

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2017-083**

 CWO

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**FINAL DECISION**

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on February 16, 2017, and assigned it to staff attorney V. Steven to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated December 1, 2017, 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 chief warrant officer (CWO), asked the Board to correct his record by changing his date of promotion from CWO2 to CWO3 to what it would have been had he been selected in 2015 by the Promotion Year (PY) 2016 CWO3 selection board. He stated that after he learned he was not selected for promotion, he had a counseling appointment with an Office of Personnel Management (OPM) counselor. The applicant stated that the counselor reviewed his record and "could find no definitive reason why [he] had not been selected for promotion." The applicant then reviewed his Officer Evaluation Reports (OERs) and determined that his performance was not accurately measured in his OER dated June 30, 2015. He submitted an application to the Personnel Records Review Board (PRRB) requesting that his marks be raised in the performance categories<sup>1</sup> Results/Effectiveness, Professional Competence, and Workplace Climate, and that his mark on the Comparison Scale be raised.<sup>2</sup> The PRRB found that the OER was inaccurate and raised the marks in Results/Effectiveness and Professional Competence from 6s to 7s (the highest possible mark).

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<sup>1</sup> In OERs, officers are evaluated in eighteen performance categories, such as "Professional Competence," "Teamwork," "Initiative," and "Responsibility," on a scale of 1 (worst) to 7 (best).

<sup>2</sup> The comparison scale on an OER form is not actually numbered, but as with the performance categories, there are seven possible marks on the scale from the first ("performance unsatisfactory for grade or billet") to the seventh ("BEST OFFICER of this grade"). A Reporting Officer assigns the Reported-on Officer a mark on the comparison scale by comparing him with all other officers of the same rank whom the Reporting Officer has known throughout his career.

The applicant argued that he would have been selected for promotion in 2015 by the PY 2016 CWO3 selection board had that board seen the corrected OER. He stated that the corrected OER was seen by the PY 2017 selection board, which did select him for promotion in 2016. Therefore, he asked the Board to backdate his promotion to what it would have been had he been selected for promotion in 2015 and to award him back pay and allowances. In support of his application, the applicant provided several documents, which are described below in the Summary of the Record.

**SUMMARY OF THE RECORD**

The applicant enlisted on [REDACTED] and was appointed a CWO on [REDACTED]. He has received several awards, including three Commendation Medals for his performance as an enlisted member. On his June 2013 OER, he received primarily marks of 5 and 6 in the various performance categories and a mark in the fifth spot on the comparison scale, indicating that he was among the better of “the many competent professionals who form the majority of this grade.” On his June 2014 OER, he received primarily marks of 6 in the performance categories and another mark in the fifth spot on the comparison scale.

The disputed OER covers the period June 27, 2014, to June 30, 2015. It was validated by OPM on August 19, 2015. The marks he originally received are below (the disputed marks are shaded).

#	CATEGORY	MARK
3a	Planning and Preparedness	6
3b	Using Resources	6
3c	Results/ Effectiveness	6
3d	Adaptability	6
3e	Professional Competence	6
4a	Speaking and Listening	6
4b	Writing	5
5a	Looking Out for Others	6
5b	Developing Others	6
5c	Directing Others	6
5d	Teamwork	6
5e	Workplace Climate	4
5f	Evaluations	5
8a	Initiative	6



8b	Judgment	6
8c	Responsibility	6
8d	Professional Presence	6
8e	Health & Well-Being	5
9	Comparison Scale	5

In October 2015, the applicant was not selected for promotion to CWO3.

### *PRRB Proceedings*

On April 15, 2016, the applicant applied to the PRRB asking that three numerical marks and the comparison scale mark be raised. The PRRB solicited and received declarations from the applicant's rating chain. The first was from CDR M, the applicant's direct Supervisor. CDR M's declaration, dated May 11, 2016, states the following:

I positively endorse the member's request for Officer Evaluation Report Correction. The information submitted at this time along with a comparison of his work with peers across the District substantiates an increase in the marks for the performance categories of Results/Effectiveness, Professional Competence, and Workplace Climate. Based upon my experience, I agree that the mark of "5" in the officer comparison scale is not consistent with the marks given on this particular evaluation. The evaluation marks average is a 5.72 (without elevating 3 dimensions requested), which in my opinion translates to a "6" or "An Exceptional Officer" on the officer comparison scale. [The applicant] is an extremely competent marine inspector with an outstanding work ethic and excellent interpersonal skills.

At the request of the PRRB, CDR M provided a second declaration, dated September 6, 2016, in which he stated that the applicant had submitted an Officer Support Form (OSF) with performance input for the disputed OER. CDR M stated that the OSF was "very thorough and contained many of the elements addressed in the PRRB application; however, it did not contain all of the additional justification provided by the Applicant for all identified blocks in his PRRB application." He added that at the time he prepared the OER, he considered the marks received by the applicant to be "very good overall," but after discussing OER marks with his counterparts within the District, he realized the OER had "missed the mark on many...performance dimensions including the marks [the applicant] has requested to be changed (i.e. the unit was marking low and had been for years)." He reiterated that in his opinion, the request should be granted.

The third declaration, dated May 3, 2016, was from CDR S, the applicant's Reporting Officer. CDR S stated that she did not believe the applicant's OER should be changed after he complained when he was not promoted. He was counseled about the marks before the OER was validated, and he had the opportunity to submit an OER reply. She stated that since several members of the unit had not been promoted, they were all trying to have their OER marks changed. She stated that this was not in accordance with policy and sets a bad precedent. CDR S specifically addressed the applicant's Workplace Climate mark. She stated that she had discussed this mark "at length" with the applicant's Supervisor after there had been negative attitudes towards a policy change and the behavior permeated the climate at the unit. The applicant's mark in Workplace

Climate was “fully discussed and it was agreed that a mark of 4 was appropriate due to the poor behavior displayed.” Ultimately, CDR S did not endorse any changes to the applicant’s OER and stated that all of the marks appropriately reflected his performance and that policy had been followed.

On September 19, 2016, the PRRB issued a decision granting partial relief. The PRRB consisted of four members, including the PRRB President, who reached a split decision and the recommendation to grant relief was approved. The PRRB considered applicable policy, the applicant’s declaration, the disputed OER, and the declarations summarized above. The applicant had specifically claimed that the “justifications submitted in his application were not accounted for in his OER.”

The prevailing members of the PRRB found that the applicant had proved his claims after comparing the information contained in the application against the disputed OER. They noted that the second declaration from CDR M was solicited specifically requesting “further explanation regarding the Applicant’s numerical marks for the Results/Effectiveness and Professional Competence blocks.” They pointed out that CDR M admitted that the applicant’s OSF was very thorough and he agreed that the applicant’s marks “should be increased as requested.” They concluded that CDR M was “essentially” stating that the justifications the applicant had provided to increase the marks in these two categories were included in the applicant’s OSF at the time the OER was prepared and that CDR M had admitted unequivocally that he and unit had erred in marking the applicant’s OER. Therefore, these two members deduced that “his supervisor overlooked some of the information contained in the OSF” when preparing the OER. “Whether viewed as an error or injustice, it was his supervisor’s oversight and the unit’s failure to mark appropriately for the ‘Results/Effectiveness’ and ‘Professional Competence’ categories that led to those sections being incorrect or irregular records.” Because the applicant provided “clear and convincing evidence” that substantiated an error or injustice in his OER, two of the members recommended that the marks in these two categories be raised from 6s to 7s and that no other relief be granted.

Two members dissented and recommended that no relief be granted. These members, including the PRRB President, found that the OER had been completed in accordance with policy. They noted that it was the rating chain’s responsibility to ensure that the applicant was marked based on his observed performance during the period. After the applicant was not selected for promotion, the rating chain “discussed marks with other units and decided that they had marked the Applicant low compared to other units.” These members found that this was “a clear violation” of policy,<sup>3</sup> which “clearly prohibits rating officials from comparing the Applicant’s performance with those of other members, units, or different periods.” The dissent argued that the applicant did not provide any evidence to substantiate a specific error in the marks on his OER and that he had not rebutted the presumption of regularity in his record. They concluded that the declarations from members in his rating chain clearly show that he was marked fairly in the disputed OER and recommended that no changes should be made.

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<sup>3</sup> PSCINST M1611.1B, Article 2.E.4.b., states that a supervisor must ensure that he compares an officer’s performance against the written standards on the OER form and *not* against other officers or the same officer in a previous reporting period.



The PRRB recommendations were reviewed by the Director of Civilian Human Resources, Diversity and Leadership, who approved the recommendation to grant relief on September 19, 2016.

### *After the PRRB*

In the applicant's OER for the period July 1, 2015, to June 30, 2016, he received all marks of 6 and 7 with one mark of 5 in "Evaluations." He received a mark in the sixth spot on the Comparison Scale, denoting an "exceptional officer." He was selected for promotion to CWO3 in October 2016 by the PY 2017 selection board. He was promoted on [REDACTED] His latest OER contains only 6s and 7s and the highest mark on the Comparison Scale.

### **VIEWS OF THE COAST GUARD**

On July 14, 2017, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. The JAG noted that the applicant's disputed OER has previously been reviewed by the PRRB and was thereafter amended. The applicant was then selected for promotion by the PY 2017 Selection board. The JAG stated that although the PRRB "did find and correct an error in the applicant's record," the Coast Guard did not view "this error to be prejudicial or material."

The JAG noted that from CDR M's declarations it was unclear if he had compared the applicant's performance with that of other officers, which is disallowed by policy, or if he had compared the standards for evaluating the applicant with those of other units and then realized he had been incorrectly applying the standards. This uncertainty is what caused a divide amongst the PRRB members. Although the recommendation to grant relief ultimately became the PRRB's decision, the JAG noted that two members, including the PRRB President, found that CDR M had violated policy by comparing the applicant to other officers. The JAG stated that if the PRRB's decision "is accepted by the BCMR, then the applicant would be entitled to relief upon a showing of material error. The question before the Board is whether the correction of the applicant's record amounts to a material error and would therefore merit some form of relief."

The JAG stated that because the applicant is a CWO, the statute establishing Special Selection Boards for Coast Guard officers, 14 U.S.C. § 263, does not apply.<sup>4</sup> The JAG therefore noted that the two-part *Engels* test should be used to determine whether to grant relief.<sup>5</sup> The first part places the burden on the applicant to show that his record is prejudiced by the error. If this showing is made, the second part switches the burden to the Coast Guard to prove that the applicant would not have been promoted had the error not been present in his record. The JAG argued that the first prong was not met because "the slight change in the applicant's OER marks" was not so prejudicial as to entitle him to relief. The JAG stated that both a 6 and a 7 are exceptional scores and the impact of the change does not carry the same weight as if the score had been changed from

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<sup>4</sup> 14 U.S.C. § 263 established Special Selection Boards for Coast Guard officers considered for promotion under Section 251. Section 251 applies only to selection boards for promotion to the rank of Lieutenant Junior Grade (LTJG) through Captain, which does not include CWOs. Nor does 10 U.S.C. § 628, which authorizes SSBs for all DoD officers, including warrant officers, apply to the Coast Guard because it is not a "military department" for the purposes of Title 10 as that term is defined at 10 U.S.C. § 101.

<sup>5</sup> *Engels v. United States*, 678 F.2d 173 (Ct. Cl. 1982).

a 4 to a 7, for example. The JAG therefore argued that difference between marks of 6 and marks of 7 is so slight that the error corrected by the PRRB should not be considered material or prejudicial. It is not the “intention of the Coast Guard” to allow “any minor error in a member’s record to entitle that member to relief.” If the Board were to find that his record had been prejudiced, the JAG argued that the applicant did not meet the second prong because he did not prove that but for the error it was likely he would have been promoted.

The JAG also noted that Coast Guard policy prohibits convening a Special Selection Board for officers when “minor commendatory data or awards are omitted” or if the record was substantially complete and correct.<sup>6</sup> While the JAG again acknowledged that Special Selection Boards are not authorized for CWOs, he argued that a similar conclusion can be drawn in that the applicant’s record “was still substantially complete and the change in commendatory information was minor.” The JAG stated that for the CWO PY 2016 selection board, 190 candidates were considered and 171 were promoted. The JAG noted that this amounts to a 90% promotion rate and argued that it was not likely that a “slight adjustment” in two OER categories would have significantly affected the outcome. In addition, the JAG argued that the applicant’s record was “substantially different” before the CWO PY 2017 selection board because of the inclusion of an additional OER. Therefore, the addition of an OER or the candidate pool likely caused the applicant’s selection for promotion, the JAG claimed. The JAG therefore recommended that the Board deny relief because the applicant did not prove that his record was prejudiced or that he would have been selected for promotion if not for the error.

#### **APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On July 24, 2017, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within thirty days. After being granted an extension, the applicant submitted his response on October 9, 2017.

The applicant alleged that the JAG admitted that the first part of the *Engels* test had been met, and he argued that the second part of the *Engels* test is in fact satisfied as well. He provided another member’s OER from the same period, who was stationed at the same department, who had the same marking officials, and who was selected for promotion to CWO3 by the PY 2016 Selection board. The applicant also provided a comparison chart (included below) and noted that the promoted member’s OER numerical total was 102 whereas his erroneous OER’s total was 103 and the corrected total would have been 105. He stated that this comparison shows “just how even the evaluations were and emphasizes the competitive nature of the selection process.”

The applicant specifically disagreed with the JAG’s contention that the change from a 6 to a 7 does not constitute a material error that would entitle him to relief. He argued that a 7 is the highest mark on an OER and “shows a mastery of the particular dimension” whereas a 6 indicates that there is room for improvement. The promoted member’s OER contained no 7s, but the applicant’s corrected OER contained two 7s “that would clearly have weighted the selection process” in his favor. The applicant stated that in accordance with *Engels*, the Coast Guard “failed to prove conclusively that had [his] record been untainted [he] would not have been promoted.”

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<sup>6</sup> Officer Accessions, Evaluations, and Promotions, COMDTINST M1000.3A, Article 6.B.13 f.(5)(b); Article 6.B.13 f.(6).

The applicant also responded to the JAG's statements regarding his supervisor's declarations. He stated that CDR M's initial statement, dated April 1, 2016, was inconsistent with the statements dated May 11, 2016, and September 6, 2016. The original statement "made no mention of discussing evaluations with counterparts or violating policy by comparing evaluations." He stated that a declaration from the unit's Commanding Officer dated July 8, 2016, approved of all four requested changes based on the merit of the applicant's performance and not based on comparing evaluations, which was consistent with the supervisor's first statement. He claimed that the inconsistent statements of CDR M "further the possibility that the disclosed error may actually have been great and further relief should have been granted by the PRRB." Given the comparison between his and the promoted member's OER, the additional declarations, and the JAG's admission that his record contained an error, the applicant argued that both parts of the *Engels* test had been met and that relief should be granted.

With his response to the Coast Guard's advisory opinion, he provided an declaration from CDR M dated April 1, 2016, that is largely identical to his May 11, 2016 declaration. The only difference to the substance of the declarations was an addition to the May 11, 2016, version and is italicized here: "I positively endorse the member's request for Officer Evaluation Report Correction. The information submitted at this time *along with a comparison of his work with peers across the District* substantiates an increase in the marks..."

The applicant also provided a signed declaration from Captain M, the applicant's Commanding Officer, dated July 8, 2016. His statement reads:

I concur with his recommendations that marks under performance dimensions results/effectiveness and professional competence be changed from 6 to 7. The activity level that he demonstrated and impacts made by his actions yielded superior results. Likewise, he completed three competencies during the period for a total of six during his apprentice tour, well above that expected of an apprentice. Also, despite his being an apprentice, I designated him as a verifying officer to verify the competence of other inspectors for qualification, a duty normally assigned to journeymen (second tour) marine inspectors. As a result he was instrumental in helping to qualify several marine inspectors increasing the unit and Coast Guard's readiness.

As for workplace climate, I agree that a mark of "5" is deserved. He positively contributed to the professional development of junior officers as noted and certainly weighed heavily on my decision to liberalize the unit's out of bounds policy to be more sensitive to crew challenges.

Finally, I concur that the appropriate comparison mark for this officer during the period under review should have been noted as "AN EXCEPTIONAL OFFICER" due to the marks assigned and the supplemental comments within the OER.

The applicant provided a copy of another member's OER for the same period, CWO M. The applicant's primary duty on the disputed OER is "Marine Inspector – Apprentice" whereas CWO M's primary duty is "INV Officer." Both members were at the same unit with the same rating chain. Below is the comparison chart provided by the applicant.



#	CATEGORY	CWO M's Marks	Applicant's Original Marks	Applicant's Corrected Marks
3a	Planning and Preparedness	6	6	6
3b	Using Resources	6	6	6
3c	Results/ Effectiveness	5	6	7
3d	Adaptability	6	6	6
3e	Professional Competence	6	6	7
4a	Speaking and Listening	6	6	6
4b	Writing	5	5	5
5a	Looking Out for Others	6	6	6
5b	Developing Others	6	6	6
5c	Directing Others	6	6	6
5d	Teamwork	6	6	6
5e	Workplace Climate	5	4	4
5f	Evaluations	5	5	5
8a	Initiative	5	6	6
8b	Judgment	6	6	6
8c	Responsibility	6	6	6
8d	Professional Presence	6	6	6
8e	Health & Well-Being	5	5	5
9	Comparison Scale	5	5	5
	<b>TOTAL MARKS</b>	102	103	105

### 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 was timely.



2. The applicant alleged that his date of rank is erroneous and asked the Board to backdate his promotion to CWO3 to what it would have been had he been selected for promotion by the PY 2016 selection board. 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.<sup>7</sup> 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."<sup>8</sup>

3. The applicant was selected for promotion to CWO3 in 2016 by the PY 2017 selection board after the PRRB had raised two of his marks on his 2015 OER from 6s to 7s.<sup>9</sup> He asked the Board to backdate his CWO3 date of rank to what it would have been had he been selected for promotion in 2015 by the PY 2016 selection board. Because CWOs are not entitled to Special Selection Boards under 14 U.S.C. § 263 or 10 U.S.C. § 628,<sup>10</sup> the Board must apply the *Engels* test to determine whether to remove his 2015 non-selection and backdate his date of rank.<sup>11</sup> Under *Engels*, to determine if the applicant is entitled to relief, the Board must answer the following 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 [he] would have been [selected for promotion in 2015] in any event?"<sup>12</sup> 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 failure of selection.<sup>13</sup> To grant relief, 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."<sup>14</sup>

4. The Board finds that the applicant has proven by a preponderance of the evidence that his record was prejudiced by errors when it was reviewed by the PY 2016 CWO3 selection board, and so the first question in the *Engels* test must be answered affirmatively. The applicant alleged and the PRRB found that his 2015 OER erroneously contained marks of 6, instead of 7, for the performance categories Results/Effectiveness and Professional Competence. These allegations of error are based on statements submitted by the applicant's supervisor dated in 2016,

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<sup>7</sup> 33 C.F.R. § 52.24(b).

<sup>8</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

<sup>9</sup> The Board notes that the applicant did not ask the Board to raise his mark for Workplace Climate or his Comparison Scale mark. Given his Reporting Officer's declaration, the preponderance of the evidence in the record does not show that these marks are erroneous.

<sup>10</sup> 14 U.S.C. §§ 263, 215 (authorizing SSBs only for officers in grades LTJG through Captain); 10 U.S.C. §§ 101, 628 101 (authorizing SSBs for the "military departments," which are defined as the Departments of the Army, Navy, and Air Force).

<sup>11</sup> *Quinton v. United States*, 64 Fed. Cl. 118, 125 n3 (2005) (noting that the Board correctly applied the *Engels* because the SSB statute did not apply and so did not supersede *Engels*).

<sup>12</sup> *Engels*, 678 F.2d 173, 176 (Ct. Cl. 1982).

<sup>13</sup> *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003), citing *Engels v. United States*, 678 F.2d at 175; *Quinton v. United States*, 64 Fed. Cl. at 125 (2005).

<sup>14</sup> *Engels v. United States*, 678 F.2d at 175.

after the applicant was not selected for promotion. The Board notes that “retrospective reconsideration [by a rating official] of an OER is not a basis for correction.”<sup>15</sup> If the supervisor decided that the applicant’s marks should be raised after completing the OER and without receiving any new information regarding the applicant’s performance, then the supervisor’s recommendation to raise the OER marks was presumably motivated by the applicant’s non-selection, rather than new information. “Retrospective reconsideration” by rating officials based on an officer’s non-selection for promotion is not grounds to find that the original marks were erroneous.

The Board, however, is not convinced that the supervisor’s recommendation is based only on retrospective reconsideration. In his first declaration, dated May 6, 2016, the supervisor indicated that he had reviewed the applicant’s PRRB application and that “[t]he information submitted at this time along with a comparison of his work with peers across the District substantiates an increase in the marks for the performance categories of Results/Effectiveness, Professional Competence, and Workplace Climate.” Although, as the JAG argued, the supervisor should not be comparing the applicant with his peers in assigning marks,<sup>16</sup> this declaration does show that the supervisor based his recommendation for higher marks at least in part on new “information submitted at this time.” Likewise, in his second declaration, dated September 6, 2016, the supervisor wrote that the applicant’s input for the OER had been “very thorough and contained many of the elements addressed in the PRRB application; however, it did not contain all of the additional justification provided by the Applicant for all identified blocks in his PRRB application.” This statement also shows that in the material that the applicant submitted to the PRRB, the supervisor had found “additional justification” supporting higher marks—i.e., new information or information he had not previously considered when assigning the applicant’s marks.

The JAG admitted that the PRRB “did find and correct an error” but argued that the difference between two marks of 6 and marks of 7 is so slight that the error corrected by the PRRB should not be considered prejudicial. The JAG did not cite any evidence or case law supporting this claim. The JAG argued that the difference in the marks should not be considered prejudicial because it was so slight that it would not have caused his non-selection, but submitted no evidence supporting this argument. Moreover, the JAG’s argument conflates the two questions of the *Engels* test. Whether an error might have caused a non-selection is considered only in the second prong. The first prong examines only whether the “record [was] prejudiced by the errors *in the sense that the record appears worse than it would in the absence of the errors.*”<sup>17</sup> (Emphasis added.) The Board finds that the errors (two marks of 6 instead of 7) clearly made the applicant’s record appear “worse,” even if only slightly so. Lower marks are clearly “worse” than higher marks—even if the lower marks are excellent marks—and these lower marks appeared in the applicant’s most recent OER when it was reviewed by the PY 2016 CWO3 selection board. Therefore, the errors in the 2015 OER were prejudicial, and the applicant has met the first prong of the *Engels* test.

5. The Board also finds that it is *not* unlikely that the applicant would have been selected for promotion in October 2015 with two more highest-possible marks of 7 in his most

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<sup>15</sup> Decision of Deputy General Counsel in BCMR Docket No. 84-96; *see also Paskert v. United States*, 20 Cl. Ct. 65, 75 (1990); *Tanaka v. United States*, 210 Ct. Cl. 712 (1976); and BCMR Docket Nos. 67-96, 189-94, 24-94, 265-92, and 311-88.

<sup>16</sup> Officer Accessions, Evaluations, and Promotions, COMDTINST M1000.3A, Article 5A.1.b.(2)(c).

<sup>17</sup> *Engels*, 678 F.2d at 176.

recent OER, and so he has met the second prong of the *Engels* test. With regard to this prong, the Coast Guard argued that “the applicant has not shown that, but for the error, it is likely that he would have been promoted.” However, a “but for” test may not be applied in such cases.<sup>18</sup> If an applicant meets the first prong of the *Engels* test, in assessing the second prong, the burden shifts to the Coast Guard to show that it is unlikely that the applicant would have been selected for promotion in any event.<sup>19</sup> The JAG argued that the change of two marks from 6s to 7s was correction of a “minor error” and does not entitle the applicant to relief, but this argument is not evidence that it was actually unlikely that the applicant would have been promoted if the two marks had been correct before the PY 2016 CWO3 selection board. In fact, there is no negative entry in the applicant’s record that made his selection for promotion unlikely “in any event,” and as the JAG pointed out, the PY 2016 CWO3 selection board had a 90% selection rate. The Board therefore agrees with the applicant that the Coast Guard did not prove that it was unlikely that he would have been selected for promotion in 2015 even if there had been no prejudicial errors in his record.

6. Both prongs of the *Engels* test have been met, and so the applicant is entitled to relief. His CWO3 date of rank should be backdated to what it would have been had he been selected for promotion by the PY 2016 CWO3 selection board in 2015, and he should receive corresponding back pay and allowances.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

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<sup>18</sup> *Christensen v. United States*, 60 Fed. Cl. 19, 23 (Fed. Cl. 2004), citing *Sanders v. United States*, 594 F.2d 804, 816 (Ct. Cl. 1979).

<sup>19</sup> *Christian*, 337 F.3d 1338, 1343 (Fed. Cir. 2003), citing *Engels*, 678 F.2d 173, 175 (Ct. Cl. 1982); *Quinton*, 64 Fed. Cl. 118, 125 (2005).



**ORDER**

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

The Coast Guard shall backdate his CWO3 date of rank to what it would have been had he been selected for promotion in 2015 by the PY 2016 CWO3 selection board and shall pay him any back pay and allowances he is due as a result of this correction.

December 1, 2017

