

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2017-087**

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**FINAL DECISION**

This proceeding was conducted according to the provisions of section 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the application on February 11, 2017, and assigned it to staff attorney ██████████ to prepare the decision for the Board as required by 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 lieutenant commander (LCDR), asked the Board to correct his record by raising six marks of 4 he received on his Officer Evaluation Report (OER) dated April 30, 2013.<sup>1</sup> Specifically, he requested the following:

- Raise the mark in Professional Competence from 4 to 6;
- Raise the mark in Speaking and Listening from 4 to 6;
- Raise the mark in Writing from 4 to 6;
- Raise the mark in Workplace Climate from 4 to 6;
- Raise the mark in Judgment from 4 to 5; and
- Raise the mark in Responsibility from 4 to 5.

The applicant, through counsel, stated that the marks of 4 on the disputed OER are inconsistent with the comments and award received during the period. He specifically noted that he was not requesting removal or modification of any of the comments in the OER, as they are all "laudatory and support the higher marks." The applicant explained that he received the disputed OER while serving overseas. He argued that the comments in the OER do not align with the

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<sup>1</sup> On an OER form, CG-5310B, officers are rated in 18 performance categories on a scale of 1 (worst) to 7 (best). An officer's Supervisor enters the marks and supporting comments for the first 13 categories, and the Reporting Officer enters the marks and supporting comments for the final 5 categories, as well as the comparison scale mark.

marks of 4, which should have been corrected prior to approval. For each of the six dimensions, the applicant emphasized certain comments which he claimed supported a mark higher than 4 (see attached brief). The applicant also pointed out certain comments on a recommendation for the Meritorious Service Medal (see attached). He noted that according to applicable Coast Guard policy, comments should “amplify and be consistent with the numerical evaluations,” which did not occur in this OER.

Regarding the timing of his application, the applicant acknowledged that he did not submit this request within three years of the OER date. He stated that although the OER is dated April 30, 2013, it was not validated until February 7, 2014, and his application was submitted within three years of that date. In addition, he stated that he was upset about the marks when he originally received the OER, so he requested career counseling through OPM, the Officer Personnel Management division of the Personnel Service Center. He claimed that two different OPM employees advised him not to appeal the marks “until the results of the next promotion board were released.” According to the applicant, the employees told him that he had a strong track record and this OER may “show up as a blip” and that hiring an attorney may be a waste of money. After he learned that he was not selected for promotion to Commander by the promotion board in July 2016, he sought out counsel and submitted this application in early 2017. The applicant stated that he is not requesting a direct promotion or “do over,” but he believes the erroneous OER caused his non-selection, and he submitted ALCGPSC 096/16, which shows that he was not selected by the CDR selection board in July 2016.

In support of his application, the applicant submitted relevant documents which are described below in the Summary of the Record. He also provided a letter to the Board which he personally wrote. He reiterated his request that the Board raise six marks of 4 on his April 30, 2013, OER because he felt that the marks are impeding his promotion. He stated that at the time the OER was being prepared, he was still overseas and he was “highly upset” by the low marks because he felt his “performance was significantly higher than what was being captured on the OER.” He expressed his concerns to his chain of command at the time, but his concerns were dismissed. He alleged that he was told that he should be pleased with these marks on his first O-4 OER as it gives him “room to show improvement.” The applicant gave an overview of some of the tasks he performed and the ways in which he represented the Coast Guard during the OER period.

The applicant stated that upon returning stateside and settling into his new duty station, he realized that over ninety days had elapsed since he signed the OER on April 30, 2013, and he had not yet received the validated OER from OPM. He alleged that he contacted his previous chain of command multiple times and was ignored. He then contacted OPM to request that OPM intercede on his behalf to obtain the completed OER. The OER was validated on February 7, 2014, almost one year after the OER date and well past the forty-five day timeline imposed by OPM. He stated that he was disappointed that Coast Guard policies were not properly followed throughout the process, not only in that it took nearly a year for the OER to be validated but also in that he was forced to sign the OER before it was completed and before his chain of command had signed it. As a result, he did not know what his final marks or comments were until he received the validated OER in February 2014. For this reason and because he feels the comments do not align with the marks of 4, he asked the Board to grant his request.

In support of his application, the applicant also provided a memorandum dated December 16, 2016, from Captain B of the applicant's current unit. In the memorandum, Captain B stated that he "support[s the applicant's] effort to correct an Officer Evaluation Report from 10 April 2012 to 30 April 2013."

### SUMMARY OF THE RECORD

The applicant was commissioned on [REDACTED]. He has received many awards and letters of commendation. Other than the OER in question, he has consistently received excellent OERs. On March 19, 2013, he was recommended for a Meritorious Service Medal for his performance during the period April 10, 2013, to May 15, 2013, which was awarded on August 5, 2013. (See attached recommendation.)

The disputed OER covers the period of April 10, 2012, to April 30, 2013, when the applicant was assigned [REDACTED] (See attached.) The applicant's Supervisor, Captain S (then a commander), assigned the first thirteen marks, including the marks for Professional Competence, Speaking and Listening, Writing, and Workplace Climate. His Reporting Officer, Captain B, assigned the last five marks, including the marks for Judgment and Responsibility.

### 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 grant relief in accordance with the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC stated that although the application is considered timely because the applicant is still on active duty, he received the disputed OER over four years ago and did not provide sufficient justification for his delay.<sup>2</sup> The applicant's rating chain has since retired or is unavailable to provide input, which has prejudiced the Coast Guard "in locating critical evidence." PSC also noted that the applicant did not pursue all of the available administrative remedies in order to have his OER corrected. He did not file a Reported-on Officer Reply as authorized by policy; nor did he submit an application to the Personnel Records Review Board as authorized within one year of the alleged error.

Despite members of the applicant's chain of command having retired, PSC was able to solicit a statement from three members. PSC noted that the applicant's supervisor at the time, Captain S, had assigned the first thirteen marks with supporting comments on the disputed OER. Captain S stated that he only supervised the applicant for a short period and had asked the outgoing supervisor for a draft OER in accordance with policy, but never received one. PSC stated that this violated the Officer Accessions, Evaluations, and Promotions manual, COMDTINST M1000.3 (hereinafter "Officer Manual"), Article 5.A.2.d.(2)(j), which states that the outgoing

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<sup>2</sup> *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

supervisor must provide the incoming supervisor with a draft OER when the supervisor changes during a reporting period. Captain S also stated that after he submitted his original OER draft to the Reporting Officer, Captain B, Captain B strongly objected to some of the marks he had assigned as being too high. Captain B “was very adamant about the scores being too high and derided [Captain S] for arguing the point.” PSC argued that this violated the Officer Manual, Article 5.A.2.e.(2)(c), which states that a Reporting Officer “shall not direct that an evaluation mark or comment be changed.” PSC therefore found that the applicant’s April 30, 2013, OER was not completed in accordance with policy because the outgoing supervisor did not provide Captain S with a draft OER and the Reporting Officer, Captain B, pressured the applicant’s supervisor, Captain S, to lower the original marks.

PSC therefore recommended that the applicant’s April 30, 2013, OER reflect the following changes in accordance with Captain S’s recommendation:

- Raise the mark in Professional Competence from 4 to 6;
- Raise the mark of Speaking and Listening from 4 to 6;
- Raise the mark in Writing from 4 to 5;
- Raise the mark in Workplace Climate from 4 to 6;
- Raise the mark in Judgment from 4 to 5; and
- Raise the mark in Responsibility from 4 to 6.

PSC provided three statements from members of the applicant’s chain of command. The first was from Captain S, who retired in July 2014 and was the applicant’s direct supervisor from March to April 2013. During this period, the applicant spent some time [REDACTED] preparing for his upcoming transfer and attended training for two or three weeks. Captain S stated that Commander M had been the applicant’s direct supervisor for the prior six months. When Commander M left, he left “no notes or any draft of an OER covering the time he supervised” the applicant. Captain S “made numerous requests” to Commander M for a draft OER, but all of his emails were ignored. Captain S stated that he “eventually” got one email from Commander M, in which he stated that the OER was now Captain S’s responsibility. Captain S was ordered by Captain B to complete the OER for the applicant, despite the fact that the only input he had was from the applicant himself and that he had only worked with the applicant for three or four weeks of the reporting period. The applicant had provided Captain S with input, comments, and supporting documents.

To the best of his recollection, Captain S stated, the applicant and Captain B had always had tension between them, which only grew during the applicant’s remaining time [REDACTED]. The applicant had expressed concern that Commander M would not be completing the OER, as Commander M had the most experience with the applicant during the OER period. Captain S instructed the applicant to speak to Captain B, who dismissed the applicant’s concerns and stated that the “OER would go forward as he...directed.” Captain S submitted his original draft to Captain B who then objected to some marks as “being too high and not commensurate with [the applicant’s] work.” Captain S “argued that from the time [he] spent with [the applicant] he was a solid officer who cared about the service and the program.” Captain B was adamant that the scores were too high and derided Captain S for “arguing the point when he [Captain B] had had the time to properly observe [the applicant] and had the insight into his overall performance.”

Captain S stated that he consented to the marks being lowered because he felt that he did not have the evidence to dispute Captain B. Captain S stated that he does not remember specifically which dimensions were lowered but that the marks as they stand “do not seem to be in alignment with what [he] thought of [the applicant] and would have marked him.” He therefore recommended that the applicant’s OER marks be corrected as shown on page 4, above.

The second statement is from Captain B, who retired in October 2016 and was the Reporting Officer for the disputed OER. He stated that he had directly observed the applicant during the OER period and noted that the applicant was a “fine officer who did well in [the] novel and challenging assignment.” Captain B stated that he reviewed the OER section prepared by Captain S and then prepared his own sections in accordance with Coast Guard policy. He noted that the applicant “met, and in most areas, exceeded the high standards of performance expected of Coast Guard officers.” He added that while he believes “the OER reasonably reflects [the applicant’s] overall performance for the period, [he has] no objection to the appeal being granted should the Board wish to do so.”

The third statement is from Captain G, who also retired in July 2014 and was the Reviewer for the disputed OER. He stated that he cannot recall any pertinent details on the disputed OER. After a “current review” of the OER, he stated that he did “not perceive any inconsistencies between the OER comments and the applicable marks of ‘4.’” He claimed that given the limited amount of space to make comments in an OER, the comments reflected positively on the applicant’s contributions but did not demand a higher mark. He therefore stated that he could not recommend that the applicant’s OER marks be raised as requested.

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

On July 24, 2017, the BCMR sent the applicant a copy of the Coast Guard’s views and invited him to respond within thirty days. After several extensions, the applicant, via his counsel, replied on October 2, 2017. The applicant stated that he agreed with the Coast Guard’s advisory opinion to raise the marks on his disputed OER. The applicant added that since submitting this application, he has not been selected for promotion to Commander again in 2017. He argued that, given his “exemplary” record, he was twice passed over because of the erroneous OER. Therefore, he requested that in addition to raising the six marks of 4, the Board also order the Coast Guard to have the applicant considered for promotion in the next two regularly scheduled O-5 promotion boards;<sup>3</sup> to backdate his date of rank and award him back pay and allowances if he is chosen for promotion; to remove any reference to his failure of selections; and to grant any other appropriate relief that the Board finds is in the interest of justice.

### **APPLICABLE LAW AND POLICY**

#### ***OER Policies***

Article 5.A.2.d.(2)(j) of the Officer Manual states that an incoming supervisor must be provided with a draft of the applicable OER sections when the supervisor changes during a

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<sup>3</sup> In making this argument, the applicant cited *Engels v. United States*, 678 F.2d 173 (1982).

reporting period. The draft must include marks and comments for the period of observation. It must be prepared and signed by the outgoing supervisor prior to his departure.

Article 5.A.2.e.(2)(b) states that the Reporting Officer must describe demonstrated leadership ability and overall potential of the Reported-on Officer for promotion and any special assignments. He must prepare the Reporting Officer sections of the OER.

Article 5.A.2.e.(2)(c) states that the Reporting Officer must ensure that the supervisor fully meets responsibilities for administration of the OER. The Reporting Officer must return a report for correction or reconsideration, if the supervisor's submission is inconsistent with actual performance or unsubstantiated by narrative comments. However, the Reporting Officer must not direct that an evaluation mark or comment be changed.

### ***Special Selection Board Law and Policies***

The Coast Guard Special Selection Board (SSB) statute at 14 U.S.C. § 263 was enacted in Public Law 1120213, Title II, § 208(a), on December 20, 2012, and 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 [REDACTED] 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.

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." Article 6.B.13.e. states the follow [REDACTED]

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.

[REDACTED]

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 regulations:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application is timely.<sup>4</sup>

2. The applicant alleged that six marks on his April 30, 2013, OER are erroneous because the comments do not support the relatively low marks. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed OER in an applicant's military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OER is erroneous or unjust.<sup>5</sup> Absent specific evidence to the contrary, the Board presumes that the members of an applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations.<sup>6</sup> To be entitled to relief, the applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.<sup>7</sup>

3. The Board agrees with the JAG that the applicant has proven by a preponderance of the evidence that his April 30, 2013, OER was erroneously prepared and warrants correction. The record shows that, contrary to Article 5.A.2.(2)(j) of the Officer Manual, the applicant's prior Supervisor, CDR M, who left the unit just a few weeks before the end of the reporting period, failed to provide a draft OER to the incoming Supervisor. Although there is no statement showing what marks the prior Supervisor would have recommended in a draft OER, his failure to provide one must be considered prejudicial for two reasons. First, the new Supervisor, Captain S, had worked with the applicant for only three or four weeks during the year-long reporting period. Second, when Captain B, the Reporting Officer, challenged the marks that Captain S had assigned, Captain S lowered the marks because he did not have more evidence to support them, which he likely would have had if the prior Supervisor had submitted the draft OER required by policy. Although it is not clear that Captain B did more than question the marks and ask Captain S to include comments that better supported the originally assigned marks, which he was allowed to do under Article 5.A.2.e.(2)(c) of the Officer Manual, it is clear that the violation of Article 5.A.2.(2)(j) of the Officer Manual adversely affected Captain S's marks in the disputed OER.

4. The applicant asked the Board to correct the disputed OER not by removing it, but by raising his marks in six performance categories: Professional Competence, Speaking and Listening, Writing, and Workplace Climate, Judgment, and Responsibility. The marks in the first four of these categories were assigned by the Supervisor, Captain S, who recommended rais-

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<sup>4</sup> *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994).

<sup>5</sup> 33 C.F.R. § 52.24(b).

<sup>6</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>7</sup> *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).



ing the marks as the applicant requested. The supporting comments for these four marks are quite positive, and although they do not clearly warrant higher marks, they could support the higher marks that the applicant requested or that Captain S has recommended. Given that the lack of input from the applicant's prior Supervisor adversely affected Captain S's preparation of his part of the OER, the Board finds that the applicant has proven by a preponderance of the evidence that the four disputed marks assigned by Captain S should be corrected as he recommended. Because OER comments are required only to provide one or two examples of an officer's performance that warrant the assigned mark and are not required to fully justify a mark,<sup>8</sup> raising these four marks would not make the OER internally inconsistent.

5. The marks for Judgment and Responsibility on an OER form are completed by the Reporting Officer, and so the contested marks of 4 in these two categories were assigned by Captain B, the Reporting Officer, rather than Captain S. The applicant asked that they be raised to marks of 5, but Captain S recommended a higher mark of 6 for Responsibility, and the Coast Guard agreed with him. The supporting comments on the OER are not clearly inconsistent with marks of 4, 5, or 6, given the written standards for those marks. Captain B stated that he does not object to raising these two marks, but he also stated that he prepared the Reporting Officer's part of the OER in accordance with policy. In light of all of these circumstances and the possibility that the lack of input from the applicant's prior Supervisor might have adversely affected Captain B's assessment of the applicant, as well as Captain S's, the Board finds that the applicant has proven by a preponderance of the evidence that the marks for Judgment and Responsibility on the disputed OER should also be raised as his Supervisor recommended.

6. Because the applicant has proven by a preponderance of the evidence that the disputed OER was adversely affected by a prejudicial violation of Article 5.A.2.(2)(j) of the Officer Manual, the Board agrees with the Coast Guard's recommendation to raise the marks as recommended by Captain S:

- Raise the mark in Professional Competence from 4 to 6;
- Raise the mark of Speaking and Listening from 4 to 6;
- Raise the mark in Writing from 4 to 5;
- Raise the mark in Workplace Climate from 4 to 6;
- Raise the mark in Judgment from 4 to 5; and
- Raise the mark in Responsibility from 4 to 6.

7. In his application, the applicant attributed his non-selection for promotion to the erroneous OER marks, and in his response to the Coast Guard's advisory opinion, he expressly asked that his two non-selections for promotion to Commander be removed from his record pursuant to the *Engels* test,<sup>9</sup> that he be considered for promotion by the next two regularly scheduled promotion boards, and that, if he is chosen for promotion, his date of rank be back-dated and he receive all back pay and allowances, as appropriate. However, when the Board

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<sup>8</sup> Officer Manual, Article 5.A.4.c.(4)(d).

<sup>9</sup> *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982) (requiring the Board, when considering whether to remove a non-selection for promotion, to answer 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?").

finds that “an action of the selection board that considered the officer ... did not have before it for consideration material information,” the Board should direct the Coast Guard to convene an SSB in accordance with 14 U.S.C. § 263, instead of applying the *Engels* test to decide whether to remove a non-selection and backdate an officer’s date of rank.<sup>10</sup> Title 14 U.S.C. § 263(b)(1) applies when a Coast Guard officer was, like the applicant, considered but not selected for promotion. It provides 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-- ... (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 notes that the Coast Guard recommended correcting the applicant’s OER but did not address his subsequent non-selections. Given the requirements of 14 U.S.C. § 263 and the half-a-loaf doctrine,<sup>11</sup> however, the Board must address them.

8. The Board finds that the applicant is entitled to an SSB under 14 U.S.C. § 263 and Article 6.B.13. of the Officer Manual because, when his record was reviewed by the CDR selection boards in July 2016 and 2017, it contained his April 30, 2013, OER with erroneous, low marks that had been adversely affected by his prior Supervisor’s failure to provide a draft OER. Therefore, the Coast Guard should correct his record as described above and convene an SSB to reconsider his non-selection by the Commander selection board that convened in July 2016 (known as the promotion year (PY) 2017 CDR selection board). If he is selected for promotion by that SSB, the applicant’s Commander date of rank should be corrected to what it would have been had he been selected for promotion in 2016 by the PY 2017 CDR selection board, and he should receive back pay and allowances.

9. The Board notes that while this case was pending, the applicant was considered for promotion a second time in July 2017 while the disputed, erroneous documentation was still in his record. Therefore, because he was not selected for promotion in 2017 by the PY 2018 CDR selection board, if the SSB convened to reconsider his non-selection by the PY 2017 CDR selection board does not select him for promotion, the Coast Guard should convene an SSB to reconsider his non-selection for promotion in 2017 by the PY 2018 CDR selection board and, if he is selected for promotion by this second SSB, his CDR date of rank should be corrected to what it would have been had he been selected for promotion in 2017 by the PY 2018 CDR selection board, and he should receive back pay and allowances.

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<sup>10</sup> 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 applied to the BCMRs for services authorized to convene SSBs); *Richey v. United States*, 322 F.3d 1317, 1324 (Fed. Cir. 2003) (finding that “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.’”

<sup>11</sup> *DeBow v. United States*, 193 Ct. Cl. 499, 504 (1970), *cert. denied*, 404 U.S. 846 (1971); see *Bonen v. United States*, 229 Ct. Cl. 144, 149 (1981) (“The ‘half-a-loaf’ doctrine normally applies where a corrections board grants plaintiff’s claim, but stops short of awarding the full appropriate relief requested by plaintiff. Failure of the board to grant full relief where it is mandated by the records change results in ‘a new cause of action’ or ‘“continuing” claim’ which revives the statute of limitations.”) (citing *Denton v. United States*, 204 Ct. Cl. 188, 195, *cert. denied*, 421 U.S. 963 (1975)).

10. Accordingly, the Board finds that the following relief should be granted:

a. The Coast Guard should correct his OER dated April 30, 2013, as follows:

1. Raise the mark in Professional Competence from 4 to 6;
2. Raise the mark of Speaking and Listening from 4 to 6;
3. Raise the mark in Writing from 4 to 5;
4. Raise the mark in Workplace Climate from 4 to 6;
5. Raise the mark in Judgment from 4 to 5; and
6. Raise the mark in Responsibility from 4 to 6.

b. After making the above corrections, the Coast Guard should convene a Special Selection Board in accordance with 14 U.S.C. § 263 and Article 6.B.13. of COMDT-INST M1000.3A to reconsider the applicant's non-selection by the PY 2017 CDR selection board in 2016. If he is selected for promotion by that SSB, his non-selections in 2016 and 2017 by the CDR selection boards should be removed from his record, his CDR date of rank should be corrected to what it would have been had he been selected for promotion in by the PY 2017 CDR selection board in 2016, and he should receive back pay and allowances.

c. If the SSB convened pursuant to paragraph b, above, to reconsider his non-selection by the PY 2017 CDR selection board does not select him for promotion, the Coast Guard should convene an SSB to reconsider his non-selection for promotion in 2017 by the PY 2018 CDR selection board and, if he is selected for promotion by this second SSB, his non-selection in 2017 by the PY 2018 CDR selection board should be removed from his record, his CDR date of rank should be corrected to what it would have been had he been selected for promotion in 2017, and he should receive back pay and allowances.

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

██████████

**ORDER**

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

- a. The Coast Guard shall correct his OER dated April 30, 2013, as follows:
  1. Raise the mark in Professional Competence from 4 to 6;
  2. Raise the mark of Speaking and Listening from 4 to 6;
  3. Raise the mark in Writing from 4 to 5;
  4. Raise the mark in Workplace Climate from 4 to 6;
  5. Raise the mark in Judgment from 4 to 5; and
  6. Raise the mark in Responsibility from 4 to 6.
  
- b. After making the above corrections, the Coast Guard shall convene a Special Selection Board in accordance with 14 U.S.C. § 263 and Article 6.B.13. of COMDTINST M1000.3A to reconsider his non-selection by the PY 2017 CDR selection board in 2016. If he is selected for promotion by that SSB, the Coast Guard shall remove his non-selections in 2016 and 2017 by the PY 2017 and PY 2018 CDR selection boards from his record; backdate his CDR date of rank to what it would have been had he been selected for promotion in 2016 by the PY 2017 CDR selection board; and pay him back pay and allowances.
  
- c. If the SSB convened pursuant to paragraph b, above, to reconsider his non-selection by the PY 2017 CDR selection board does not select him for promotion, the Coast Guard shall convene an SSB to reconsider his non-selection for promotion in 2017 by the PY 2018 CDR selection board. And if he is selected for promotion by this second SSB, the Coast Guard shall remove his non-selection in 2017 by the PY 2018 CDR selection board from his record; backdate his CDR date of rank to what it would have been had he been selected for promotion in 2017; and pay him back pay and allowances.

December 1, 2017

