

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2000-058

DECISION OF THE ACTING GENERAL COUNSEL ACTING UNDER
DELEGATED AUTHORITY

In this case, the Board recommends removal, from the applicant's Coast Guard records, of an enlisted performance evaluation. The Board would find that there was an inconsistency between certain below average marks given the applicant in that evaluation and the fact that the applicant had received a Navy citation commending him for superior performance during the same period. The Board's proposed finding on that point in turn led it to determine that an admitted procedural violation¹ was not harmless.

This case is similar to two recent cases, Docket No. 214-94 and Docket No. 2000-037. In each, the applicants sought to have performance evaluations expunged, by attempting to rebut various low marks and unfavorable comments with contrary evidence. Scrutiny was given to the evidence submitted on each challenged mark or comment, in order to determine whether the applicant had shown that there had been a clear and prejudicial violation of a statute or regulation, or a misstatement of hard fact. *See Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992).

In the first of those cases, Docket No. 214-94, seventeen specific adverse comments were individually reviewed. The evidence indicated that the majority of them were either unchallenged or sustained by the evidence. However, there were a sufficient number of probable misstatements of hard fact, and damaging yet unsupported statements of opinion, to satisfy me that factors had entered into the evaluation process that did not belong there, and relief was granted. In the second, Docket No. 2000-037, there were also numerous adverse comments, which the applicant sought to rebut largely through signed but not sworn statements of colleagues. Careful analysis indicated that the colleagues' statements for the most part contained generalized praise of the applicant, which was insufficient to rebut the particular criticisms made by the rating chain. The

¹ The applicant's rating chain supervisor was not at least one pay grade senior to the applicant, as required by the Coast Guard Personnel Manual, Art. 10.B.2.12.a.

few comments that were rebutted by specific contrary statements were redacted, but relief was otherwise denied.

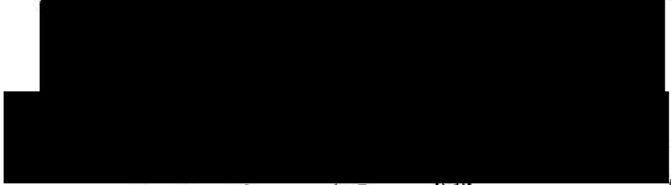
In the present case, the applicant appears to be complaining primarily of low marks of "3" in the categories of responsibility, evaluations, setting an example, integrity, and loyalty. The Navy citation, on which the Board exclusively relies in recommending relief on the point, commends his "professionalism, personal initiative, and unswerving devotion to duty," and the specific examples it notes relate to these traits. While a low mark in loyalty may be inconsistent with praise for "devotion to duty," the low marks in the evaluation and the favorable comments in the citation seem on their face otherwise to be addressing different characteristics.² While there are no categories precisely correlating to "initiative" or "professionalism," the applicant received high marks in such related categories as "using resources" (a "5"), "professional knowledge," and "professional development" (both "6").

Were there sufficient time under 14 U.S.C. § 425, I would remand this case to the Board for a more complete analysis as to whether the applicant has shown that the adverse marks were rebutted by specific evidence to the contrary, as guided by the standard set in Germano and the decisions in Dockets No. 214-94 and 2000-037, as well as for a recommendation as to whether, even if the marks were not so rebutted, the procedural error standing alone should warrant relief.

However, such time is not available, and the record indicates elsewhere that the applicant is soon to retire, which limits the impact of affording relief here.

Thus, I will not disturb the Board's action, except to instruct that its opinion here not be given precedential effect.

DATE: Sept. 21, 2001


Acting General Counsel
Delegate of the Secretary
Department of Transportation

² Of course, an individual may rank highly in some qualities but be lacking in others, as the evaluation form itself recognizes. The fact that a member receives praise for some qualities does not mean that he or she deserves praise for all.

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FINAL DECISION

Chairman:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The proceeding was docketed on January 24, 2000, upon the Board's receipt of a complete application for correction of the applicant's military record.

This final decision, dated November 16, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a [REDACTED] pay grade E-7) alleged that his enlisted performance evaluation for the period ending September 30, 1998 was erroneous and unjust. During that period he was the [REDACTED] substance abuse rehabilitation department.

The applicant asked the Board to expunge the disputed evaluation from his record, for the following four reasons. First, he alleged that his "supervisor" was junior to him with respect to time in grade in violation of Coast Guard regulation. Second, he alleged that the marks of "3" in the evaluation were unjust and inconsistent with his receipt of the Navy and Marine Corps Achievement Medal for service from December 1995 to September 1998. Third, he alleged that his marks were the result of the actions of people in his chain of command who were deliberately trying to sabotage his career. Fourth, he alleged that his appeal of the disputed evaluation was handled improperly.

On April 19, 1999, the applicant was awarded the following citation by the Navy:

FOR professional achievement in the superior performance of duties while serving as [REDACTED] Substance Abuse Rehabilitation Department (SARD), Naval Medical Center, [REDACTED] from December 1995 to September 1998. Chief [REDACTED] volunteered to work a schedule that provided structured

weekend activities for the patients berthed at SARD. He developed and implemented three one and one half hour workshops to teach 20 patients new skills related to their recovery from addiction. He devoted extensive off-duty hours toward continuing education, which enabled him to qualify to facilitate relaxation workshops teaching 265 patients new skills relating to all aspects of their recovery from addiction. These structured weekend activities developed by [REDACTED] directly led to a 20 percent decrease in the number of incident reports, relapse incidents, and disciplinary problems in SARD's diverse patient population. [REDACTED] professionalism, personal initiative and unswerving devotion to duty reflected great credit upon himself and were in keeping with the highest tradition of the United States Naval Service.

The applicant received 3s in responsibility, evaluations, setting an example, integrity, and loyalty, on the Coast Guard evaluation reports that covered approximately the same period referred to in the Navy citation. He received 4s for directing others, working with others, developing subordinates, adaptability, safety and occupational health, and stamina. He received 5s for work-life sensitivity, respecting others, administrative ability, organization, using resources, monitoring work, and customs and courtesies. He received 6s for human relations, professional knowledge, professional development, communications, and military bearing.

VIEWS OF THE COAST GUARD

On July 31, 2000, the Chief Counsel of the Coast Guard recommended that no relief be granted to the applicant. The Chief Counsel said the record does not support the applicant's allegations of error and injustice.

The Chief Counsel agreed that the supervisor should be at least one grade senior to the person being evaluated (Personnel Manual Art. 10.B.2.12.a.), but he said that this deviation from regulations constituted harmless error because the applicant "failed to show how such technical error invalidates the evaluation." The Chief Counsel said that the applicant failed to submit any proof that the marks on his evaluation "were anything but the honest professional judgment of those responsible for rating him within the enlisted evaluation system." The Chief Counsel also said that the applicant failed to prove that his appeal of his marks was handled improperly or that his chain of command intended to sabotage his career. The Chief Counsel stated that absent strong evidence to the contrary, it is presumed that the marking officials executed their duties "lawfully, correctly, and in good faith." Arens v. United States, 969 F.2d 1034, 1037 (1990). "Simply because Applicant disagrees with the assessments of his marking officials is not enough to overcome the presumption of regularity afforded those individuals." There is also no evidence, according to the Chief Counsel, that the applicant was treated unjustly.

RESPONSE OF THE APPLICANT TO COAST GUARD VIEWS

On August 2, 2000, the Board sent the applicant a copy of the views of the Coast Guard on this case and notified the applicant that he could submit a response to these views within 15 days of the date of notification.

No response was received from the applicant.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10, United States Code. The application was timely.

2. The applicant alleged that his enlisted performance evaluation report for a period when he served as Coast Guard liaison to a Navy department was erroneous and unjust.

3. The applicant stated that the report should be expunged because the supervisor on his rating chain was not senior in pay grade to the applicant, as required by Coast Guard regulations.

4. The applicant submitted a certificate of performance for this period in the form of a Navy and Marine Corps Achievement medal. According to this certificate, his performance was outstanding. The certificate is relevant to this case because it is based on the applicant's performance at the same medical center during the same time period, and it is probative because it is based on observation. The performance described in the citation contradicts the 3s and 4s in his Coast Guard evaluation. There is no explanation in the record for the marked disparity between the Navy citation and the Coast Guard evaluation, both of which cannot logically be accurate.

5. Personnel Manual Art. 10B.2.12.a. was violated by the Coast Guard. The supervisor was not senior to the applicant. Furthermore, the marking officials who wrote the evaluations did not observe the applicant's performance on a daily basis. Given the disparity between the Coast Guard evaluation and the Navy citation, the procedural irregularity of the Coast Guard's process cannot fairly be regarded as harmless error.

6. Accordingly, the Board is persuaded that the Coast Guard committed error or injustice by including the disputed evaluation in the applicant's record.

ORDER

The application of _____, USCG, is granted. The enlisted performance evaluation form dated September 30, 1998, shall be removed from his record and replaced with a continuity report showing that he was recommended for advancement by his marking officials.

