

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-232

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

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 case after receiving the completed application August 20, 2009,¹ and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 13, 2010, 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 asked the Board to correct the title of his assigned position from July 15, 2005, to July 31, 2006, which appears in block 2 of his officer evaluation report (OER) for the period April 1, 2005, through March 31, 2006. He alleged that although his record and the disputed OER show that his position was Chief of the Prevention Department, they should show that he was Commander of the Prevention Command.

The applicant explained that during a reorganization of various commands in 2004, Sector Miami and Sector San Juan were both "stood up" with Prevention Commands, instead of Prevention Departments, because of the very large amount of work and personnel involved. Therefore, the heads of those organizations received the position of "Commander, Prevention Command" within those sectors. His own sector, Xxxxxxxx, was also large and was originally designated to have a Prevention Command instead of a Prevention Department. However, before Sector Xxxxxxxx stood up, "the Commandant reversed his decision and eliminated Prevention Commands altogether." The decision was never explained to him.

The applicant alleged that while he served as the Chief of the Prevention Department at Sector Xxxxxxxx, both Sector Miami and Sector San Juan continued to operate with Prevention

¹ A completed application includes the form DD 149 prepared and submitted by the applicant and receipt of the applicable military records from the National Personnel Records Center in St. Louis, Missouri. Although the application was completed on August 20, 2009, his DD 149 was received on July 10, 2009.

Commands. He alleged that his scope of responsibility was equivalent to those of his counterparts at the other two sectors, but his title and level of recognition was not. Therefore, he argued, the position title on the disputed OER is unjust. The applicant noted that had he not elected to retire on July 31, 2006, the lower position title might have negatively affected his chance of promotion.

SUMMARY OF THE RECORD

The applicant reported to MSO XXXXXXXX, which was part of Group XXXXXXXX, on July 1, 2002. His title on his first and second annual OERs at MSO XXXXXXXX, dated April 30, 2003 and 2004, was “Chief, Vessel Compliance Department.” The position description on the OERS shows that he led some two dozen officers, a dozen enlisted members, and two or three civilian employees and was responsible for administering the “commercial vessel safety program in one of the nation’s largest ports ... for inspection/examination of vessel construction, maintenance, operation, manning, & equipment on all U.S. & foreign flagged vessels in port.”

On his third annual OER at MSO XXXXXXXX, dated March 31, 2005, the applicant’s position title is noted as “Chief, Operations Prevention Dept.” The position description shows that he led about two dozen officers, two dozen enlisted members, and five civilian employees and was “[r]esponsible for all CG ops directed at preventing marine casualties, accidents, & security incidents. Manages & oversees the regulatory/inspection/investigation/ waterways management elements of the CG’s safety, security, & environmental protection responsibilities to ensure compliance in regulated communities (foreign/domestic vessels, merchant mariners, & facilities.”

The applicant’s fourth annual OER while stationed at XXXXXXXX which was entered in his record on July 10, 2009, is the disputed OER in this case as it shows that he was assigned to Sector XXXXXXXX and that his primary duty title was “Chief, Prevention Department (PD).” The position description shows that he led about two dozen officers, four dozen enlisted members, five civilian employees, and two Aids to Navigation Teams. The responsibilities listed are identical to those listed on the previous OER. On this disputed OER, the applicant received seven marks of 6 and eleven marks of 7 in the various performance categories² and a mark in the seventh spot on the comparison scale, meaning that he was the best officer of his rank that the reporting officer had ever known throughout his career.

VIEWS OF THE COAST GUARD

On December 10, 2009, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC). The PSC submitted copies of three documents regarding the reorganization of the sectors:

² Coast Guard officers receive numerical evaluation marks in eighteen performance categories on a scale of 1 (worst) to 7 (best).

In a memorandum with the subject line, "Decision Memo: Sector Organizational Construct," dated May 2, 2004, paragraph 3 states that "major internal Sector components" will include either a "Prevention Department or Command." The 16-page enclosure to the memorandum states the following in pertinent part:

Standard Sector Command Organizational Architecture. The creation of Sectors transforms a diverse array of field structures into a standard Sector Command organizational architecture, consisting of Prevention, Response and Logistics components, which will be either commands or departments depending on specific Sector characteristics. ...

Span of Control. Span of control and geographic and functional requirements determine the need for command authorities below the Sector level. ...

Prevention Department or Command

Under the general direction of the Sector Commander and the Deputy Sector Commander, the Chief, Prevention Department/Commander, Prevention Operations shall be responsible for all Coast Guard operations directed at preventing maritime casualties, accidents and security incidents, as described below: [The list of responsibilities does not make any distinction between those of a Chief, Prevention Department and those of a Commander, Prevention Operations.]

In a memorandum that appears to be dated June 3, 2005, regarding the "Establishment of Sector XXXXXXXX," the Commandant approved the establishment of the sector. The memorandum states that it "[e]stablishes the department-based structure of the Sector as depicted in enclosure (1)." Enclosure (1) is an organizational chart showing the components of Sector XXXXXXXX, including the Prevention component, were designated as departments rather than commands.

In a message issued by the Commandant on July 8, 2005, entitled "Operating Facility Change Order (OFCO) No. 055/05: Establishment of Sector XXXXXXXX," paragraph 1 states that "Sector XXXXXXXX will be composed of a Response Department, Prevention Department and Logistics Department. ... All existing missions and functions performed by Group XXXXXXXX, Group Eastern Shore, and MSO [Marine Safety Office] XXXXXXXX should be realigned under this new organizational structure per [the memorandum dated June 3, 2005]. This action should take place [no later than] 15 July 2005."

The PSC also submitted two statements from the applicant's rating chain. The captain who served as the Sector Commander and reporting officer for the disputed OER stated that when the sector was stood up the applicant's assigned position title was changed from the Chief of the Operations Prevention Department at MSO XXXXXXXX to Chief of the Prevention Department for the sector. However, "[h]is duties were essentially unchanged with minor losses and additions in personnel and divisions throughout the entire assignment. While he did professionally and expertly supervise a large group of people located in xxxxxxxxxx, his duties did not include the authorities and responsibilities inherent in Command."

The captain who served as the Deputy Sector Commander and supervisor for the disputed OER stated that the applicant was the Chief of the Prevention Department and his performance was outstanding. He further stated that he is

not familiar with the current or past command structures of Sectors Miami or San Juan. That said, I suspect that [the applicant's] role as Prevention Department Head at Sector XXXXXXXX was equivalent to the Commander, Prevention Command positions at these two units as he has suggested. A decision to retroactively designate [his] Sector XXXXXXXXXXXX's position a command billet is not one that would be made locally by his rating chain and has broader service-wide implications. I do not concur that [he] would have been disadvantaged for promotion or assignment had he remained in the USCG since most senior leadership in the Coast Guard is/was aware of the history of Command designations for certain Sector billets.

The PSC noted that the application may not be timely and that the applicant did not file an application with the Personnel Records Review Board.

The PSC stated that the job description in block 2 of the disputed OER "accurately reflects the applicant's assigned duties" during the evaluation period. The PSC noted that the reporting officer stated that the applicant's duties during the evaluation period "did not include the authorities and responsibilities inherent in Command."

The PSC stated that the May 2, 2004, memorandum showed that Sector Commands would be established with either Prevention Commands or Prevention Departments. PSC stated that the Commandant's final implementation decision was reflected in the "stand-up guidance" dated June 3, 2005, and July 5, 2005.

The PSC argued that the applicant's claim that his title as the chief of a department rather than the commander of a command was a disservice and could have caused him to fail of selection had he remained in the Coast Guard is not supported and speculative. The PSC alleged that although both Group XXXXXXXX and MSO XXXXXXXX were significantly reorganized in the creation of Sector XXXXXXXX, "the applicant's scope of responsibility changed minimally. These changes do not equate to command level responsibilities." The PSC concluded that the applicant is not entitled to the requested relief.

The PSC further noted, however, that there is no OER in the applicant's record covering his performance from April 1 through his retirement on July 31, 2006, so his record is incomplete. The PSC stated that a continuity OER should be created to cover this period.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 14, 2009, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

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.
2. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers, or reasonably should have dis-

covered, the alleged error or injustice. The disputed OER was entered in the applicant's record on July 10, 2006, and he retired on August 1, 2006, which is when the three-year period began to toll.³ The Board received his DD 149 application form on July 10, 2009. Although the application was not completed until the Board received his military records from the National Personnel Records Center on August 20, 2009, the Board finds that his application was timely submitted.

3. The applicant alleged that his position title from July 15, 2005, to July 31, 2006, as shown in block 2 of his final OER, is unjust. The Board begins its analysis in every case 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.⁴ 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."⁵

4. The applicant alleged that his position title should be corrected from Chief, Prevention Department to Commander, Prevention Command on the disputed OER because his sector was originally supposed to have a Prevention Command when the sector "stood up," instead of a Prevention Department, and because two other sectors of similar size, Sector Miami and Sector San Juan, operated with Prevention Commands. The documents submitted by the PSC show that each new sector was to have either a Prevention Department or Command and that Sector XXXXXXXX was organized with a Prevention Department. Therefore, the position title shown on the disputed OER conforms to the official designation of the applicant's billet and is not erroneous.

5. The applicant alleged that his position title was unfair because his work was substantially similar to the work of the officers who led the Prevention Commands at Sector Miami and Sector San Juan and who received the title of Commander. However, as the applicant's reporting officer noted, Commanders of commands, like Commanding Officers, bear the duties and responsibilities of command in addition to those borne by department heads.

6. The documents submitted by the PSC do not reveal the Commandant's reasoning in determining why Sector XXXXXXXX should have a Prevention Department rather than a Prevention Command. Assuming that the applicant's allegation that the size of Sector XXXXXXXX is comparable to the size of Sector Miami and Sector San Juan is true, some factor other than size must have been the determining factor. Apparently, the determining factor was never explained to the applicant, but the Board will not assume that the decision was arbitrary and capricious simply because the Commandant's reasons are unknown.

³ *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).

⁴ 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

7. Accordingly, the applicant's request should be denied because he has not proved by a preponderance of the evidence that his position title as Chief, Prevention Department from July 15, 2005, to July 31, 2006, was erroneous or unjust,⁶ that it violated any regulation, or that it was a product of bias or prejudice.

8. The Board notes that the PSC stated that the applicant's record should contain a continuity OER covering his service from April 1 to July 31, 2006, because the applicant's last OER covered his service only through March 31, 2006. However, the applicant did not request this correction of his record, and he did not respond to the PSC's recommendation in the advisory opinion. Therefore, the Board will not address the matter.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁶ See *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (finding that for purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is treatment by military authorities that "shocks the sense of justice").

ORDER

The application of xxxxxxxxxxxxxxxxxxxx, USCG Retired, for correction of his military record is denied.

Donna M. Bivona

Nancy L. Friedman

Dorothy J. Ulmer