

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:



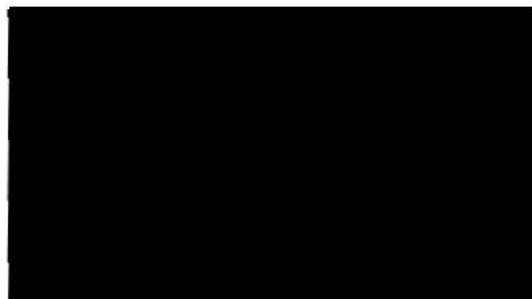
BCMR Docket
No. 1999-096

DECISION OF THE DEPUTY GENERAL COUNSEL

- ☒ I approve the recommended Order of the Board.
- ☐ I disapprove the recommended Order of the Board.
- ☐ I concur in the relief recommended by the Board.

DATE:

Feb. 10, 2000



**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

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Coast Guard Record of:



BCMR Docket
No. 1999-096

FINAL DECISION

:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14, United States Code. It was docketed on April 16, 1999, upon the BCMR's receipt of the applicant's complete application for correction of his military record.

This final decision, dated January 31, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a lieutenant commander (LCDR) on active duty, asked the Board to correct his record by modifying his officer evaluation report (OER) for the period from May 1, 1996 to April 30, 1997 (disputed OER). He further requested that the corrected OER be returned to the reviewer for any comments he desired to make. He also requested the removal of his 1998 and 1999 failures of selection for promotion to CDR.

EXCERPTS FROM RECORD AND SUBMISSIONS

The applicant requested that the disputed OER be modified by raising the mark from 3 to 4 in block 9.e. (health and well-being) and lowered from 6 to 5 in block 9.b. (judgment). He also requested that the following comment be deleted from block 9.f. (comments): "Made mistake while attempting to counsel JO [junior officer] in public bar while drinking, which hurt his credibility; one time event, performance since has been stellar." The applicant further requested that the corrected OER be returned to the reviewer "for a determination as to whether he wishes either to allow it to be filed in the applicant's record *without* reviewer comments . . . or whether he wishes to modify his comments in light of such corrections as the Board may direct in § 9." The reviewer's comments state as follows:

I am satisfied the OER submitted by the Commanding Officer . . . accurately captures [the applicant's] performance with the following exception:

PERSONAL QUALITIES: Judgment

The Mark of "6" is contradicted by the closing remarks in block 9. The ill-timed counseling session is not indicative of 'always doing the "right" thing at the "right" time.' As written, the comments support a mark of "5".

All other performance marks are adequately supported and reflect the Reporting Officer's Block 12 Comparison/Evaluation of [the applicant] as a *Distinguished Performer*.

The applicant received the disputed OER while serving as the executive officer (XO) on a Coast Guard cutter, with a crew of 100 officer and enlisted personnel. There were 12 officers, five of whom were women.

The applicant alleged that one of the female officers had a problem in accepting the Coast Guard's policy against fraternization between officer and enlisted personnel. The applicant stated that he had had to counsel her several times about her behavior in this regard.

The applicant stated that while on liberty hours during a port call, he and a number of other officers and enlisted personnel found themselves in a restaurant and bar. While there, members from the crew began line-dancing, which they had done previously on the ship as a form of aerobic exercise. However, this particular female officer began to slow dance with an enlisted male.

The applicant stated that he noticed the female officer dancing with an enlisted man. He stated that he called it to a chief's attention and advised the chief that he could "make a difference when [he sees] something [inappropriate] going on." According to the applicant, this galvanized the chief and he went over to talk with the female officer. The chief told her that "the XO . . . is concerned about your actions." The applicant stated that the female officer began to cry, appeared visibly upset, and ran into the ladies' restroom. The applicant stated that he became concerned and followed the female officer into the ladies' room. The applicant stated that he was concerned not so much because she had done something terrible on the dance floor, but rather, because, based on what he had seen, he thought her emotional state might be fragile and could endanger her personal safety, as well as her effectiveness on the ship. The applicant's questionable handling of this incident was the basis for the mark of 3 in "health and well being" and related comments on the disputed OER.

The applicant stated that he spoke with the female officer in the ladies' restroom for approximately 45 minutes. He asserted that most of that time they were accompanied by a female corpsman, who, like him, had been concerned for the officer. The applicant stated that he explained to the female officer why the chief had intervened and he stressed that she was not in trouble for dancing with the enlisted man. He also told her that others could perceive the situation differently and view the conduct to be inappropriate. The applicant stated that although the female officer was

initially defensive, she later appeared to accept the point he was trying to make and recovered her composure. Subsequently all parties left the ladies' room.

Sometime later, the CO ordered the ship's engineering officer to conduct an informal investigation into the incident, i.e. the applicant's entering the ladies' restroom. The applicant stated that the investigating officer found the following:

[The applicant] did show poor judgment by entering the women's restroom however he did this out of concern for a crewmember. His actions were definitely not sexually motivated. From my findings, I did not feel that this incident met the requirements for an alcohol related offense. I firmly believe that [the applicant] would have acted out of concern for a crewmember had he consumed alcohol or not.

According to the applicant, the informal investigation occurred as a result of an anonymous phone call to the Coast Guard's [REDACTED], a female CDR, complaining about the applicant's entry into the women's restroom. The situation was brought to the attention of the [REDACTED] Area Commander's (Area) staff. According to the applicant, his CO, who had intended to handle the matter without commenting on it in his OER, decided to mention it in his OER after several discussions with his Area superiors about the matter.

The applicant stated that the CO stated to him, in May 1997 and on October 8, 1998, that the CO believed that the mark in block 9.e. (health and well-being) is a "throw away". Therefore he decided to give the applicant a mark of 3 in that category because it would do the least damage. To justify the 3, the CO added the following comment in block 9.f.: "Made mistake of attempting to counsel JO [junior officer] in public bar while drinking, which hurt credibility; one time event, performance since has been stellar."

The applicant alleged that the CO thought that his treatment of the incident in the OER would be sufficient, and there would be no need for reviewer comments. However, the reviewer did attach the comments mentioned above.

The applicant stated that as the CO pointed out in an attached statement, "if the reviewer felt the OER was incorrect, he had a duty under article 10-A-2f.(2)(d) of the Personnel Manual to remand it [to the CO]." The applicant further alleged that he has never had an alcohol-related incident over the course of his 16 years of active duty.

The applicant argued that under Article 10-A-1b.(1) of the Personnel Manual, an OER must be accurate, fair and objective, which the subject OER was not. The applicant asserted that the OER conveyed the impression that his actions, with respect to the incident in question, was the result of inebriation. The applicant stated that the gravamen of the problem was not alcohol but rather an isolated shortcoming in judgment.

The applicant stated that he believed that the Area Commander "erred in causing the [CO] to prominently and unfairly note the . . . incident in the OER. Left to his own devices. . . [the CO] would not have singled the matter for attention." The applicant questioned whether this was undue command influence. He argued, however, even if it was not command influence, the result is an OER that fails to meet the standard for accuracy and fairness. The applicant stated that he believed the mark in 9e should be raised to a 4 and the negative related comment in block 9.f. should be deleted as well. With respect to any potential corrective action, the applicant stated that he did not have any objection to reducing the mark in judgment (block 9.b.) from a 6 to a 5, as suggested by the CO.

The applicant alleged that he suffered a double penalty by having section 9 reflect the incident and by having the reviewer reemphasize the incident in his attached comments. The applicant argued that there is a mismatch between the reporting officer's treatment of the incident and the reviewer's treatment of it. The applicant suggested that the fairest course of action was to correct the OER and then allow the reviewer an opportunity to revisit the matter to determine what, if anything, ought to be said in the optional reviewer comments.

The applicant argued that the relief that would make whole relief in this case, requires not only correction of the OER but also removal of his failures of selection for promotion to CDR and two additional opportunities for consideration for promotion to CDR based on a corrected record.

Statements Submitted by the Applicant

The applicant submitted six statements. Each is summarized below:

1. The applicant's CO stated that after learning of the incident, he ordered an investigation. The investigating officer did not find the incident to be alcohol-related. The CO stated that in addition to the administrative letter of censure that he gave to the applicant, a captain (now a rear admiral) in his chain of command recommended that the applicant be screened by the Navy's Alcohol Counseling Service. The CO stated that the applicant was screened by the Navy and found not to be an alcohol abuser. The CO stated that he informed the Captain that he would evaluate the applicant's performance in his end of period report.

The CO stated that he was surprised and upset to learn that the reviewer had attached comments to the OER. He stated that the OER should have been returned to him to resolve any inconsistencies. The CO stated that he was in the best position to evaluate the applicant's performance. He stated that reviewer comments "can negatively 'flag' the attention of the selection board."

The CO stated that he did not mean to imply by his comments that the applicant had been involved in an alcohol incident. He stated that although the applicant had been drinking, there was no evidence that he was intoxicated. The CO stated the problem was the location the applicant chose in which to counsel the junior officer. He

stated that the incident involved more a matter of judgment than health and well-being. He stated that he believed "the mark assigned in Health and Well-Being should have been a "4". The judgment dimension would have been the most appropriate dimension against which to factor in [the applicant's] inappropriate action of attempting to counsel a junior officer in a public bar.

The CO stated that the applicant was an outstanding executive officer. He stated that this one incident in no way defined his overall performance for the period.

2. The female CDR ([REDACTED]) who had received the complaint against the applicant wrote a statement. She stated that the individual who made the complaint was quite upset about the incident and the fact that the person believed that nothing was being done about it. The CDR stated that she spoke to the applicant's CO about the matter. Subsequently, she also informed her supervisor.

3. The applicant also submitted a statement from the engineering officer [EO] who investigated the incident. He stated that he no longer had a copy of the investigation, but he remembered that his findings led him to believe that the applicant showed poor judgment by entering the women's restroom, even though it was out of concern for a crewmember. The EO stated that the applicant's actions were not sexually motivated; nor did the incident meet the requirements of an alcohol-related offense. He stated that he served with the applicant for two years, that he highly respected the applicant, and that he was proud to have served with him.

4. The applicant submitted a statement from the training officer (TO) who worked for the applicant at the time of the incident. The TO stated that the applicant was easy to work with, had an easy-going manner and had a genuine interest in developing junior officers. He stated that he was surprised to hear that the applicant might be denied a chance to serve again in the afloat community because of the incident under review.

The TO stated that he was not a witness to the incident, but he had heard various rumors with regard to it. The TO stated that before the incident in question, he witnessed the female officer's (the one counseled by the applicant) vindictive attitude toward the applicant. He stated that the female officer often spoke to the applicant in a disrespectful manner and talked poorly about him to others. The TO stated that the female officer made it clear that she would not be told what to do by the applicant or any other authority figure.

The TO stated that the applicant was very supportive of junior officers and was an excellent mentor. He stated that the applicant was genuinely interested in the well-being of the crew and spent a lot of his own time helping crewmembers resolve problems.

5. A lieutenant junior grade (LTJG) who was the officer of the Deck at the time of the incident wrote a statement. He stated that he did not have first hand knowledge of the incident. He stated that the female officer involved in the incident shunned

everyone on the ship that was senior to her in rank. The LTJG stated that the female officer had a particular dislike for the applicant, because he was the person that directed the assignments for junior officers. The LTJG stated that the female officer told him that the applicant had counseled her about an inappropriate incident. He stated the day after the incident occurred rumors were circulating about it, each one becoming more elaborate than the last. He stated that the applicant was an excellent XO and was concerned about the crew.

6. The CWO2 (chief warrant officer W-2) who spoke to the female officer on the night in question about dancing with the junior enlisted man submitted a statement. The CWO2 was a chief petty officer at the time the incident occurred. He wrote that the applicant encouraged him, as a senior enlisted man, to intervene in the situation. He stated that he spoke with the female officer about her behavior and she became upset and began to cry.

Applicant's OERs

The applicant's performance as a LCDR is consistently rated average to above average, with mostly 5s and 6s (on a scale of 1 to 7), and occasional 4s in areas like military bearing, evaluations and health and well being. His only mark of 3 is on the disputed OER in the health and well being category. In block 12 on his LCDR OERs, he has received the following marks in descending order, 7 (5), 7 (5), 6 (5)¹, 5, 5, 5, and 4. The comments on all of his LCDR OERs were positive and most complimentary (except for the challenged comment on the disputed OER).

The applicant's performance as a LT was average to above average. He did receive an occasional 4 in areas like evaluations and health and well-being. On his first OER as a LT he received 7s in all of the performance dimensions and well as in block 12. His block 12 marks on his LT OERs, in descending order, were 4,5,5,5,5,5,5,7,7 and 7.

Views of the Coast Guard

On December 7, 1999, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the reviewer comments be deleted because the reviewer violated Article 10-A-2f.(2)(d) of the Personnel Manual by not returning the OER to the reporting officer to resolve inconsistencies between the marks and comments, before attaching his comments. The Coast Guard recommended that the remainder of the applicant's request be denied.

The Chief Counsel submitted a memorandum from the Commander, Coast Guard Personnel Command (CGPC), as part of the Coast Guard's advisory opinion. The CGPC stated that the applicant's change of mind with respect to the 3 in health and

¹ The 7 (5) and 6(5) indicate that the applicant was rated a 7 or 6 on the comparison scale by the reporting officer, who was a Naval officer, but was rated lower by the reviewer, who was a Coast Guard officer. Article 10-A-2f.(2)(c) of the Personnel Manual states that "[f]or any officer whose Reporting Officer is not a Coast Guard commissioned officer, the Reviewer shall describe on a separate sheet of paper the officer's 'leadership and Potential' and include an additional 'Comparison Scale' Mark.

well-being and the related comment in 9.f. amounted to retrospective reconsideration. The CGPC stated that given the applicant's failures of selection, the CO was regretted that this comment in the OER was responsible for such an outcome.

CGPC stated that the CO, in his November 22, 1999, statement clearly indicated that he felt it was necessary to reflect the incident in the disputed OER. CGPC also stated that the CO also gave the applicant an administrative letter of censure. CGPC stated that the CO expressed regret for using the phrase "while drinking" because it implied that the incident was an alcohol-related incident. Contrary to his statement, CGPC stated that "at the time the CO thoughtfully drafted Applicant's OER, his assessment was that it was a mistake for Applicant to counsel the junior officer while drinking, because it "hurt his credibility." CGPC stated that it was obvious that the CO considered the conclusion of the investigating officer and the result of the Navy alcohol screening in reaching his decision not to document the incident as an alcohol-related incident. CGPC argued that "there is no requirement in the Personnel Manual that requires documentation of an alcohol incident or alcohol related situation as a prerequisite before a comment that documents an officer's drinking can be included in an OER."

CGPC disagreed with the applicant's contention that if it had not been for the Area's senior officer's influence on the CO, he would not have documented the incident in the applicant's OER. CGPC stated that the CO in his statement wrote that "he informed his second level supervisor at [REDACTED] AREA (the Reviewer's supervisor) that [he] did not believe a *special OER* (emphasis added) was required and that he would evaluate [Applicant's] performance in his end of period report." CGPC further stated that the CO wrote in his statement that he counseled the applicant after receiving the investigative report and told him that his actions would be considered when the CO prepared the applicant's performance evaluation for the period.

CGPC stated that both the CO and the reviewer's superior officer indicated that the CO was never influenced or ordered by his chain of command as to how to document the incident in the applicant's OER.

With respect to the applicant's contention that the mark in judgment should be lowered from 6 to 5 and the mark in health and well being should be raised from 3 to 4, CGPC stated as follows: "Applicant would hide the incident in the Judgment mark of 5, which would not require a supporting comment with negative connotations to justify the mark." CGPC argued that by signing the subject OER, the CO authenticated the OER and verified that it reflected his best evaluation of applicant's performance at the time. He stated that absent a basis of factual error, it would be inherently unfair to allow any rating official to reconsider a valid assessment of performance based on outcomes that occur later in an officer's career.

CGPC stated that contrary to the applicant's argument, there is no requirement that the reviewer rectify any mark assigned by the previous rating officials. With respect to the applicant's argument that the reviewer's comments constituted a double penalty by drawing attention to both the judgment area and the health and well being

area, CGPC stated that "there is no prohibition against using an example of observed performance to influence more than one evaluative area on an OER."

CGPC noted that the applicant did not file a reply to the OER. CGPC stated the applicant's failure to submit a reply to the OER was a tacit indication that he accepted the rating officials' characterization of his performance at that time.

CGPC stated that since the applicant has not denied that the incident took place, various other details offered by the applicant are irrelevant (such as allegations that the female officer harbored a grudge against the applicant.)

On the issue of removing the applicant's failures of selection for promotion to CDR, the CGPC stated that

[t]he Coast Guard promotion system is highly competitive, especially at the O-5 level. In accordance with the Personnel Manual, boards must consider an officer's entire record, but should focus on the previous seven years of performance for promotion to O-5. The OER . . . disputed by the applicant falls well within that window, and would therefore have been given significant weight by the O-5 promotion board. The Applicant has an excellent record of performance, a well-defined surface operations career track, and excellent diversity of assignments. His record is excellent with the exception of the incident in question.

Should the Board grant the Applicant partial relief, as recommended . . . the mark of "3" and supporting comments in the "health and well being" category would still stand. Therefore, the incident would still be documented in his record, and it is doubtful that the Applicant would be selected for O-5 in such a competitive environment.

In addition to the letter from the CO, the Chief Counsel also attached a letter from a rear admiral, who was the reviewer's supervisor at the time. The admiral stated that he worked closely with the reviewer and was familiar with the incident. He stated that he discussed the incident with the CO. He also stated that from the very beginning the CO was in control of the situation and was taking appropriate steps to ensure that all of the facts were known. The admiral stated that both he and the reviewer were satisfied with the actions taken by the CO in this case.

Applicant's Response to the Views of the Coast Guard

On December 17, 1999, the Board received the applicant's response to the views of the Coast Guard. He argued that the OER is inaccurate and therefore was prepared in violation of the Personnel Manual.

According to the applicant, the error occurred by documenting the incident in the judgment category instead of the health and well-being category. He stated that the opportunity to properly document the incident in the judgment dimension was lost

when the required OER process was not followed. That process required the reviewer to return the OER to the reporting officer to correct any apparent inconsistencies between the numerical marks and the narrative comments. He stated that the reviewer felt there was an inconsistency between the mark of 6 in judgment and the last sentence of the narrative comments.

The applicant argued that the reporting officer erred when he entered the mark of 3 and the related narrative comment in the health and well-being category. He stated that the reviewer's comments (attached to the OER) and the reporting officer's statement of March 10, 1999 confirm that the incident should have been reflected in the judgment category. The applicant argued again that the mark of 3 in health and well-being is clearly wrong. He stated that the reviewer is deceased and contended that therefore there is no sure-fire way of knowing what the result would have been if the reporting officer had had the opportunity to correct the discrepancy in the OER. However, the reporting officer stated that he was surprised to learn that the reviewer had attached written comments. The reporting officer stated that he was in the best position to evaluate the applicant's performance.

The applicant argued that the reporting officer's statements are not retrospective reconsideration. The reporting officer believes the mark for judgment was inappropriately high, and the mark for health and well-being was erroneous. There is no indication that these views constitute a change of position on the part of the reporting officer.

The applicant argued that, if left to his own devices, the reporting officer would not have documented the incident in the OER. He stated that a rear admiral, who was chief of operation forces, [REDACTED] Area, was extremely interested in the situation. It was the rear admiral, according to the reporting officer, who recommended that the applicant be screened by the Navy's Alcohol Counseling Service. The applicant stated that the admiral's statement, which was attached to the advisory opinion, confirmed his high level of interest in the situation.

The applicant argued that the reporting officer was placed in a position of having to show that he was in control in order to satisfy both the reviewer and his boss, now a rear admiral. The impact of this high level interest resulted in the reporting officer reflecting the incident in health and well-being where it thought it would do the least damage to the applicant.

The applicant asserted that the changes he asked for are necessary in order to achieve accuracy in the OER. The applicant stated that in addition to the removal of the reviewer's comments he is entitled to other requested relief. The applicant stated that "even if all the Board were to do would be to remove the Reviewer's comments, he would still be entitled to relief from his passovers. His record without the Reviewer's comments would have been stronger than with them, and the Coast Guard has not demonstrated that he would have been passed over in any event based only on the mark and isolated comment in the health and well-being category."

The applicant attached a copy of his most recent OER, which contains marks of 6s and 7s and a mark of 7 (on a scale of 1 to 7) in block 12. It was prepared to reflect the applicant's performance while serving liaison to the [REDACTED]. Reviewer comments were attached with a mark of 5 in block 12.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10, United States Code. It was timely.
2. The Chairman recommended that the application be decided without a hearing and the Board concurred in recommendation. 33 CFR § 52.31.
3. The Coast Guard has admitted that the reviewer violated Article 10-A-2f.(2)(d) of the Personnel Manual by not returning the OER to the reporting officer to correct the inconsistency between the 6 in judgment and the comment - "Made mistake of attempting to counsel JO [junior officer] in public bar while drinking, which hurt his credibility; one time event, performance since has been stellar." The reviewer found that this comment was inconsistent with the prewritten standard for a mark of 6 in judgment, which states in part that a reported-on officer "did the right thing at the right time". Instead of returning the OER to the reporting officer for resolution of the inconsistency, the reviewer attached comments to the OER.
4. The applicant has alleged that the disputed OER is inaccurate because it unfairly portrays his performance in the judgment and health and well-being categories. It is his contention that the mark of 3 and the comment - "Made mistake of attempting to counsel JO [junior officer] in public bar while drinking, which hurt his credibility; one time event, performance since has been stellar" - incorrectly implies that this was an alcohol-related incident or that he was drunk at the time. He asserts that the incident was an isolated lapse in judgment and not alcohol related.
5. In this regard, the applicant believes that the incident should be reflected in the judgment category by lowering his mark of 6 to a 5 in that area. He further believes that the mark of 3 in health and well being (block 9.e.) should be raised to 4, since the incident should not have been reflected in this area. The applicant also wants the related comment in block 9.e. deleted. He did not say what if any other comment should be made about the incident, if the corrections he requested were instituted. The applicant asserted that the corrected version of the OER should be returned to the reviewer for review and any comment he desired to make. However, the reviewer is now deceased.

6. Contrary to the applicant's assertions, the comment in block 9.e. does not characterize the incident as an alcohol-abuse incident. It states that when the incident occurred the applicant was in a bar and had been drinking. From the evidence that has been presented to the Board, this is an accurate statement. The investigating officer did not say that the applicant had not been drinking, but he did not find that the incident met the requirements of an alcohol-related incident. The CO stated that the applicant's alcohol screening evaluation report stated that the applicant was not an alcohol abuser. However, the CO did not say that the report stated that applicant had not been drinking that night. If alcohol had not been involved, no reason would have existed to send the applicant for an alcohol screening. There is nothing in the pertinent provision of Chapter 20 or the OER provisions of Chapter 10 of the Personnel Manual that would prevent an officer's rating chain from commenting on events where an officer had been drinking at the time he exhibited unusual behavior, even if the event is not characterized as an alcohol-related incident. The Board finds that the CO exercised his discretion under Article 20.B.2.b of the Personnel Manual and decided not to document this incident as an alcohol-related incident. However, this decision by the CO would not have prevented him from commenting on the facts of the incident as they relate to the applicant's performance.

7. The Board is not persuaded that the CO was wrong in reflecting the incident in the health and well-being category. Among other factors, the health and well-being category measures the "extent to which an officer exercised moderation in the use of alcohol." See pre-written standard on OER form. There is no prewritten standard for a mark of 3 on the OER form which means that a mark of 3 would fall somewhere between the standards for a 2 and a 4. The standard for a 2 states "failed to meet the minimum standards of . . . sobriety." The prewritten standard for a 4 states in pertinent part: "Used alcohol only discriminately or not at all; job performance and social behavior was never affected." The applicant denied that he was drunk. Again, the OER does not say he was drunk, only that he had been drinking. The applicant did not deny that he had been drinking. Even though the applicant was not drunk, it was logical to report that he had been drinking at the time he displayed the lapse in judgment. The Board notes that the applicant spent 45 minutes in the ladies' restroom, in a public bar, and part of that time he was not accompanied by a female other than the female officer whom he counseled.

8. The Board finds that the CO's statement, with respect to modifying the OER, to be retrospective reconsideration because of the applicant's failure to be selected for promotion to CDR. The CO's March 10, 1999 statement confirms the Board's conclusion in this regard. He wrote in that statement "as I look at my comments in section 9.f. of the OER, I did not mean to imply that this was an alcohol-related incident." This implies to the Board that the CO is currently dissatisfied with the comment, not that he was dissatisfied with the comment at the time he wrote it. Moreover, it is clear from both of the CO's statements that he intended to consider this matter in the evaluation of the applicant's performance. While he now states that it should have been reflected in the judgement area by lowering the mark from 6 to 5, he does not state whether he would include any comments with respect to it in the comments section, block 9.f. Lowering the mark in judgment and not including any comments about the incident

would not reveal the inappropriate behavior or poor judgment exhibited by the applicant.

9. The CO intended to reflect the matter in the applicant's OER, because if he did not, he could have given the applicant a 4 or higher in the first instance. He knew that to give the applicant a 3 he had to include justification in the comments section of the health and well-being category. The applicant's own statement -- that the CO told him that he thought a mark of 3 in the health and well-being category would do the least damage--corroborates the Board's finding that the CO gave considerable thought on how the incident should be reflected in the OER. The CO gave no indication that he was confused about what he was doing at the time he prepared the OER. The Board finds nothing erroneous or unjust with the OER as written, absent the reviewer's comments.

10. The applicant asserts that the CO was under pressure from a Captain (now a rear admiral) assigned to the Area staff to document the incident in the disputed OER. The applicant argued that the interest exhibited by the Captain, in the incident, placed the CO in a position of having to show he was in control. The Board is not persuaded that the CO felt any undue pressure. The CO did not indicate that he felt pressured by the Area staff, and he never indicated that it was ever his intention not to mention the incident in the OER. There was nothing improper about the Area captain discussing the matter with the CO, particularly since a complaint had been made to the [REDACTED] about the incident. Such discussions in and of themselves do not amount to improper command influence. The Board notes for the record that the CO did not exhibit any hesitancy in commenting on the reviewer's failure to return the OER to him to resolve the reviewer's concern about inconsistency between the 6 in judgment and the comment about the applicant's inappropriate behavior. Accordingly, the Board is satisfied that the CO would not have permitted himself to be subjected to any undue command influence at the time he prepared the OER.

11. The applicant's complaint with respect to a double penalty, because the incident was mentioned by the reviewer, is rendered moot by the recommended removal of the reviewer's comments, if the Board agrees. The Board agrees that the reviewer comments should be removed, since the reviewer violated Article 10-A-2f(d)(2) of the Personnel Manual by not returning the OER to the reporting officer to resolve the inconsistency between the mark of 6 in judgment and the comment with respect to his questionable behavior and poor judgment with respect to the incident in question.

12. With respect to the removal of the applicant's failures of selection for promotion to CDR, the applicant must establish a causal connection between the errors found by the Board in the disputed OERs and his failures of selection for promotion to CDR before the 1998 and 1999 CDR selection boards. In determining whether a nexus exists between the errors or injustices and the applicant's failures of selection, the Board applies the standards set forth in Engels v. United States, 230 Ct. Cl. 465 (1982).

13. 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.

14. Applying the first prong of the Engels test to the applicant's record, the Board finds that the applicant's record appears worse than it would in the absence of the alleged error. The reviewer's attached comments bring additional attention to the incident and are negative in nature. They also mention that the applicant's judgment should be lowered from a 6 to a 5 because he does not always do the right thing at the right time. The applicant's CO corroborates the Board's opinion that reviewer comments flags a record for closer review by the selection board.

15. The Coast Guard suggested that with the reviewer's comments removed "it is doubtful that the applicant would be selected for O-5", because he would still have the 3 and the comment about the incident in block 9.f. The Board does not agree with the Coast Guard on this point. The applicant has a good performance record, with no other blemishes. The Coast Guard recognized his excellent performance record in the advisory opinion. The reviewer comment's called the applicant's judgment into question, where the OER itself did not. Without this additional negative information, the Board finds that is not unlikely that the applicant would have been selected for promotion to CDR.

16. The applicant's statement and that of several of his witnesses that the female officer held a grudge against the applicant appear to be irrelevant to the issue of the accuracy of the OER. The female officer was not in the applicant's rating chain and there has been no evidence that any grudge she harbored against the applicant had a negative impact on the applicant's rating chain for the disputed OER.

17. Accordingly, the reviewer comments should be deleted from the OER and the applicant's 1998 and 1999 failures of selection for promotion should be removed from his record.

ORDER

The application of [REDACTED], USCG, for correction of his military record is granted, in part. His record shall be corrected as follows:

The OER for the period May 1, 1996 to April 30, 1997 shall be corrected by removing the reviewer comments from the OER.

The applicant's 1998 and 1999 failures of selection for promotion to CDR shall be removed from his record. The applicant shall be given two additional opportunities to be considered for promotion before the 2000 and 2001 CDR selection boards. He shall be considered as an officer within the zone by the 2000 CDR selection board. If he is selected for CDR by the 2000 CDR selection board, his date of rank, once promoted, shall be adjusted to the date he would have received if he had been selected for promotion to CDR by the 1998 board, together with back pay and allowances.

All other requests for relief are denied.

