

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-216

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████████████████

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application upon receipt of the applicant's completed application on September 30, 2016, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 23, 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

The applicant is a former active duty officer who received his commission as an ensign upon graduating from the Coast Guard Academy in ██████████ was promoted to lieutenant junior grade (LTJG/O-2) in ██████████, and was discharged on June 30, 2016, after being non-selected for promotion to lieutenant (LT/O-3) in September 2014 and 2015.¹ He asked the Board to correct his record by removing his second non-selection for promotion to lieutenant (LT) in September 2015 as well as his consequent involuntary discharge so that he will have another opportunity for selection. He asked that, if selected for promotion by the next LT selection board to review his record, his date of rank be backdated and he be awarded back pay and allowances.

The applicant's request follows a decision of the Personnel Records Review Board (PRRB) to remove his April 30, 2015, Officer Evaluation Report (OER)² from his record. After

¹ The results of these LT selection boards were published on November 10, 2014, and October 30, 2015, respectively. Pursuant to 14 U.S.C. § 282, LTJGs are normally discharged from active duty on the June 30th following their second non-selection for promotion to LT.

² On an LTJG OER form, CG-5310A, LTJGs are marked according to written standards in eighteen performance dimensions, such as "Adaptability" and "Responsibility," on a scale of 1 (worst) to 7 (best), and a few comments are added to support the marks. In addition, the Reporting Officer assigns a comparison scale mark on which the Reporting Officer compares the LTJG to all of the other LTJGs that the Reporting Officer has known throughout his career. A mark in the third, fourth, or fifth spot (of seven) on the comparison scale indicates that the LTJG is "one of the many competent professionals who form the majority of this grade."

being non-selected for promotion in September 2014 and 2015, the applicant had applied to the PRRB in March 2016 for removal of his April 30, 2015, OER, and the PRRB removed the OER from his record because it contained an erroneous comment. The applicant argued that because his record contained this error when it was reviewed by the LT selection board in 2015, his non-selection for promotion should be removed and he should have another opportunity for selection and the continuation of his military career.

APPLICANT'S ALLEGATIONS TO THE PRRB

On March 4, 2016, the applicant applied to the PRRB,³ requesting removal of his OER covering the three-month period from February 1 to April 30, 2015, when the applicant completed his tour of duty as ██████████ Sector office.⁴ The occasion for this OER was his Reporting Officer's departure from the Sector and the applicant's own transfer from the Sector to a unit in ██████████.⁵ The disputed OER contains no negative marks or comments but has lower numerical marks than the applicant's prior OER, dated January 31, 2015.⁶ The applicant argued to the PRRB that the disputed OER should be removed for the following reasons:

- (a) The OER was optional, rather than required, under the Article 5.A.3.a. of COMDTINST M1000.3A (hereinafter, "Officer Manual") because he had received a semiannual OER on January 31, 2015,⁷ fewer than 92 days earlier, and his supervisor had previously agreed not to prepare the OER. The applicant stated that his supervisor had agreed, instead, to prepare a draft semiannual OER, which would be dated June 30, 2015, for finalization by his next command, as the applicant had requested. The Personnel Service Center confirmed their interpretation of Article 5.A.3.a. in an email. The applicant stated that after transferring from the Sector office, he attended a DEOMI training in May and June 2015 to learn how to perform his duties at his new unit. His prior supervisor sent

³ Although the PRRB has removed the disputed OER, the applicant's allegations of error and injustice in the OER are relevant to the BCMR's determination of whether his record was prejudiced by a "material error" when it was reviewed by the LT selection board in 2015.

⁴ The applicant served in this position from October 2013 to April 2015.

⁵ Article 5.A.3.b. of COMDTINST M1000.3A (hereinafter, the "Officer Manual") states that an OER is required for officers on a semiannual OER schedule, including LTJGs, if the officer's Reporting Officer detaches from the unit and more than 92 days have passed since the officer's last regular OER. Article 5.A.3.c. states that an OER is optional for an officer who is being transferred to another unit if the officer is on a semiannual OER schedule and his last OER was submitted within the last 92 days.

⁶ On the disputed OER, the applicant received two marks of 4, fifteen marks of 5, one mark of 6, and a mark in the fourth (middle) spot on the officer comparison scale. On his previous OER, dated January 31, 2015, the applicant had received five marks of 5, twelve marks of 6, and one mark of 7 in the performance dimensions and a mark in the fifth spot on the comparison scale.

⁷ Article 5.A.3.a. of the Officer Manual states that LTJGs normally receive semiannual OERs every January 31st and July 31st but that if the LTJG will be considered for promotion that year, the OER should be dated June 30th instead of July 31st.

his new command a draft OER by email on June 4, 2015,⁸ but his new command refused to sign it because they lacked familiarity with the applicant since he had been away at training since his transfer. Therefore, his new command returned the OER to his prior command to complete. When he asked his prior supervisor “about adding input” for the OER in July 2015, the applicant alleged, he was told that it was “not necessary” because they had already received enough input from him for the OER. He stated that being told that it was “not necessary” led him to believe that it was not permitted. The applicant stated that he received the OER dated April 30, 2015, on August 12, 2014, and was counseled on it by his prior supervisor for about an hour on August 14, 2015.⁹

- (b) The applicant alleged that his supervisor paid inadequate time and attention in preparing the OER. He argued that his prior rating chain had inadequate time to prepare the OER and did not respond to some of his repeated requests for updates on the status of his OER in July 2015. The applicant stated that the final OER he received was worse than the proposed OER that his supervisor had sent to his next command on June 4, 2015.¹⁰ The applicant argued that he was given only two days to review the OER before being counseled on it and acknowledging counseling with his signature and that this short period leads him to believe that the preparation of the OER “was a matter of meeting a deadline, instead of ensuring a proper evaluation and accurate account” of his performance.
- (c) The applicant alleged that his supervisor failed to adhere to the goals of the Officer Evaluation System (OES) concerning career development and performance feedback.¹¹

⁸ Article 5.A.2.d.(2)(b)(9) of the Officer Manual states that if an officer’s supervisor changes during an evaluation period, the prior supervisor must provide the new supervisor with a draft OER, including proposed marks and comments.

⁹ The applicant submitted copies of emails supporting his claims about how his supervisor had originally agreed to provide a draft OER as input for a semiannual OER signed by his next command, instead of a three-month OER upon his transfer from the Sector.

¹⁰ In support of this allegation, the applicant submitted the unsigned draft of the disputed OER, which his supervisor had prepared for the new command. The draft OER bears an end date of June 30, 2015, and includes no marks of 4, fifteen marks of 5, three marks of 6, and an officer comparison scale mark in the fourth spot. The comments in this draft OER are almost identical to those in the final OER and include the comment that the PRRB found to be erroneous.

¹¹ Article 5.A.1.c. of the Officer Manual, COMDTINST M1000.3A, includes the following as goals of the Officer Evaluation System:

(c) Career Development. Career development is a cooperative process that seeks to meet immediate and future Coast Guard needs while satisfying the personal and professional aspirations of individual officers. The OES is a vehicle for performance feedback and career counseling by the rating chain and assignment managers.

(d) Performance Feedback. Performance feedback is an essential part of every officer’s career development.

[1] Performance feedback occurs whenever a subordinate receives advice or observations related to their performance in any evaluation area. Performance feedback can take place formally (e.g., during a conference) or informally (e.g., through on-the-spot comments). Regardless of the forum, each officer should receive timely counseling and be clear about the feedback received. If feedback is not fully understood, it is the reported-on officer’s responsibility to immediately seek clarification and the rating chain’s responsibility to provide it.

Regarding career development, the applicant argued that having a three-month OER in his record, rather than a six-month OER documenting the period February 1 to June 30, 2015, was prejudicial to his record and thus to his career development given that the LT selection board was convening in September 2015. He also argued that because the time frame of the expected OER was diminished by three months, his supervisor was “not properly briefed of what my actual performance was during the shortened time frame” and advised the applicant not to add more input. Therefore, he argued, his supervisor was not fully informed of his performance during the shorter evaluation period.

Regarding feedback, the applicant alleged that during the OER counseling session on August 14, 2015, his supervisor informed him that one of their customers had claimed that the applicant “was not performing at expected levels possibly due to a change in duties.”¹² However, the applicant stated, he had not been informed of this complaint or of any problem with his performance at the time. Therefore, he argued, he was unjustly denied feedback during the reporting period for the OER so that he could fix the perceived performance deficiency. He alleged that he was surprised by the marks on the disputed OER.

- (d) The applicant alleged that his supervisor did not consider the applicant’s extenuating circumstances when preparing the OER. The applicant explained that because he was not selected for promotion in 2014, he was told in January 2015 that his tour of duty at the Sector would be extended for a third year. Therefore, he “assisted in planning and intended on participating in multiple operations to assist the command beyond [his] normal duties.” He advised his rating chain of his intentions and was “led to believe I was on the right track to achieve my marks necessary for high recommendations for LT, although there was minimal feedback upon request from my supervisor.” However, in March 2015, an Assignment Officer (detailer) at the Personnel Service Center (PSC) informed him that he would be transferred to a new unit in ██████████ in April 2015, instead of being extended at the Sector. He had to detach from the Sector at the end of April to attend DEOMI training for his new duties in May and June 2015. In addition, the transfer prevented him from participating in operations scheduled to occur after April, and he was instructed to cancel his participation in an April operation, which he had helped plan. The applicant stated that he was also instructed to take most of the night watches in April to give himself more time during the day to arrange his medical examinations, close accounts, and ship his vehicle and household goods to ██████████. The applicant stated that while on the night watch, he had little to no interactions with his rating chain or the command. This lack of interaction, he alleged, caused his rating chain to overlook many of his accomplishments during the month of April.

[2] Performance feedback by use of the Officer Support Form (OSF), Form CG5308, is the prescribed format for ensigns and lieutenants (junior grade). However, rating chains are strongly encouraged to provide timely performance feedback during and at the end of each reporting period for all officers. Rating chains are strongly encouraged to provide a copy of the completed OERs to reported-on officers prior to submission of the OERs to Commander (CG PSC).

¹² The description of duties in the disputed OER does not show a significant change in duties since his prior OER.

On August 11, 2016, the PRRB issued a split decision. Two members recommended that the OER be removed and replaced with a “Continuity OER”¹³ because one comment showed that the rating chain had considered performance that had occurred after the end of the evaluation period, which indicated that they had not fully followed the OES rules.¹⁴ These two members noted that the applicant had not shown that any other information in the OER was inappropriate, inaccurate, or unreliable but recommended removing the OER and the applicant’s 2015 non-selection for promotion. They did not explain why they recommended removing the entire OER instead of just the erroneous comment.

Two other members of the PRRB disagreed and stated that the only error identified by the PRRB was that one comment in block 8 of the OER addressed the applicant’s performance at the DEOMI training in May and June 2015, after the end of the evaluation period on April 30, 2015: “Superb representative of CG in DEOMI class; capitalized on opportunity to be only CG rep to DoD students & staff as future Equal Opportunity Advisory of CG; professional presence credited service.” These two members of the PRRB recommended that the comment be redacted because OER comments may not address performance that occurred outside the evaluation period but argued that the error did not justify removing the entire OER or the applicant’s non-selection for promotion in 2015. They noted that the rest of the OER was presumptively accurate and that the applicant had not submitted any evidence that proved otherwise.

In arriving at these recommendations, the PRRB received sworn declarations from the three officers on the applicant’s rating chain who had signed the OER:

- The applicant’s supervisor, a lieutenant commander and [REDACTED], stated that he had initially prepared a draft OER to provide input to the applicant’s new command so that the new command could prepare an OER that documented a full performance period, but he then learned that the new command was not comfortable evaluating the applicant as of June 30, 2015, because he had been away attending training in May and June, and so the Sector command determined that they needed to complete an OER. The supervisor stated that he had no reservations or doubts about the accuracy of the disputed OER and that he thought it was actually generous, although he admitted that because they discovered that they had to complete the OER in July 2015, they “were working on a short deadline.” The supervisor further stated that he doubts that the disputed OER caused the applicant’s non-selection, which he attributed to a derogatory mark and comment in a prior OER.¹⁵ He stated that the prior OER “will likely prevent any realistic chance of selection.”

¹³ A Continuity OER is an OER that includes only a description of the officer’s duties in block 2 and no performance marks or comments.

¹⁴ Article 5.A.7 f.(11) of the Officer Manual states that a rating chain shall not “[d]iscuss reported-on officer’s performance or conduct which occurred outside of the reporting period” in an OER.

¹⁵ On the applicant’s OER dated June 27, 2013, when he was an LTJG assigned to a 210-foot cutter, he received a below-standard mark of 3 for “Judgment,” which was supported by the comment, “Displayed rare lapse in judgment on watch as u/w OOD [underway Officer of the Deck] by allowing self to become distracted by presence/use of personal electronic device; lack of full attention to duties placed safe navigation of cutter at risk for brief, but unacceptable, period of time.”

- The applicant's Reporting Officer, who was a captain and the Deputy Sector Commander, stated that the disputed OER accurately reflects the applicant's performance, which he and the supervisor had had many opportunities to observe during the period. He stated that the applicant "performed adequately during the marking period, but did not make an effort to go above and beyond baseline expectations." He stated that initially, the supervisor had provided a draft OER to the applicant's next command, but when that command objected, they completed the OER for the three-month period they had observed his performance. He denied that the applicant's OER counseling was rushed. He noted that the OER had been optional under the rules and that he would not object if an OER dated June 30, 2015, was submitted instead.
- The OER Reviewer, a captain who was the Sector Commander, stated that he interacted regularly with the applicant pursuant to daily intelligence briefs, discussions, and analysis. The Sector Commander stated that the disputed OER was authorized, albeit not required; that the applicant had sufficient time to excel at his duties and was given opportunities to demonstrate his strengths in all of the performance dimensions during the three-month period; that he had been unaware that the supervisor had received a customer complaint but does not believe that it negatively affected the applicant's OER; and that the rating chain did consider the applicant's circumstances in preparing the OER and extended him "due credit and generous benefits of the doubt ... for performance during this timeframe." The OER Reviewer stated that he and the Deputy Sector Commander had discussed the OER at length, given its potential impact on the LT selection board, and that if they had erred at all, they had "erred on the side of generosity." He also stated that he would be fine with submitting a "shared OER" with the applicant's next command, as originally proposed, but that the disputed OER is fair and accurate.

The Director of Civilian Human Resources, Diversity, and Leadership approved the removal of the entire OER and its replacement with a Continuity OER. The Director also recommended that the case be referred to the BCMR with a recommendation to remove the applicant's second non-selection for promotion and to award him back pay and allowances if selected for promotion by the next board.

VIEWS OF THE COAST GUARD

On March 28, 2017, the Judge Advocate General submitted the Coast Guard's advisory opinion in which he recommended that the Board deny relief and adopted the findings and analysis provided in a memorandum on the case prepared by PSC.

PSC noted that under Article 6.B.13.a. of the Officer Manual, Commander, PSC may convene a Special Selection Board (SSB) for an officer whose record contained a material error when it was reviewed by a selection board.

PSC stated that the Board should deny relief because the only error identified by the PRRB in the applicant's record when it was reviewed by the LT selection board in September 2015 was the inclusion of the positive comment, "Superb representative of CG in DEOMI class;

capitalized on opportunity to be only CG rep to DoD students & staff as future Equal Opportunity Advisory of CG; professional presence credited service.” PSC argued that the applicant failed to substantiate his other allegations of error in the OER.

PSC stated that although only the erroneous comment should have been removed from the disputed OER, it has complied with the PRRB’s decision by replacing the disputed OER with a Continuity OER. However, PSC argued, there is no justification for removing the applicant’s 2015 non-selection for promotion. PSC stated that the inclusion of the erroneous comment in the OER does not warrant removing the non-selection because the comment is extremely positive and so was not “material” in the applicant’s non-selection. PSC noted that Article 6.B.13.e. states 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.” PSC argued that the inclusion of the positive comment did not meet that criterion. Therefore, PSC recommended that the Board deny the applicant’s request.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 26, 2017, the applicant responded to the views of the Coast Guard and disagreed with them. The applicant alleged that it is “common knowledge” that any personnel record with erroneous information prejudices the officer’s chance of promotion. He alleged that he did not have time to contest the disputed OER before the selection board convened.¹⁶

In response to PSC’s claim that the applicant had not substantiated any error other than the inclusion of the positive comment, the applicant claimed that the preparation of the OER and his OER counseling were rushed, that he had not received timely feedback, that the PRRB’s decision shows that the whole OER was erroneous, and that the change in plans regarding the end date for the OER without his knowledge violated policy. The applicant also argued that the replacement of the disputed OER with a Continuity OER by the PRRB was not unauthorized and that he is entitled to an SSB under Article 6.B.13. of the Officer Manual because the inclusion of the positive comment in the disputed OER was an administrative error. In addition, the applicant argued that his record should be reviewed by the next LT selection board convening in 2017.

APPLICABLE LAW AND POLICY

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--

¹⁶ COMDTINST M1000.3A does not authorize appeals of OERs. Instead, Article 5.A.7.e. authorizes an officer to submit an OER Reply for inclusion in his record within 21 days of receiving the final OER. The applicant did not submit an OER Reply within 21 days of receiving and being counseled on it on August 12 and 14, 2015, and the LT selection board convened 31 days later on September 14, 2015.

- (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 would have been applicable to the officer or former officer had the officer or former officer 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 the next higher 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 either an officer who was "considered but not selected for promotion to the next higher grade because of a material error in their record," or an officer who was "not considered *and* not selected for promotion to the next higher grade because of an administrative error." [Emphasis added.]

Article 6.B.13.c. states that an officer may submit a request for an SSB within one year of the announcement of the results of the selection board or, later, through the BCMR.

Article 6.B.13.e. states the following:

SSBs may be convened pursuant to 14 U.S.C. § 263 to consider or reconsider commissioned officers or former commissioned officers for promotion when one or more of the following occur:

- (1) An officer was not considered from in or above the promotion zone by a regularly scheduled selection board because of administrative error.
- (2) The Secretary determines that a selection board that considered an officer from in or above the promotion zone acted contrary to law or made a material error.
- (3) The selection board that considered an officer from in or above the promotion zone did not have before it some material information required to be presented to the board by Coast Guard policy.
- (4) The Coast Guard Board for Correction of Military Records (CG BCMR) or a federal court directs a SSB be convened.

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.¹⁷
2. The applicant alleged that his non-selection for promotion in 2015 was erroneous and unjust and asked the Board to remove it. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's

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

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.¹⁸ 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.”¹⁹

3. Although the applicant asked the Board to remove his 2015 non-selection for promotion, as it used to do pursuant to a test espoused in *Engels v. United States*, 678 F.2d 173 (Ct. Cl. 1982),²⁰ since the enactment of the Coast Guard’s SSB statute, 14 U.S.C. § 263, in 2012, the question before the Board in such cases is whether the applicant has proven by a preponderance of the evidence that he is entitled to an SSB under that statute and the implementing regulations in Article 6.B.13. of the Officer Manual. In *Richey v. United States*, 322 F.3d 1317, 1324 (Fed. Cir. 2003), the court stated, “In *Porter*[²¹] we held that once it is determined that the initial selection board’s decision ‘involved material administrative error,’ nothing in this statute [10 U.S.C. § 628, a similar SSB statute that applies to the other military services] requires the Secretary, acting through the Corrections Board, to make a harmless error determination.” The court stated that under 10 U.S.C. § 628, if a correction board (of the Army, Navy, or Air Force) finds that an officer’s record contained a “material administrative error” when it was reviewed by a selection board, the correction board should refer the matter to an SSB.

4. Title 14 U.S.C. § 263(b)(1) applies to cases in which a Coast Guard officer was, like the applicant, considered but not selected for promotion.²² It states that the Secretary may convene an SSB 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.” The Board finds that subparagraph (A)(i) does not apply because the applicant has not shown that the selection board itself acted in a way that was contrary to the laws governing selection boards. Nor does paragraph (B) apply because the applicant has not shown that the 2015 selection board did not have before it any material information that should have been in the record before that board. The only remaining consideration is whether the 2015

¹⁸ 33 C.F.R. § 52.24(b).

¹⁹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992).

²⁰ In *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), the court held that the Board must determine whether an applicant’s non-selection 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?” When an officer showed that his record was prejudiced before a selection board by error, “the end-burden of persuasion [fell] to the Government to show harmless— that, despite the plaintiff’s *prima facie* case, there was no substantial nexus or connection” between the prejudicial error and the non-selection. *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003), citing *Engels*, 678 F.2d at 175; *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005).

²¹ *Porter v. United States*, 163 F.3d 1304, 1318-19 (Fed. Cir. 1998) (rejecting the “but for” test for deciding whether a non-selection for promotion should be removed).

²² The Board notes that 14 U.S.C. § 263(a) applies only to officers who were not considered for promotion as a result of an administrative error.

LT selection board's decision not to select the applicant "involved material error of fact or material administrative error," pursuant to subparagraph (A)(ii).

5. Although the applicant argued that the disputed OER was prejudiced by many errors, the Board finds that the only proven error in his record when it was reviewed by the 2015 selection board was the inclusion in the OER of an extremely positive comment, "Superb representative of CG in DEOMI class; capitalized on opportunity to be only CG rep to DoD students & staff as future Equal Opportunity Advisory of CG; professional presence credited service." The applicant's positive performance during DEOMI training should not have been mentioned in the OER pursuant to Article 5.A.7.f.(11) of the Officer Manual because he attended that training in May and June 2015 after the evaluation period ended on April 30, 2015. With regard to the applicant's other arguments, the Board finds them unpersuasive as explained below:

a. The applicant alleged that the disputed OER documenting his transfer from the Sector was only optional and argued that it should have been completed as a regular OER dated June 30, 2015, because the Sector command had agreed with that plan. The Board finds, however, that the applicant transferred from and was no longer assigned to the Sector after April 30, 2015, and his new command in Connecticut acted properly and reasonably in refusing to sign an OER for the applicant dated June 30, 2015, given that they had not observed his performance before that date. The record shows that the applicant did not start performing his duties in Connecticut until July 2015 because, after leaving the overseas Sector on April 30, 2015, he attended DEOMI training in May and June 2015. Moreover, the disputed OER was authorized under Article 5.A.b.3. of the Officer Manual because both the applicant and his Reporting Officer were leaving the Sector on or about April 30, 2015. The applicant admitted that he provided input to his supervisor regarding his accomplishments during the evaluation period for the draft OER, which the supervisor sent to his new command on June 4, 2015. The applicant has not proven by a preponderance of the evidence that the change in the end date and shortening of the evaluation period for the disputed OER constituted an error or injustice.

b. The applicant alleged that his supervisor paid inadequate time and attention in preparing the OER and that his rating chain rushed the preparation of the OER and his OER counseling. The record shows, however, that after the applicant's departure on April 30, 2015, his supervisor prepared a draft OER with numerical marks and supporting comments to send to his new command by June 4, 2015, in accordance with Article 5.A.2.d.(2)(b)(9) of the Officer Manual. Then, after the OER was rejected by the new command in early July, his supervisor and other rating chain members took about a month to revise and sign the OER and sent it to him on August 12, 2015. The applicant was given two days to read the OER and was counseled about it for approximately an hour on August 14, 2015. The applicant could have but did not submit a timely OER Reply for inclusion in his record within twenty-one days, as authorized by Article 5.A.7.e. of the manual, and before the LT selection board convened a month later, on September 14, 2015. Given this timing, the Board finds that the applicant has not proven by a preponderance of the evidence that his rating chain's preparation of his OER was rushed in any way so as to cast doubt on its accuracy. The Board notes that each member of the rating chain has affirmed the accuracy of the OER in a sworn statement.

c. The applicant alleged that his supervisor failed to adhere to the goals of the OES concerning career development and feedback, as listed in Article 5.A.1.c. of the Officer Manual. Regarding career development, he argued that having his evaluation period end on June 30, 2015, would have improved his record and that the shortening of the evaluation period prevented his supervisor from being fully informed of his performance during the evaluation period. However, as noted in finding 5.a., above, the disputed OER's end date was authorized and appropriate under the Officer Manual, and the applicant's claim that the shortening of the evaluation period caused his supervisor not to be fully informed of his performance at the Sector is not credible. The applicant admitted that he submitted input documenting his achievements at the Sector before his supervisor prepared the draft OER, and his complaint is that he was not expressly encouraged to submit more input about his performance at the Sector after the evaluation period was shortened so as to include only his last three months at the Sector and not the weeks he was at DEOMI training following his transfer.

d. Regarding the OES goal of providing feedback, the Board notes that Article 5.A.1.c. of the Officer Manual states that providing feedback to an officer is a goal of the OES, including the feedback contained in the OERs. Article 5.A.2.d.(2)(b)[5] of the manual states that the supervisor shall “[p]rovide timely performance feedback to the reported-on officer upon that officer's request during the period, at the end of each reporting period, and at such other times as the supervisor deems appropriate.” And Article 5.A.1.c. notes that performance feedback “occurs whenever a subordinate receives advice or observations related to their performance” and may be formal or informal “through on-the-spot comments.” In light of these regulations, the rating chain's declarations, and the evidence that the applicant was counseled about the OER, the Board finds that the applicant has not proven by a preponderance of the evidence that the disputed OER is erroneous or unjust because of the alleged lack of performance feedback during the reporting period.

e. The applicant alleged that his rating chain did not consider his “extenuating circumstances” when preparing the disputed OER, which included having to prepare for his transfer to Connecticut and being unable to participate in operations he had helped plan. The record shows, however, that his rating chain was aware of his pending transfer, and he was allowed to submit OER input to tout his performance and accomplishments, such as his participation in planning operations. The applicant has not proven by a preponderance of the evidence that his rating chain failed to consider extenuating circumstances in preparing the disputed OER.

6. As noted above, the only error shown to have been in the applicant's record when it was reviewed by the LT selection board in September 2015 was the inclusion of the very positive comment, “Superb representative of CG in DEOMI class; capitalized on opportunity to be only CG rep to DoD students & staff as future Equal Opportunity Advisory of CG; professional presence credited service.” This comment was entered in the draft OER when the Sector command thought that the next command would submit an OER dated June 30, 2015, and it was not removed when the evaluation period was shortened to exclude the applicant's time away at

DEOMI training. Under 10 U.S.C. § 263(b)(1)(A)(ii), if the inclusion of this comment can be considered a “material error of fact” or a “material administrative error” and if the non-selection action (decision) “involved” this material factual or administrative error, the applicant is entitled to an SSB. While the applicant has not shown that the comment is factually erroneous, pursuant to Article 5.A.7.f.(11) of the Officer Manual, the inclusion of the comment was an administrative error.

7. To find that the inclusion of the very positive comment was “material” to and “involved” in the 2015 LT selection board’s non-selection decision, as required by 10 U.S.C. § 263(b)(1)(A)(ii), would be absurd, however. 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.” A very positive, factual OER comment, whose inclusion in an OER is entirely in an officer’s favor, cannot possibly be considered important to, necessary to, or influential in the applicant’s non-selection, and the selection board’s decision to not select the applicant cannot have “involved” the very positive comment. The Board finds, therefore, that the administratively erroneous inclusion of the very positive, factual comment about the applicant’s performance at DEOMI training was neither “material” to nor “involved” in the LT selection board’s action—its non-selection of the applicant. Therefore, the applicant is not entitled to an SSB under the statute.

8. Nor does the Coast Guard’s interpretation of the SSB statute in Article 6.B.13. of the Officer Manual entitle the applicant to an SSB. Because the applicant was “considered but not selected for promotion” in 2015 (rather than “not considered and not selected”), Article 6.B.13.a. requires a “material” error, as does the statute, not just any administrative error. But as explained in finding 7, the inclusion of a very positive, factual comment in an OER, even if administratively erroneous, cannot be considered “material” to a selection board’s decision not to select an officer for promotion.

9. Accordingly, the Board finds that the applicant has not proven by a preponderance of the evidence that his record contained a material factual error or a material administrative error that was involved in the 2015 LT selection board’s action (decision) not to select him for promotion. Therefore, he is not entitled to an SSB under 14 U.S.C. § 263 or COMDTINST M1000.3A. No relief is warranted.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

June 23, 2017

