coast Guard stated that at best, the cases stand for the "unremarkable proposition that where the Court's remand order states that the applicant may submit additional matters to the administrative board, the applicant may submit those matters to the administrative board. The reviewing courts did not make such an order in the present case."

The Coast Guard stated, however, that the Board is not foreclosed from requesting additional evidence, pursuant to 33 CFR § 52.61(b), if it determines such matter is necessary to deciding the issue properly before it. In the opinion of the Service, there is no need for the Board to request or consider additional evidence in the present case.

The Coast Guard argued that "[a]lthough the Board did not articulate its reasoning to meet the satisfaction of the Circuit Court, its previous decisions of these issues were correct." The Service stated that the appeals court's decision in this case was based on the insufficiency of the Board's explanation for its denial of relief with respect to the remanded issues, not on the merits of the applicant's arguments or the strength of evidence. The Service stated that on the merits of the first two issues, the Court merely noted that from its perspective, they "do not appear frivolous on their face" and could affect the Board's ultimate disposition of this case. Thus, the Coast Guard stated that the task of the Board is to reconsider the three remanded issues and to clearly articulate its reasoning.

The Coast Guard stated that the applicant has not proved that the performance captured by the remark regarding the missed deadline from the Commandant in fact occurred outside the reporting period. The Service stated that the applicant stated in his December 10, 1991 brief to the BCMR that "because of his subordinate's lack of interest, a deadline for the District's response to Headquarters was missed in May 1987, and that this failure was reflected in the OER." The Coast Guard stated that the applicant provided no evidentiary basis for his allegation that this particular deadline was the one referred to in the OER -- an officer on a District staff could certainly be responsible for responding to more than one headquarters inquiry in the course of a year. The Service argued that this statement was of a conclusory nature, and the applicant failed to articulate the evidentiary foundation on which it is based. The statement, accordingly, is of little probative value.

Similarly, the Coast Guard stated that the applicant has provided no credible proof that he was not counseled during the reporting period or that any lack of counseling rendered the disputed OER erroneous or unjust.

The Coast Guard argued that the applicant's evidence on the issue of counseling is not credible because it was not raised in the initial application, but only in response to the Coast Guard's comments. The Service asserted that it

correctly stated in its earlier comments that the supervisor's statement and the disputed OER showed that the applicant was counseled regarding his performance shortcomings. The Service stated that the applicant's statement (that he was not counseled) was inherently improbable, considering the nature of his work environment, his performance problems, and his interactions with supervisors.

The Coast Guard stated that the applicant's claim that he was not counseled on an OSF is not corroborated. The Service stated that the applicant provided no support for his argument that "because of the plain violations of Personnel Manual requirement, the OER as a whole must be expunged." In this regard, the Service stated that while use of the OSF was required, it is hardly the only method by which the applicant could have known what was required of him in the performance of his duties. The Coast Guard commented that if the applicant was taken by surprise upon receipt of the disputed OER, he would have raised the issue in an OER reply, a PRRB (Personnel Records Review Board) application, or at the very latest, in his initial application to the BCMR.

The Service stated that even if the applicant's interactions with his supervisors did not meet his own definition of "counseling" and the OSF was not used as required, he has not shown that a lack of counseling rendered the entire challenged OER, or any part of it, erroneous or unjust.

The Coast Guard provided the following analysis with regard to the question of nexus between the alleged errors and the requested relief.

(1) Even if the Board found the comment regarding the missed deadline was erroneous, the applicant's record did not appear significantly worse because of the errors, considering the negative comments and other matter in his record that were not found to be error. Thus, [the] applicant has not shown that the errors prejudiced him before the promotion board.

(2) Moreover, it is highly unlikely that [the] [a]pplicant would have been selected in any event, and thus the errors were harmless. [The] [a]pplicant's characterization of the Coast Guard burden of showing harm as an "affirmative defense" on this matter is misleading. First, the BCMR is not an adversary process. The Coast Guard generally only must present evidence from outside the record if the applicant has first established a prima facie case for relief, and it determines that additional evidence is necessary for a proper disposition of the issues before the [B]oard. As the Court of Appeals acknowledges, the burden of persuasion on the issue of harm is upon the [a]pplicant until the applicant first proves prejudice, and then makes the requisite prima facie showing of harm. Only then does the burden shift to the government to rebut that presumption of harm with additional evidence.

(3) [The] [a]pplicant has made no such prima facie showing. The challenged OER reflected very early career performance. It was [the] applicant's second OER of ten, seven of which were substantive. Even without the challenged OER, the Section 12 Comparison Scale evaluation on the remaining OER's show a downward trend during his tour at the Eighth District. In addition, the subsequent five substantive section 12 evaluations also show [the] [a]pplicant consistently in the middle of the pack of the "many competent professionals who form the majority of this grade." Thus [the] [a]pplicant's reporting officer evaluations, including those from an evaluation command while [the] [a]pplicant was performing in his career specialty, consistently reported that the applicant was in the middle of the range of O-2's -- not only those O-2's in zone before the O-3 selection board, but the full range of O-2's, from those freshly promoted to those pending separation for non-selection. Even if the Board found that the errors resulted in prejudice before the promotion boards, it should consider the degree of such prejudice, and apply its experience, expertise, and common sense, in evaluating [the] [a]pplicant's record to determine whether [the] [a]pplicant was ultimately harmed by those errors under the Engels test.

Applicant's Reply to the Coast Guard Views

In response to the Coast Guard comment that accepting additional submissions in the case would broaden the issues, the applicant stated that nothing in the additional documents broadens the issues. He stated that whether he would have been promoted in any event and the role played by the non-existent OSF are already issues in the case. The applicant interpreted the Coast Guard comments as not objecting to the submission of the additional evidence.

The applicant disagreed with the Coast Guard's comment that the court of appeals' dissatisfaction was confined to the Board's failure to articulate its reasoning. Rather, according to the applicant, the Court found the Board had, among other things, imposed impossible or irrational evidentiary requirements on the applicant, failed to address certain of his contentions, and inferred that the applicant would not have been promoted in any event by focusing on his marks in section 12 of his OERs.

The applicant stated that it is of no moment that he first made the assertion with regard to counseling in response to the Coast Guard's 1992 advisory opinion. The applicant stated that his contention that he was not counseled is not rendered "improbable" by the nature of his work environment, his performance problems, or his interaction with supervisors. He stated that the Coast Guard should have submitted rebuttals from the members of his rating chain, rather than attacking the applicant's sworn statement.

The applicant stated that the record includes sworn assertions regarding a lack of counseling on an OSF that is expressly required by the Personnel Manual. The issue is not what the applicant considers to have constituted counseling; the difficulty arises squarely from the agency's own binding regulation.

The applicant argued that a nexus exists between the applicant's passovers and discharge and the corrections to the disputed OER that have already been ordered to the applicant's record. This nexus would be even stronger once the disputed OER is expunged because of the alleged OSF and counseling violations.

The applicant argued that it is impermissible to look solely to the marks in section 12 when deciding whether an officer would have been passed over in any event. Further, the applicant stated that the Coast Guard does not meet its burden by saying that the applicant's OERs put him in the middle range of his peers. The applicant also stated:

[T]he data from which [the applicant's] "class standing" can be known is exclusively in the Coast Guard's control and the Coast Guard refuses to release them. . . . [E]ven if the section 12 marks on the OERs were a reliable indicator of where an officer stood on the curve, nearly 85% of [the applicant's] peers were promoted. If . . . he was in the middle of his class, he would necessarily be well ahead of many of those who were promoted. In other words, he is still entitled to prevail. . . .

Excerpts from the Record with respect to the "missed deadline" issue

With respect to the comment "missed letter report deadline responding to COMDT query," the available evidence of record is discussed below.

The applicant stated that prior to his temporary assignment as Chief of the Reserve Programs Branch, his predecessor had received an inquiry from Headquarters. The applicant stated that the request had been left on the desk of the then Chief of the Reserve Administration Section, the CWO3. The CWO3 retired at the end of June 1987 and the deadline for answering Headquarters' inquiry was missed in May 1987. The applicant stated that this failure was reflected in the OER.

In response to a comment by the Coast Guard that the "applicant inherited those projects that [the CWO3] did not complete" and "the performance recorded in the OER resulted from how [the] [a]pplicant pursued those projects," the applicant stated the following in a letter dated April 20, 1992.

[The applicant] did not "inherit" [the CWO3's] jobs. He was called upon, before [the CWO3] departed, to handle the response to an inquiry from Headquarters. He properly asked [the CWO3] to handle the

-11-

matter, as it related to Reserve Administration. [The CWO3] did not handle it, and did not keep him informed of his own lack of progress on the task. When [the CWO3's failure to complete the response thereafter came to his attention, [the applicant] prepared the appropriate response himself. What is critical to note is that . . . this entire episode occurred and was a subject of counseling . . . during the previous reporting period.

APPLICABLE PROVISIONS OF THE PERSONNEL MANUAL

There are several provisions in the Personnel Manual that govern the use of the OSF and responsibilities attached thereto.

Article 10-10-A-2c.(2).(2) of the Personnel Manual sets forth the following as the responsibilities of a Reported-on Officer:

(c) As necessary, seeks performance feedback from the Supervisor during the period.

* * * * *

(k) Notwithstanding the responsibilities assigned to others in the rating chain, is ultimately responsible for managing his or her own performance. This includes ensuring that performance feedback is thorough enough and received in a timely manner and that OER's and associated documentation are timely, complete, and accurate.

Article 10-A-2c.(3) of the Personnel Manual in effect during the period covered by the disputed OER stated the following:

Mandatory meetings and use of the OSF for ensigns and lieutenants (junior grade). All Reported-on Officers in the grades of ensign and lieutenant (junior grade) are required to arrange for initial and end-of-period meetings with their Supervisors and must submit an OSF as prescribed. . . .

Article 10-A-2d.(3) of the Personnel Manual states as follows:

Mandatory meetings and use of the OSF for ensigns and lieutenants (junior grade). Supervisors shall conduct beginning and end-of-period meetings and are required to maintain an OSF on all reported-on Officers in the grades of ensign and lieutenant (junior grade). . . . [Emphasis in original]

Article 10-A-5 of the Personnel Manual states in relevant part:

Use of the OSF or similar format is mandatory for Supervisors of all Reported-on Officers in the grades of ensign and lieutenant (junior grade), when the Reported-on Officer requests its use, or when a senior member of the rating chain directs its use. . . .

FINDINGS AND CONCLUSIONS

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

1. The Board concurs in the determination that the application can be disposed of without a hearing. 33 CFR § 52.31 (1993). The documents in the record provide an adequate basis for a decision.

2. The Board has determined that it will accept and consider additional evidence offered by the applicant.

3. The applicant claimed that it was unfair to blame him for the missed deadline because his subordinate, a CWO3, had been given the task of meeting the deadline, but retired prior to completing it. This claim is without merit. The applicant was ultimately responsible for completing the assignment. The applicant admitted in his April 20, 1992 letter that he was given this assignment and that he delegated it to his subordinate, the CWO3. The applicant stated in this letter that "he was called upon prior to the CWO3's retirement to handle the response to an inquiry from Headquarters." The fact that the CWO3 might not have completed the task and did not keep the applicant informed of lack of progress did not absolve the applicant of responsibility for completing the assignment. After all, the applicant's superior gave the job to him, and it was his responsibility to ensure that it was completed. If the applicant chose to delegate the project to the CWO3, without first obtaining the consent of the person who assigned the job to him, he was responsible for monitoring the CWO3 until the assignment was completed. It was not unfair for the reporting officer to hold the applicant responsible for the manner in which he chose to perform his duty in this regard. The Board notes that the supervisor failed, however, to acknowledge his own responsibility for the missed deadline.

4. The applicant stated that the evidence is clear that the deadline was missed by the CWO3 and that the entire event occurred during the previous reporting period. However, the only evidence the applicant has provided is his own sworn statement that the deadline was missed in May 1987. He failed to provide a corroborating statement, a copy of the request from Headquarters, a copy of the final product, or anything else that would lend support to his claim that the entire event occurred during the previous reporting period. The applicant did not present evidence showing that he requested evidence from the Coast Guard to support his contention that the missed deadline occurred in the previous reporting period. The parts of the disputed OER that the Board ordered corrected in Docket No. 162-94,

were based on the applicant's statement and other corroborating evidence. Here, in contrast, the applicant only submitted evidence showing that the CWO3 retired effective July 1, 1987. This evidence does not establish the deadline that was given to the applicant for completing the assignment, nor does it affect the possibility that the deadline for completing the assignment carried over into the period covered by the disputed OER. As the Coast Guard stated, "the applicant provided no evidentiary basis for his allegation that this deadline was the one referred to in the OER."

5. There are inconsistencies between what the applicant alleged and what the record shows. Instead of accepting responsibility for missing the imposed deadline, the applicant attempted to excuse himself by blaming the failure to meet the deadline on the CWO3, whom he supervised and to whom he delegated the assignment. Monitoring and completing the assignment was not beyond the applicant's control. In his April 20, 1992 letter, the applicant stated that he received no counseling during the period covered by the disputed OER. As the Board found in its decision in Docket No. 162-94, however, the applicant was counseled by the reporting officer midway through the reporting period. See Docket No. 162-94 at 13. The applicant stated in his application that the failure to comply with the missed deadline "was reflected in the OER." The Board interpreted this to mean the applicant's previous OER. However, there is no mention of a missed deadline in the applicant's previous OER. The previous OER does mention the successful and timely completion of a Headquarters' assignment. See section 3.f. of OER for period February 28, 1987 to September 1987. The applicant failed to identify and describe the nature of the assignment, thereby making a comparison with comments in the previous OER difficult. The Board also must recognize that the applicant's statement is self-serving. He stands to benefit from a correction to his record. The applicant has the burden of proof in establishing his claim. In light of the absence of any corroborating evidence and in light of the inconsistencies noted above, the Board finds that the applicant has failed to meet his burden in establishing that the missed deadline event occurred in the previous reporting period.

6. The court of appeals found that the Board had not adequately answered the applicant's contention, in Docket No. 162-94, that he was not counseled in the manner and at the time required by the Personnel Manual. The court of appeals stated that it appeared that the members of the applicant's rating chain did not follow proper procedure with respect to the counseling that was provided to the applicant. According to the Personnel Manual, counseling by the supervisor is required at the beginning and end-of-reporting period. It is also required that the supervisor maintain and use the OSF.

7. On the issue of the OSF and counseling, the applicant is correct that Article 10-A-2d.(3), Personnel Manual (Commandant Instruction M1000.6A) provides that supervisors "shall conduct" beginning and end of period meetings and are required to maintain an OSF on all reported-on officers in the grades of ensign and lieutenant (junior grade). The applicant's supervisor failed to comply with this requirement.

8. The applicant also failed to follow the Personnel Manual. The Personnel Manual places a similar responsibility on the reported-on officer, the applicant, to ensure that the OSF is used. The responsibility for submitting the OSF to the supervisor lies with the reported-on officer (the applicant). The text of Article 10-A-2c.(3) that was in effect at the time stated that "[a]ll Reported-on Officers in the grades of ensign and lieutenant (junior grade) are required to arrange for initial and end-of-period meetings with their Supervisors and to submit an OSF. . . ." [Emphasis added] The applicant has failed to show that he met his part of the responsibility to submit the OSF to the Supervisor or to request that it be used. Thus, the applicant himself is partly responsible for the absence of an OSF in this case.

9. Even though counseling did not take place on the OSF, in the circumstances of this case, the Board finds that the applicant was counseled and put on notice that there were problems with his performance during the reporting period. In the documentation that the applicant submitted to the Board, he asserted that a CWO2 was constantly complaining to the applicant's superiors about his performance. Also, the applicant stated that his supervisor commented that he held the applicant responsible for the failure of new software to work as it should. The comment by the supervisor and the complaints to the applicant's supervisors by the CWO2 should have put the applicant on notice that there were problems with his performance and that he needed to obtain counseling and feedback from his rating chain. The applicant did not seek feedback in accordance with Article 10-A-2c.(2) of the Personnel Manual. The reporting officer in fact counseled the applicant midway through the reporting period and advised him on "his specific responsibilities, his performance, projects he was expected to accomplish, and aspects of his performance that need attention." Moreover, the supervisor's statement of June 13, 1991, indicates that the applicant received end-of-period counseling. The supervisor wrote in that statement, "[the applicant] reacted very professionally and was very concerned about the OER during our counseling session." The Board notes that the applicant's performance subsequently improved, which suggests that the counseling he did receive was effective. Therefore, the Board finds that the applicant was counseled and notified in a timely manner of shortcomings in his performance. The Coast Guard's failure to provide the applicant with counseling in the manner and at the time stated in the Personnel Manual is harmless error.

10. In light of findings 3 through 9 above, the Board finds that the applicant has failed to establish that he is entitled to any further corrections to the disputed OER or to its removal from his record.

11. Accordingly, as directed by the court of Appeals, the Board reexamines the issue of the removal of the applicant's failures of selection, in light of the correction made to the applicant's record in Docket No. 162-94, by applying the test 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?" Engels at 470.

12. The applicant was promoted from ensign to LTJG with the disputed OER in his record. On the disputed OER, in the block marked performance of duties, the applicant received marks of 3 in being prepared, getting results, and professional expertise. In the interpersonal relations block, the applicant received a mark of 3 in working with others. His writing skills were evaluated as a 2 in the communications skills section. The disputed OER also contained negative comments.

13. Applying the first prong of the Engels test to the applicant's record, the Board finds that the applicant has demonstrated that the disputed OER contained minor errors before it was corrected. The applicant has failed to establish, however, that he was prejudiced by the minor errors found by the Board in Docket No. 162-94. The Board finds that the applicant's record does not appear worse than it would in the absence of the errors. The corrective action taken by the Board in Docket No. 162-94 did not substantially change the face or the tone of the disputed OER. After correction of the record, the applicant's record appeared essentially the same. The Board's order in Docket No. 162-94, directed that the word "mainframe" be changed to "system" and that the sentence "much time spent pursuing air shipment of 32' PWB only to find prohibitive cost factor ignored" be deleted. The below average grades of a 2 and several 3s remained, as did most of the negative comments. For example, comments such as the following remained throughout the disputed OER: "[The applicant] has had difficulty assessing areas of responsibility and establishing near goals and objectives; has not kept supervisor adequately informed regarding status of ongoing projects; does not possess rudimentary familiarity with publications necessary to conduct research and develop definitive answers;"

Nothing else in the applicant's record has changed. Unlike the situation in Engels, there was no drop in the applicant's overall rating, there was no complimentary letter missing from the applicant's record, and there was no addition of negative comments. The applicant's record when considered by the selection boards in 1990 and 1991 was a substantially fair and accurate reflection of his performance.

14. Even if there had been some prejudice, the Board finds it unlikely that the applicant would have been promoted in any event. It was not the deleted comments that were the most damaging to the applicant. It was the disputed OER itself, with below average grades of a 2 and several 3s, the negative comments scattered throughout, and the lack of an express recommendation for promotion (although one is not required, a promotion recommendation is usually included in block 11) that was most damaging to the applicant before the selection boards.

In addition, this was the second OER of the applicant's Coast Guard career. It could be viewed as a decline in his performance, since on the first OER he received marks no lower than a 4, a mark of 5 in block 12, and very complimentary comments. In the first OER, the reporting officer wrote that the applicant was "[a]

-16-

very competent ensign well qualified for promotion with his peers. Has the ability . . . to assume additional responsibility. . . ." In block 11 of the disputed OER, there is no recommendation for promotion, and the reporting officer wrote in part "[w]on the confidence of his subordinate but experienced significant credibility problems with officer co-workers. Time and experience should help. Needs to improve written communications and analytic problem solving skills."

15. The applicant argued that the statistical evidence showed that 85% of the officers who were considered on a within-the-zone (not previously passed over) basis were selected for promotion to LT. He further stated that with a promotion rate this high and in light of the secrecy of selection board proceedings, there is no way the Coast Guard can prove that the applicant would have been passed over in any event. The statistical data offered by the applicant has no probative value in determining whether it was likely the applicant would have been selected for promotion. It was the selection board's responsibility to evaluate the applicant's record to determine if he was one of those best qualified for promotion to the next grade. Article 10-A-3, Personnel Manual. In the applicant's case the selection board not only considered the disputed OER, but the ones before and after it as well. As stated above, the applicant was promoted to LTJG with this OER in his record. This Board will not second guess the decision of the selection board. Moreover, we cannot judge and compare the applicant's record with the other officers at the time because we have neither the authority nor the resources to do so.

16. The Board finds that the applicant's record remained virtually unchanged after the corrections ordered by the Board in Docket No. 162-94. The Board finds that the errors that were determined to exist in the disputed OER were minors ones that did not change the grades or lessen of damaging tone of the disputed OER. Therefore, the Board concludes that it is unlikely that the applicant would have been promoted in any event.

17. The applicant complained that the Coast Guard refused to provide him with information about other officers who were considered by 1990 and 1991 selections boards. The Board notes that the Coast Guard explained to the applicant in a letter, dated October 24, 1995; which the applicant submitted to the Board, that the information was being withheld under certain FOIA exemptions.

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

ORDER

The application on remand of former [REDACTED]
USCG, for correction of his military record is denied.

