

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-029

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████████████████

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. After receiving the applicant's completed application on December 18, 2015, the Chair docketed the case and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 2, 2016, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a Reserve lieutenant and staff judge advocate serving on extended active duty, asked the Board to correct his record by removing his non-selection for promotion to lieutenant commander (LCDR) by the promotion year (PY) 2016 LCDR selection board, which convened in August 2015, and—if he is selected for promotion by the next LCDR selection board in August 2016—to correct his date of rank as a LCDR to what it would have been had he been selected in August 2015 and award him back pay and allowances.¹ The applicant alleged that this relief is warranted because his 2014 Officer Evaluation Report (OER) failed to show his Reviewer's additional comparison scale mark,² as required by policy, when it was reviewed by the PY 2016 LCDR selection board in 2015.

The applicant stated that OERs are the most important documents reviewed by selection boards and that the comparison scale mark is a very important mark on an OER. He noted that

¹ Upon inquiry by the Chair, the applicant stated that he had "decid[ed] not to revise my request to request a special [selection] board" pursuant to 14 U.S.C. § 263.

² On an OER form, a lieutenant is marked on a "comparison scale" with seven possible marks, denoted by "bubbles," by comparing the subordinate to all of the other lieutenants that the rating officer has known throughout his or her career. The seven possible marks are "Performance unsatisfactory for grade or billet" (first bubble), "Marginal performer; limited potential" (second bubble), "Fair performer; recommended for increased responsibility" (third), "Good performer; give tough, challenging assignments" (fourth), "Excellent performer; give toughest, most challenging leadership assignments" (fifth), "Strongly recommended for accelerated promotion" (sixth), and "BEST OFFICER of this grade" (seventh).

normally, only the Reporting Officer enters a comparison scale mark on an OER, and the Reviewer's only task is to review the OER prepared by the Supervisor and Reporting Officer for consistency. However, Reporting Officers may add another page to an OER with separate comments and, pursuant to Article 5.A.2.d.(4)(b)(2) of the Officer Evaluations, Accessions, and Promotions Manual, COMDTINS [REDACTED] Reporting Officers are required to add an additional page to the OER with comments and a comparison scale mark for any officer whose Reporting Officer is not a Coast Guard commissioned officer, member of the Coast Guard Senior Executive Service, or a Public Health Service flag officer serving in the Commandant's office (CG-11).

The applicant stated that from July 2013 to October 2015, he was assigned to detached duty with a U.S. Navy Defense Service Office. Therefore, Navy JAG officers served as both his Supervisor [REDACTED]g Officer and prepared his OER in 2014. His OER Reviewer was the Coast Guard's Deputy Judge Advocate General (DJAG). Because his Reporting Officer for his 2014 OER was not a commissioned officer of the Coast Guard, his Reviewer was required to complete the extra page for his OER with both comments and an additional comparison scale mark in accordance with Article 5.A.2.d.(4)(b)(2) of COMDTINST M1000.3. The applicant stated that when the LCDR selection board reviewed his record in August 2015, his 2014 OER did include his Reviewer's comments, but did not show the required additional comparison scale mark.

The applicant stated that after he was passed over for promotion in August 2015, he noticed the [REDACTED] Officer Personnel Management Branch of the Personnel Service Center (PSC) confirmed that the lack of a comparison scale mark on the Reviewer's comment [REDACTED] constituted an error on his 2014 OER. The applicant argued that this [REDACTED] judicial and may have caused his non-selection for promotion in August 2015. Therefore, his non-selection should be removed. [REDACTED]

[REDACTED]

The applicant argued that there is a causal nexus between the error and his non-selection pursuant to the *Engels* test, which states that the Board should consider two questions when considering removing a non-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?" *Engels v. United States*, 230 Ct. Cl. 465, 470 (1982). Regarding the first question, the applicant argued that the lack of the extra comparison scale mark did make his record appear worse because the mark that was missing indicated that he was an "Excellent performer; give toughest, most challenging leadership assignments." The applicant argued that when an officer's Reporting Officer is not a Coast Guard officer, "the presence of an additional comparison marking by a CG Reviewer removes any doubt as to the standard under which the CG officer is being compared by his/her Rating Chain." The applicant stated that the purpose of the mandated comments and comparison scale mark is a protective measure that ensures that a selection board has input from a Coast Guard officer who understands performance and potential criteria specific to the Coast Guard. The applicant argued [REDACTED] that the input of a Coast Guard Reviewer under these circumstances, selection boards have no way to ascertain whether the non-Coast Guard rating chain evaluated the officer's performance consistent with Coast Guard standards. There-

fore, he argued, the lack of a comparison scale mark on his Reviewer's page was prejudicial "because it failed to provide a usable baseline for the selection board."

Regarding the second question in the *Engels* test, the applicant alleged that "there is simply no way to determine with [redacted] tainty whether or not it is unlikely that [he] would have been promoted" if the LCDR selection board had seen the Reviewer's comparison scale mark. He noted that it is impossible to prove what impact the missing mark had, if any, because the proceedings of selection boards are secret pursuant to 14 U.S.C. § 261. However, the applicant stated, he has been recommended for promotion in all of his OERs, his OER marks have trended upward, he has been awarded a Coast Guard Achievement Medal and a Navy-Marine Corps Commendation Medal, and he was chosen as the Junior Officer of the Quarter at his Navy Defense Service Office in October 2014. In addition, he has received a staff attorney billet in a [redacted] Coast Guard's most professionally challenging legal District, a detached joint-assignment as a criminal trial attorney with the U.S. Navy, and a highly sought after out-of-specialty billet in the marine safety field, showing that he has the JAG office's full faith and confidence. Conversely, he noted, there is no evidence to support a finding that his selection for promotion to LCDR would have been unlikely even with a corrected record because he has never received a derogatory remark or rating. Therefore, he argued, it is likely that he would have been selected for promotion if the selection board had seen the Reviewer's comparison scale mark.

SUMMARY OF THE RECORD

On [redacted], the applicant accepted a direct commission as a Reserve lieutenant in the JAG corps and began serving on a four-year extended active duty contract. [redacted], he signed another, three-year extended active duty contract ending on [redacted].

The applicant was first assigned as a staff attorney in the [redacted] District. On his first annual OER, [redacted], he received "standard" and "above-standard" marks of 4 and 5 (out of 7) in the various performance categories, except for one excellent mark of 6 for "Health and Well-Being," and a mark in the fourth bubble (of seven) on the lieutenant comparison scale, indicating that he was a "good performer." He was also "recommended for advancement with peers."

On his second annual OER in this billet, dated [redacted], the applicant received primarily above-standard marks of 5 in the various performance categories but excellent marks of 6 for "Adaptability," "Speaking & Listening," "Writing," "Looking Out for Others," "Evaluations," "Initiative," and "Responsibility"; a superior mark of 7 for "Health and Well-Being"; but another mark in the fourth bubble on the comparison scale. His Reporting Officer wrote that he has "[n]atural energy & enthusiasm for the mission. Potential to succeed in positions of increased responsibility & visibility in or out of primary legal specialty. ... Recommended for promotion with peers."

On his third OER, dated [redacted], the applicant received four marks of 5 (for "Using Resources," "Professional Competence," "Directing Others," and "Judgment"), ten marks of 6, and four marks of 7 (for "Adaptability," "Speaking and Listening," "Workplace Climate," and "Health and Well-Being"), and a mark in the fifth bubble on the comparison scale,

denoting an “excellent performer.” His Reporting Officer noted that he was “[s]till a first-tour atty; made significant marked progress during this marking period” and that he was “[r]ecommended for promotion to O-4 with top flight of peer group.”

On his fourth OER, dated [REDACTED] the applicant received primarily marks of 6 but two marks of 5 for “Looking Out for Others” and “Directing Others” and two marks of 7 for “Speaking and Listening,” and “Adaptability.” He received another mark in the fifth bubble on the comparison scale, and his Reporting Officer wrote that he was an “Excellent officer and sage legal advisor. Demonstrated significantly increased acumen this period and is ready to assume greater responsibility in the legal program. ... Highest recommendation for promotion to O-4 with peers.”

In [REDACTED] the applicant was transferred to serve as defense counsel at a Navy Defense Service Office. On his first OER for this work, dated May 31, 2014, which is the disputed OER in this case, he received primarily marks of 6 but five marks of 5 (for “Results/ Effectiveness,” “Adaptability,” “Developing Others,” “Directing Others,” and “Evaluations”) and two marks of 7 (for “Looking Out for Others” and “Workplace Climate”). He received his Reporting Officer’s “Highest recommendation for accelerated promotion to O-4” but another mark in the fifth bubble on the lieutenant comparison scale. His Supervisor and Reporting Officer are noted as O-4 and O-5 officers, respectively. (The Coast Guard has not disputed that they are Navy, rather than Coast Guard officers, although the OER form does not state this.) The Reviewer was the DJAG, who prepared a comment page showing another mark in the fifth bubble on the [REDACTED] comparison scale, although this mark was “masked” and slightly enlarged when the OER was reviewed by the LCDR selection board in 2015 (see attached). [REDACTED] AG included the following comment (which was visible): [REDACTED]

Reviewer comments submitted IAW paragraph 5.A.2.f.(1) [REDACTED] Officer Accessions, [REDACTED] promotions, COMDTINST M1000.3. I fully concur with the marks and comments of the supervisor and reporting officer who observed [the applicant’s] performance on a daily basis. [His] accomplishments in this joint environment bring significant credit to the Coast Guard and to our legal program.

[The applicant] demonstrates professionalism, leadership, and managerial acumen that reflects tremendous potential. His experience, performance, and enthusiasm mark him as an officer who will excel in challenging assignments both in and out of CGJAG. He is highly recommended for assignments of greater responsibility and for promotion to O-4 with the very best of his peers.

On his second OER as defense counsel at the Defense Service Office, dated May 31, 2015, the applicant received primarily excellent marks of 6 in the various performance categories, five superior marks of 7 (for “Using Resources,” “Speaking and Listening,” “Looking Out for Others,” and “Workplace Climate”) and one mark on the sixth bubble on the lieutenant comparison scale, indicating that he was “strongly recommended for accelerated promotion.” His Reporting Officer wrote that he was a “Practiced litigator and exemplary officer. Reached upper

echelon of oral/written advocacy this period. ... Highest recommendation for promotion to LCDR with very best of peers.”

As the Supervisor and Reporting Officer for this OER were both Navy JAGs, the DJAG again added a comment page. He [REDACTED]ur[red]” with the marks and comments of the Supervisor and Reporting Officer but then assigned the applicant a mark in the fifth bubble on the lieutenant comparison scale, instead of the sixth. He explained the difference as follows:

[The applicant’s] performance in this joint environment brought significant credit to the Coast Guard. This officer is an excellent representative of the Coast Guard culture, work ethic, and values and is highly recommended for assignments of greater responsibility. The Navy [Reporting Officer] strongly recommends acceleration [REDACTED], which suggests uncommon potential; [the applicant’s] performance suggests uncommon potential and clearly indicates promotion at least with the very best of his CG peers.

The applicant was not selected for promotion by the PY 2016 selection board, which convened in August 2015.

On October 1, 2015, the applicant was transferred to Sector office to serve as a marine inspector and port state control officer. On his annual OER dated May 31, 2016, he received two marks of 5 for “Workplace Climate” and “Evaluations,” nine marks of 6, and seven marks of 7 in the various [REDACTED] categories, and another mark in the fifth bubble on the comparison scale. His Reporting Officer wrote that the applicant has his “[a]bsolute highest recommendation for promotion w/very best of peers. Stellar leadership skills coupled with [REDACTED] Mission Support expertise & impressive grasp of Prev msn demo unlimited potential to succeed in future hi-vis leadership positions.” [REDACTED]

[REDACTED]
The applicant was selected for promotion to LCDR in August 2016.

VIEWS OF THE COAST GUARD

On May 27, 2016, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny re [REDACTED]se and adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC stated that when the applicant’s 2014 OER was reviewed, the Reviewer’s “marked comparison scale bubble was errantly covered with an open circle. The errantly covered bubble selection on the form is apparent to any reader since the added open bubble is larger than the other selection options.” PSC stated that the Reviewer’s selected bubble was the same as that chosen by the applicant’s Navy Reporting Officer, and their agreement was reflected in the Reviewer’s comment that he “fully [REDACTED] with the marks and comments of the supervisor and reporting officer.” PSC argued that a “reasonable reader would likely have only been influenced if the mark had been a higher or lower selection compared to that of the Reporting Officer’s comparison scale mark. The removal of a higher or lower mark would convincingly

alter the effect of the evaluation – either by disadvantaging or advantaging the [reported-on officer], but in this case the marks were the same. Therefore, this error is immaterial and was not prejudicial to the applicant, as it did not indicate any conflicting information in regards to applicant’s performance and the agreement of the Reviewer with the Reporting Officer is clearly conveyed to the reader.” PSC argued that because the error is immaterial, there are no grounds for convening a special selection board (SSB). PSC noted that the error has been administratively corrected.

PSC alleged that the applicant failed to substantiate that the error of the masked/enlarged mark was prejudicial and caused his non-selection in 2015. Therefore, PSC recommended that no relief be granted unless the applicant is selected for promotion in 2016 and the opportunity for selection in 2016 “is lower than that of the [2015] LCDR selection board.”³ PSC did not explain this condition.

The JAG argued that the *Engels* test relied on by the applicant has been superseded by statute, 14 U.S.C. § 263, under which a special selection board should be convened if a “material error” prejudices an officer’s record before a selection board. The JAG argued, however, that that not all errors on an OER are material and warrant a special selection board pursuant to 14 U.S.C. § 263. The JAG noted that “material error” has not been defined, but in *Porter v. United States*, the court relied on the government’s position and “suggested that ‘material error’ would be ‘an error that *might* have affected the outcome of the selection board decision.’” The JAG noted that Black’s Law Dictionary defines “material” as “Important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form.” The JAG stated that when the PSC identified the error in this case, it “determined that the error identified by the applicant was not material.” The JAG therefore recommended that the Board deny relief.

Regarding the masked and enlarged “bubble,” the JAG stated that “a reasonable person should conclude the error had no potential to affect the selection board’s decision” because the Reviewer’s comment that he fully concurred with the Reporting Officer’s marks would lead a reasonable person to believe that the Reviewer agreed with the Reporting Officer’s selection of comparison scale marks. In addition, the JAG argued, because the Reviewer is only required to add an extra comparison scale mark when the Reporting Officer is not a Coast Guard officer, “the absence of a mark in that block in this case would not appear anomalous and, at worst, would appear to have been an oversight by the Reviewer.” Third, the JAG argued, the Reviewer’s comments are “highly suggestive of a rating of 5,” which is the mark the Reviewer actually assigned.

The JAG concluded that the applicant has not met his burden of showing that his record was prejudiced by a material error when it was reviewed by the LCDR selection board in 2015. The JAG stated that there is “no reason to disturb [PSC’s] factual conclusion that no material error has been shown. If the Board concludes otherwise, it should direct that an SSB be convened under 14 U.S.C. § 263 to consider the applicant for promotion, and if selected, backdate his date of rank and grant him any corresponding pay and allowances.” The JAG argued that in

³ According to ALCOAST 092/16, the opportunity for selection in 2016 was 80 percent, while according ALCOAST 076/15 it was just 75 percent in 2015.

enacting 14 U.S.C. § 263, Congress took the BCMRs “out of the business of serving as super selection boards.” The JAG noted that in *Richey v. United States*, 322 F.3d 1317, 1324 (Fed. Cir. 2003), the court held, “In *Porter* we held that once it is determined that the initial selection board’s decision ‘involved material administrative error,’ nothing in this statute requires the Secretary, acting through the Corrections Board, to make a harmless error determination. Instead, under the statute, as interpreted in *Porter*, the Corrections Board should refer the matter to an SSB, which decides whether to promote the officer based on his corrected military record, and, therefore, ‘the harmless error rule has no application.’”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

The applicant was granted an extension of the thirty-day period for responding to the views of the Coast Guard and submitted his response on September 15, 2016.

The applicant argued that “application of the material error standard announced in *Porter* shows the error in the instant case constitutes a material error under 14 U.S.C. § 263 warranting the requested relief. The applicant argued that the LCDR selection board that convened in August 2016 could be designated an SSB in accordance with 14 U.S.C. § 263(h) and COMDT-INST M1000.3A [Article] 6.B.13.b.(4).

Regarding the JAG’s argument that 14 U.S.C. § 263 has superseded the *Engels* test, the applicant noted that the JAG has relied on the *Engels* test “as recent[ly] as 2012 to resolve similarly situated applicants,” and that in *Godwin v. United States*, 338 F.3d 1374, 1380 (Fed. Cir. 2003), the court found that the guidance in *Porter* and *Richey* about *Engels* did not apply to Coast Guard cases.⁴ The applicant noted that in 2012-007—a case in which the applicant’s record had erroneously included an arrest report for public intoxication when it was reviewed by a selection board—the Board relied on the *Engels* test to backdate an officer’s date of rank after finding that absent the error, it was not unlikely that the officer would have been selected.

The applicant argued that the Reviewer’s comment concurring with the Reporting Officer’s marks and comments did not render the Reviewer’s comparison scale mark meaningless because the purpose of the mark is to reflect the Reviewer’s comparison of the officer against all others of the same rank that the Reviewer has known, and a selection board also sees the statistics on all of the other comparison scale marks the Reviewer has ever assigned. The applicant argued that the absence of the Reviewer’s comparison scale mark deprived the selection board of a useful measurement of his potential for promotion and noted that the Coast Guard has recently begun changing the OER form to include a promotion scale as well as a comparison scale. This change, he argued, shows how critical a comparison scale mark is to promotion decisions.

The applicant argued that the lack of a comparison scale mark on his 2014 OER would not have gone unnoticed because the Reviewer’s comparison scale mark on his 2015 OER was present. He argued that the selection board members would have noticed the difference, ques-

⁴ *Porter* concerned a Title 10 SSB statute applicable only to the other military services. Therefore, the court found in *Godwin* in 2003 that the *Engels* test was still applicable in Coast Guard cases. The Coast Guard’s SSB statute was enacted in December 2012 and implementing regulations were published on March 14, 2016.

tioned the inconsistency, and therefore “carr[ie]d less of an opinion of me for not having corrected the error prior to the board. While officers do have responsibility of reviewing their personnel files prior to boards, they do not carry the burden of perfection. ... The 2014 OER contained an error which carried a real potential to reflect negatively on a perception of my attention to detail.” But he did not [REDACTED]; he “simply, like other officers, missed in during the multiple reviews of my record prior to the promotion board. It is reasonable to believe that the noticeable absence of the marking in my 2014 OER carried the potential to negatively influence one or more board members.”

The applicant argued that the Coast Guard’s claim that the Reviewer’s comments about his leadership and potential are suggestive of the mark in the fifth bubble of the comparison scale is unexplained and speculative.

[REDACTED]

The applicant disagreed with the Coast Guard’s claim that the error was not material. He argued that the error *might* have affected his chance of selection, as required by *Porter*, “because (1) the absence of the marking withheld a crucial analytic to board members, (2) the importance of a specific comparison scale marking is of high importance, and (3) absence of my correction of the error prior to the board carried a potential to present me in a negative light before the board.” The applicant also argued that the *Godwin* case shows the existence of a nexus between the error in his OER and his non-selection. In *Godwin*, an officer’s record was missing an entire OER when it was reviewed by the selection board, and the court found that the lower court should not have dismissed the case because Godwin had pleaded enough facts about the importance [REDACTED] the selection process to make a prima facie case that there was a nexus between the missing OER and his non-selection. The applicant argued that he has [REDACTED] the importance of the comparison scale mark in the selection process [REDACTED] proven the nexus between the error on his OER and his non-selection.

[REDACTED]

The applicant [REDACTED] he has shown that his record contained an error, that the error made his OER appear worse than it otherwise would have, and that his record contains no evidence that he would not have been selected but for the error. Therefore, he argued, the results of the 2016 selection board should be considered as the results of an SSB, and his date of rank should be backdated to what it would have been had he been selected for promotion in 2015.

APPLICABLE LAW AND [REDACTED]

Title 14 U.S.C. § 263, enacted in Public Law 1120213, Title II, § 208(a), on December 20, 2012, states the following:

(b) Officers considered but not selected; material error.--

(1) In general.--In the case of an officer or former officer who was eligible for promotion, was considered for selection for promotion by a selection board convened under section 251, and was not selected for promotion by that board, the Secretary may convene a special selection board to determine whether the officer or former officer should be recommended for promotion, if the Secretary determines that--

(A) an action of the selection board that considered the officer or former officer--

- (i) was contrary to law in a matter material to the decision of the board; or
- (ii) involved material error of fact or material administrative error; or

(B) the selection board that considered the officer or former officer did not have before it for consideration material information.

(2) Effect of failure to recommend for promotion.--If a special selection board convened under paragraph (1) does not recommend for promotion an officer or former officer, whose grade is that of commander or below and whose name was referred to that board for consideration, the officer or former officer shall be considered

(A) to have failed of selection for promotion with respect to the board that considered the officer or former officer prior to the consideration of the special selection board; and

(B) to incur no additional failure of selection for promotion as a result of the action of the special selection board.

(c) Requirements for special selection boards.--Each special selection board convened under this section shall--

(1) be composed in accordance with section 252 and the members of the board shall be required to swear the oaths described in section 254;

(2) consider the record of an applicable officer or former officer as that record, if corrected, would have appeared to the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board and that record shall be compared with a sampling of the records of--

(A) those officers of the same grade who were recommended for promotion by such prior selection board; and

(B) those officers of the same grade who were not recommended for promotion by such prior selection board; and

(3) submit to the Secretary a written report in a manner consistent with sections 260 and 261.

(d) Appointment of officers recommended for promotion.--

(1) In general.--An officer or former officer whose name is placed on a promotion list as a result of the recommendation of a special selection board convened under this section shall be appointed, as soon as practicable, to the next higher grade in accordance with the law and policies that have been applicable to the officer or former officer had the officer or been recommended for promotion by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.

(2) Effect.--An officer or former officer who is promoted to the next higher grade as a result of the recommendation of a special selection board convened under this section shall have, upon such promotion, the same date of rank, the same effective date for the pay and allowances of that grade, and the same position on the active duty promotion list as the officer or former officer would have had if the officer or former officer had been recommended for promotion to that grade by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.

(3) Record correction.--If the report of a special selection board convened under this section, as approved by the President, recommends for promotion to grade an officer not eligible for promotion or a former officer whose name was referred to the board for consideration, the Secretary may act under section 1552 of title 10 to correct the military record of the officer or former officer to correct an error or remove an injustice resulting from the officer or former officer not being selected for promotion by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.

(e) Application process and time limits.--The Secretary shall issue regulations regarding the process by which an officer or former officer may apply to have a matter considered by a special selection board convened under this section, including time limits related to such applications.

ALCOAST 090/16, issued on March 14, 2016, announced the Coast Guard's publication of regulations for SSBs in Article 6.B.13. of COMDTINST M1000.3A. Article 6.B.13.a. states that the purpose of an SSB is to consider for promotion an officer who was not selected for promotion because of a material error or an administrative error. Article 6.B.13.c.

states that Commander, PSC shall review reports of selection boards and officer's requests for SSBs to determine the existence of an administrative or material error, and the convening authority shall convene an SSB if Commander, PSC, the BCMR, or a federal court determines that an SSB is warranted. Article 6.B.13.e. provides that an SSB may be convened if the selection board "did not have before it some material information required to be presented to the board by Coast guard policy" or if "directed by the BCMR or a federal court." Article 6.B.13.j. states that an SSB considers the record of an officer as it should have appeared (i.e., after correction) with "a weighted sample of records, reflecting the Opportunity of Selection of the prior board to include an appropriate number of records from officers of the same grade who were recommended for promotion by the prior selection board along with an appropriate number of records from those officers of the same grade who were not recommended for promotion by the prior selection board." Article 6.B.13.n. states that an officer who is selected for promotion by an SSB shall have the same date of rank he or she would have had if selected by the regular selection board.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application to the Board is timely.⁵
2. The applicant requested an oral hearing before the Board. The Chair denied the request, acting pursuant to 33 C.F.R. § 52.51, and recommended disposition of the case without a hearing. The Board concurs in that recommendation.⁶
3. The applicant alleged that his non-selection for promotion in 2015 was erroneous and unjust because the LCDR selection board did not see his Reviewer's comparison scale mark on his 2014 OER. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁷ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."⁸
4. The Coast Guard and the applicant both state that when the LCDR selection board convened in 2015, the Reviewer's comparison scale mark was not visible on the applicant's 2014 OER. The Coast Guard has submitted a copy of the OER as seen by that selection board, and the fifth "bubble," which the Reviewer had marked, is not filled in. According to the Coast Guard,

⁵ 10 U.S.C. § 1552(b) (requiring application within 3 years of the applicant's discovery of the alleged error).

⁶ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board").

⁷ 33 C.F.R. § 52.24(b).

⁸ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992).

someone at PSC erroneously “masked” the mark made by the Reviewer before the selection board convened.

5. As the Coast Guard and the applicant noted, because his Reporting Officer was a Navy commander, instead of a Coast Guard commander, in 2014, Article 5.A.2.d.(4)(b)(2) of COMDTINST M1000.3A required his OER Reviewer to add a Reviewer’s page to the OER with comments and an extra comparison scale mark. According to the instructions on the OER form, the mark is supposed to be indicated by filling in the chosen bubble. Therefore, the Board agrees that the applicant’s 2014 OER contained an error when it was reviewed by the LCDR selection board in 2015. The question is whether the error was “material” within the meaning of 14 U.S.C. § 263, because if so, the Board should direct the Coast Guard to convene an SSB for the applicant as the statute requires.

6. As the JAG noted, “material error” has not been well defined in this context. In *Miller v. Department of Navy*, 476 F.3d 936, 939 (D.C.C. 2007), and *Mori v. Department of the Navy*, 917 F. Supp. 2d 60, 64 (D.D.C. 2013), the courts accepted the Navy’s prescribed definition of “material error” in the Title 10 SSB statute, 10 U.S.C. § 628, as “[a]ny error of fact or administrative/procedural error that is more likely than not to have deprived the officer concerned of a fair and impartial consideration by the board.” The Coast Guard’s regulations, however, do not expressly define “material error.” Article 6.B.13.e. states that SSBs *may* be convened if “[t]he selection board that considered an officer ... did not have before it some material information required to be presented to the board by Coast Guard policy.” This could be considered a definition of “material error” although it not particularly helpful. On the other hand, Article 6.B.13.a. of COMDTINST M1000.3A states that the purpose of an SSB is to consider for promotion an officer who was not selected for promotion “because of” a material error or an administrative error. This rule erroneously suggests that Commander, PSC must find that the error caused the non-selection before convening an SSB even though courts have strongly rejected such a “but for” test.⁹

7. As the JAG argued, when Congress passed 14 U.S.C. § 263 in 2012, the BCMR’s role in such cases changed. Now, when a “material error” exists, the Board should direct the Coast Guard to convene an SSB instead of applying the *Engels* test, or harmless error test, to decide whether to remove a non-selection and backdate an officer’s date of rank.¹⁰ According to the JAG, Commander, PSC exercised his authority pursuant to Article 6.B.13.c. and decided that the error in this case was not material. However, it is not clear from the record whether Commander, PSC thought that he should only convene an SSB if he thought the error caused the non-selection, as misleadingly stated in Article 6.B.13.a.

8. The JAG argued that there is “no reason to disturb [PSC’s] factual conclusion that no material error has been shown. If the Board concludes otherwise, it should direct that an SSB

⁹ *Richey v. United States*, 322 F.3d 1317, 1324 (Fed. Cir. 2003); *Porter v. United States*, 163 F.3d 1304, 1318-19 (Fed. Cir. 1998) (rejecting the “but for” test and citing *Hary v. United States*, 618 F.2d 704, 707-08 (Ct. Cl. 1980); *Engels v. United States*, 678 F.2d 173, 175-76 (Ct. Cl. 1982), and *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979)).

¹⁰ See *Porter v. United States*, 163 F.3d 1304, 1324 (Fed. Cir. 1998) (finding that since the enactment of the Title 10 SSB statute, 10 U.S.C. § 628, the “harmless error test” espoused for the BCMRs in *Engels* no longer applies to the Air Force BCMR).

[special selection board] be convened under 14 U.S.C. § 263 to consider the applicant for promotion, and if selected, backdate his date of rank and grant him any corresponding pay and allowances.” The JAG noted that in *Richey v. United States*, 322 F.3d 1317, 1324 (Fed. Cir. 2003), the court held, “In *Porter* we held that once it is determined that the initial selection board’s decision ‘involved material administrative error,’ nothing in this statute requires the Secretary, acting through the Corrections Board, to make a harmless error determination. Instead, under the statute, as interpreted in *Porter*, the Corrections Board should refer the matter to an SSB, which decides whether to promote the officer based on his corrected military record, and, therefore, ‘the harmless error rule has no application.’” And yet the recommendation of PSC and the JAG relies entirely on a harmless error analysis and asks the Board to make the same harmless error analysis and deny relief. They do not argue that the DJAG’s comparison scale mark was unimportant or irrelevant (i.e., immaterial) to the selection board’s decision but, in essence, that the error should be considered not to have harmed his chance of selection (i.e., to be harmless) because the selection board would, allegedly, have been able to guess what comparison scale mark the DJAG chose from his written comments. They claim that the missing comparison scale mark was harmless because the error was cured by the fact that the DJAG wrote that he “fully concurred” with the marks and comments made by the Reporting Officer, who had also assigned the applicant a mark in the fifth bubble on the comparison scale.

9. As explained above, however, the Board may no longer decide such a case based on a finding of whether an error is harmless. Instead, the Board must determine whether an error is “material” for the purpose of 14 U.S.C. § 263, which is a substantially different question. The closest thing to a definition of “material” in Coast Guard regulations is whether the selection board “did not have before it some material information required to be presented to the board by Coast Guard policy.”¹¹ Is an OER comparison scale mark “material information” to a promotion decision? The Board strongly believes that it is. As the JAG noted, Black’s Law Dictionary defines “material” as “Important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form.” While the Coast Guard would have the Board focus on the “having influence or effect” part of this definition, which would lead the Board into a harmless error analysis, the Board finds that that an OER comparison scale mark assigned by the DJAG to a Coast Guard lawyer cannot reasonably be considered unimportant or irrelevant or a matter of form, rather than substance, particularly with regards to the lawyer’s chance of promotion. Therefore, it cannot be considered immaterial. As the applicant noted, comparison scale marks are arguably the most important mark on an OER form for selection boards.¹²

10. Even if the Board did consider whether the DJAG’s comment about “fully concur[ring]” rendered the missing comparison scale mark on the applicant’s 2014 OER harmless to his chance of promotion, the Board could not draw the conclusion recommended by the Coast Guard. The Coast Guard argued that the DJAG’s comment about “fully concur[ring]” in essence cured the error by making the LCDR selection board members believe that the DJAG agreed

¹¹ COMDTINST M1000.3A, Article 6.B.13.e.

¹² The Board might have drawn a different conclusion if the DJAG had concurred in writing specifically with the Reporting Officer’s comparison scale mark or noted in his comment that he had chosen the fifth bubble—which would make it an error of form (a comment about the comparison scale mark in lieu of an actual mark) rather than substance—but he did not.

with the comparison scale mark in the fifth bubble that the Reporting Officer had assigned. But this argument ignores the fact that on the Reviewer's page for the applicant's 2015 OER, the DJAG also "fully concur[red]" with the Reporting Officer's marks and comments and yet assigned the applicant a lower mark on the comparison scale than the Reporting Officer had assigned him. Thus, the comment [REDACTED] in scale mark on the Reviewer's page of the applicant's 2015 OER show that the Coast Guard's argument regarding the effect of the "fully concur" comment on his 2014 OER would fail even if the Board were to apply a harmless error analysis in this case.

11. Therefore, the Board finds that the applicant has proven by a preponderance of the evidence that the LCDR selection board that convened in August 2015 was deprived of material information about the Reviewer's assessment of his performance during the reporting period for his 2014 [REDACTED] his record contained a "material error" when it was reviewed by the selection board. Pursuant to 14 U.S.C. § 263 and Article 6.B.13.e. of COMDTINST M1000.3A, he is entitled to review by an SSB.

12. The applicant argued that the results of the 2016 LCDR selection board should be considered like the results of an SSB. If so, his date of rank would be backdated because he was selected for promotion in August 2016. However, the applicant's record was substantially better when it was reviewed by the 2016 LCDR selection board than it was in 2015. In 2015, the applicant had received six annual OERs evaluating his performance in two non-supervisory staff legal billets. On the first two, he had received fairly mediocre performance marks, marks in the middle but [REDACTED] comparison scale, and lukewarm recommendations for promotion "with peers." His next four OERs were better, with higher performance marks, marks in [REDACTED] and sixth bubbles (of seven) on the comparison scale, and more enth[REDACTED] recommendations for promotion "with best of peers." But his 2016 OER had almost all high marks of 6 and 7 and showed that the applicant can perform exceptionally well as an offic[REDACTED]ling subordinates in an operational, p[REDACTED] well as in a non-supervisory legal billet. Therefore, the Board is not persuaded that the applicant's selection for promotion in 2016 shows that he would have been selected for promotion in 2015 but for the error in his record or that the results of the 2016 selection board should be treated as the results of an SSB.

13. Because the applicant's record contained a material error when it was reviewed by the LCDR selection board in 2015, the Coast Guard should [REDACTED] SSB in accordance with Article 6.B.13. of COMDTINST M1000.3A to consider him for promotion based on his military record as it should have appeared when reviewed by the LCDR selection board in August 2015 (as well as the required sampling of other candidates' records as they appeared when reviewed by the LCDR selection board in August 2015). If the SSB recommends him for promotion, once promoted to LCDR, his LCDR date of rank should be backdated to what it would have been had he been selected for promotion in August 2015, and he should receive corresponding back pay and allowances.

(ORDER AND [REDACTED] RES ON NEXT PAGE)

ORDER

The application of [REDACTED], USCG, for correction of his military record is granted in part as follows. The Coast Guard shall convene a Special Selection Board in accordance with Article 6.B.13. of COMDTINST M1000.3A to consider him for promotion based on his military record as it should have appeared when reviewed by the LCDR selection board in August 2015. If the Special Selection Board recommends him for promotion, once promoted to LCDR, his LCDR date of rank shall be backdated to what it would have been had he been selected for promotion in August 2015, and he shall receive corresponding back pay and allowances.

December 2, 2016

