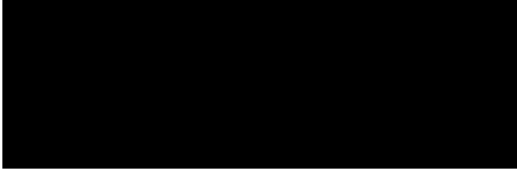


DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of  
Coast Guard Record of:



BCMR Docket  
No. 23-96

DECISION OF THE DEPUTY GENERAL COUNSEL

I approve the Final Decision of the Board.

I disapprove the Final Decision of the Board.



Rosalind A. Knapp  
Deputy General Counsel  
Delegate of the Secretary  
Department of Transportation

DATE: March 20, 1987

DEPARTMENT OF TRANSPORTATION  
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FINAL DECISION



This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on November 16, 1995, upon the receipt by the BCMR of the applicant's request for correction of his military record.<sup>1</sup>

This final decision, dated March 6, 1997, is signed by the three duly appointed members who were designated to serve as the Board in this case.

**Applicant's First Request for Correction (PRRB)**

On October 30, 1995, the applicant asked for relief before the Personnel Records Review Board (PRRB). He alleged that he was not, in 1995, selected for promotion to lieutenant commander (LCDR) on the ground that his record was "administratively incorrect" because a disputed OER "was completed on the wrong form by [his] supervisor." He stated that the standards between Forms CG-5311 and CG-5312 were not the same and would lead to incorrect comparisons.

The applicant did not identify any differences between the two forms.

On November 9, 1995, the PRRB decided that it did not have jurisdiction to determine the application and forwarded the request to the BCMR on the ground that it had not been submitted within the one-year jurisdiction of the PRRB.

**Applicant's Second Request for Correction (BCMR)**

The applicant, a lieutenant (O-3) in the Coast Guard since 1990, asked the BCMR to correct his officer's evaluation report (OER) for the period July 9, 1992 to November 30, 1992 (disputed OER). The applicant asked to have the disputed OER

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<sup>1</sup> On April 16, 1996, the Chairman granted the applicant's request for 15 additional days to respond to the views of the Coast Guard.

corrected or, if uncorrectible, removed from his record.

In August of 1996, he was considered for advancement to LCDR. The 1996 LCDR Selection Board selected him for promotion to LCDR. On February 1, 1997 he is scheduled for promotion to LCDR.<sup>2</sup>

The applicant alleged that his military record was in error or unjust with respect to the disputed OER, in the following particulars: "Page one of subject report is on form CG-5312 (Level II Officer Evaluation Report) . . . but pages two through four are on form CG-5311 (Level I Officer Evaluation Report)."

### Views of the Coast Guard

On March 26, 1996, the BCMR received the views of the Coast Guard with respect to this application. The Chief Counsel of the Coast Guard admitted that the wrong forms were used in pages two, three, and four of the disputed OER, but he declared that this "error was not material." The Coast Guard admitted that this administrative error should have been caught by Headquarters during "quality review," but it declared that "ultimately" the applicant was responsible for "ensuring [that] the proper forms were used."

The Chief Counsel said "there are no differences between the Level I (CG-5311 series) standards and Level II (CG-5312 series) standards for any of the assigned marks received by the applicant," with two exceptions. If the correct form had been used, the applicant's marks for those exceptions ("Judgment" and "Section 12") would not have been higher because the correct standards were more stringent than those used. "The administrative irregularity of using incorrect forms did not," according to the Coast Guard, "negatively alter the fairness, objectivity or accuracy of the evaluation, and in actuality, may have been more beneficial to the applicant."

The Commander of the Coast Guard Personnel Command (PC) listed the applicant's marks on section 12 (comparison scale) of each of the ten OERs prepared on him during his five years as a lieutenant (LT). His section 12 mark as a LT on the disputed OER was the same as his section 12 mark on five of the 10 LT OERs. His section 12 marks on the other five of his 10 LT OERs were "5"s. The PC concluded that "the OERs are good but not so good as to ensure promotion at the highly competitive LCDR board." It further concluded that "although the disputed OER is the weakest of [the LT OERs], the removal of that OER does not make applicant's record significantly stronger."

The Coast Guard ultimately recommended that no relief be granted because the applicant has not provided sufficient proof or evidence to support his application.

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<sup>2</sup> The applicant did not notify the BCMR that he had been selected.

### Applicant's Response to the Views of the Coast Guard

On May 8, 1996, the BCMR received a response from the applicant to the effect that he and the Coast Guard agree that a mistake was made to his record. His request is still to have this mistake corrected.

The applicant said he wants the next selection board "to view a correct file. . . [He does] not want this error to play a factor in [his] selection or non-selection."

### FINDINGS AND CONCLUSIONS

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

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code.

2. The applicant's disputed OER was prepared on two different forms, CG-5311 and CG-5312. As the Coast Guard admitted, the disputed OER should have been completed entirely on CG-5312. Instead, the first page of the disputed OER was prepared on the correct form, but pages two through four of the disputed OER were prepared on the incorrect form. The Coast Guard also admitted that this error should have been caught during the Service's "quality review" process.

3. The applicant alleged that the standards on forms CG-5312 and CG-5311 "are not the same." The Service submitted a blank copy of the two forms and declared that "there are no differences" between the two, except for sections 9b. and 12.

4. The Board, acting for the Secretary, is required "to correct an error" in a military record when it "considers it necessary." 10 U.S.C. § 1552. The Board considers it "necessary" to correct the Coast Guard's admitted error in the use of the wrong form.

5. The application should be granted on the ground that the Coast Guard committed an error in using the wrong forms. The error should be corrected by removing the OER that was based on erroneous forms and by replacing it with a report for continuity purposes only.

6. It is not necessary to further correct the error by removing the applicant's failure of selection and promoting him retroactively because he does not meet the standard of *Engels v. United States*, 230 Ct.Cl. 465, 678 F.2d 173 (1982). According to the *Engels'* court, two questions must be answered in the affirmative to establish a

"nexus" between the error or injustice and the failure of selection: (a) Was the claimant's record prejudiced by the error in the sense that his record appears worse than it would have in the absence of the error? (b) Even if there was some such prejudice, is it unlikely that he would have been promoted in any event?

7. In the opinion of the Board, the first question should be answered in the negative, rendering the second moot. Although the Coast Guard committed error in using the wrong forms, the applicant's record does not appear worse because of that fact. The most significant difference between the correct and incorrect forms occurred in block 12 where the incorrect form was labelled "One of the Many Competent Professionals who Form the Majority of this Grade" and the correct form was labelled "Exceptional performer; very competent, highly respected professional." Both block 12s had seven marks from the lowest (1) to the highest (7). The applicant's numerical mark was the one in the center, a 4. We doubt that the selection board members pay particular attention to the descriptive language used in block 12. They very likely overlooked the error entirely, and focused only on the numerical mark given.

Finally we note that he was selected for promotion in 1996 even with the erroneous OER in his file. This can be explained by the fact that his 2 latest OERs are highly complimentary.

8. Accordingly, the application should be granted in part.

ORDER

The application to correct the military record of [REDACTED]  
[REDACTED] USCG, is granted by removing the disputed OER and by replacing it with a  
report for continuity purposes only.

