

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

Application for the Correction of
the Coast Guard Record of:

**BCMR Docket No. 2015-197
Final Decision**



SUMMARY OF THE RECORD

In April 2015, the applicant asked the Personnel Records Review Board (PRRB) of the Coast Guard to expunge two officer evaluation reports (OERs) for the marking periods ending March 31, 2014, and July 10, 2014, from his record; to remove his non-selection for promotion to [REDACTED] in June 2014; and, if selected for promotion to [REDACTED] to back date and correct his date of rank and position on the Register of Officers to what they would have been had he been selected for promotion in June 2014 and to award him corresponding back pay and allowances.

In a decision dated August 31, 2015, the PRRB found that the disputed OERs, which have low marks, rate the applicant as a “fair performer,” and contain comments such as “cannot be trusted to follow instructions,” were not fair or objective assessments of his performance during the marking periods, when he was the Executive Officer of a small cutter. Therefore, the PRRB ordered them removed and replaced with Continuity OERs. In addition, because the applicant was selected for promotion in 2015, the PRRB, which has no authority to award back pay and allowances, recommended that the case be forwarded to the BCMR for further correction. Specifically, the PRRB recommended that the applicant’s [REDACTED] date of rank and position on the ADPL and Register of Officers be corrected to what they would have been if he had been selected for promotion in 2014 and that he be awarded corresponding back pay and allowances.

The PRRB’s recommendation was approved by Commander, Personnel Service Center (PSC), and forwarded to the BCMR for consideration. On November 20, 2015, the Coast Guard submitted an advisory opinion recommending that the Board grant relief by adjusting the applicant’s date of rank and position on the Register of Officers as if he had been selected for promotion in 2014 and by awarding him back pay and allowances.

FINDINGS AND CONCLUSIONS

The record shows that in 2015, PSC removed two OERs from the applicant’s record that the PRRB had found to be erroneous and unjust. Subsequently, the applicant has been selected for promotion to [REDACTED]. In light of the PRRB’s decision, this Board finds that the applicant has proven by a preponderance of the evidence that his record contained prejudicial errors when it

was reviewed by the [REDACTED] selection board in June 2014. When an applicant proves that his military record contained an error when it was reviewed by a selection board, this Board must determine whether the applicant's non-selection for promotion should be removed by answering two questions: "First, was [the applicant's] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?"¹ When an officer shows that his record was prejudiced before a selection board by error, "the end-burden of persuasion falls to the Government to show harmlessness—that, despite the plaintiff's *prima facie* case, there was no substantial nexus or connection" between the prejudicial error and the non-selection for promotion.² To void a non-selection, the Board "need not find that the officer would in fact have actually been promoted in the absence of the error, but merely that promotion was not definitely unlikely or excluded."³

The Board agrees with the PRRB and PSC that the applicant's two erroneous OERs were prejudicial and that it is not unlikely that the applicant would have been selected for promotion if those prejudicial errors had not been in his record. Therefore, because it is not unlikely that the applicant would have been selected in June 2014 had his record been correct at the time, the Board finds that his non-selection for promotion in June 2014 should be removed from his record pursuant to the *Engels* test.⁴ In addition, because he was selected for promotion to [REDACTED] in 2015, his date of rank as an [REDACTED] and his position on the Register of Officers and the ADPL should be corrected to what they would have been had he been selected for promotion in June 2014, and he should receive corresponding back pay and allowances.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹ *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

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

³ *Engels*, 678 F.2d at 175.

⁴ *Id.* at 175-76.

ORDER

The application of [REDACTED], USCG, for correction of his military record is granted as follows:

The Coast Guard shall expunge from his record his non-selection for promotion by the [REDACTED] selection board that convened in June 2014. The Coast Guard shall back date his [REDACTED] date of rank and correct his position on the Register of Officers and on the ADPL to what they would have been had he been selected for promotion to [REDACTED] in June 2014. The Coast Guard shall pay him the corresponding back pay and allowances due as a result of these corrections.

August 5, 2016

