

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 159-97

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on August 4, 1997, by the filing of an application for relief with the BCMR.

This final decision, dated May 8, 1998, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a commander (CDR) on active duty, asked that his 1994 failure of selection for promotion to CDR be removed from his record. He also asked that his CDR date of rank be adjusted to the date he would have received had he been selected in 1994, with appropriate back pay. The applicant was selected for promotion to CDR in 1995.

EXCERPTS FROM RECORD AND SUBMISSIONS

The applicant claimed that the BCMR's failure to process his previous BCMR case(s) (BCMR Docket No. 43-91; on remand, the application was re-docketed as 41-93) within 10 months, as required by statute,¹ was instrumental in causing his failure before the 1994 CDR selection board.

¹ Section 425 of title 14, U.S.C., states as follows:

"(a) DEADLINE FOR COMPLETION OF ACTION. -- The Secretary shall complete processing of an application for correction of military records under section 1552 of title 10 by not later than 10 months after the date the Secretary receives the completed application.

"(b) REMEDIES DEEMED EXHAUSTED. -- Ten months after a complete application for correction of military records is received by the Board for Correction of Military Records of the Coast Guard, administrative remedies are deemed to have exhausted, and --

- (1) if the Board has rendered a recommended decision, its recommendation shall be final agency action and not subject to further review or approval within the department in which the Coast Guard is operating; or

The applicant submitted his initial application (Docket No. 43-91) with the Board on October 29, 1990. In that application, he asked the Board to remove two lieutenant (LT) OERs and his failures of selection for promotion to LCDR. A final decision was issued in that case on November 22, 1991, denying the requested relief on the basis of untimeliness. The Board determined that it was not in the interest of justice to waive the three year statute of limitations in BCMR No. 43-91.

The applicant challenged the Board's decision in United States District Court for the District of Columbia. [REDACTED], the Court remanded the case to the Board to analyze the applicant's reasons for not filing his application within three years and the likelihood of success on the merits in determining whether it was in the best of justice to waive the statute of limitations.

The application on remand was docketed by the Board as BCMR No. 41-93. On August 10, 1993, the Deputy General Counsel, acting under delegated authority, affirmed the Board's decision and approved the BCMR's recommended order that relief be granted to the applicant, as follows:

The applicant's] military record shall be corrected by removing the two disputed OERs and replacing them with reports for continuity purposes only, and by removing all references to his failures of selection to the grade of lieutenant commander. If the applicant is selected for

if the Board has not rendered a recommended decision, agency action is deemed to have been unreasonably delayed or withheld and the applicant is entitled to --

(A) an order under section 706(1) of title 5, directing final action be taken within 30 days from the date the order is entered; and

(B) from amounts appropriated to the department in which the Coast Guard is operating, the costs of obtaining the order, including a reasonable attorney's fee.

* * * * *

SPECIAL RIGHT OF APPLICATIONS UNDER THIS SECTION. -- This section applies to any applicant who had an application filed with or pending before the Board or the Secretary of the department in which the Coast Guard is operating on or after June 12, 1990, who files with the Board for Union of Military Records of the Coast Guard an application for relief under the amendment made in section (a). If a recommended decision was modified or reversed on review with final agency action occurring after expiration of the 10-month deadline under that amendment, an applicant who requests shall have the order in the final decision vacated and receive the relief granted in the recommended decision if the Coast Guard has the legal authority to grant such relief. The recommended decision shall otherwise have no effect as precedent.

EFFECTIVE DATE. -- This section shall be effective on and after June 12, 1990.

Applicant's LT and LCDR OERs

When the applicant's record was considered by the 1994 CDR selection board, he had 12 OERs in the grade of LT covering a period from July 1, 1984, to November 30, 1990. Two of the OERs were non-observed, the applicant received them while he was attending post-graduate school. He also had two reports in his record that were entered for continuity purposes only (these were the two removed by the Board in the applicant's previous case). On the other observed reports, the applicant received marks of 5 and 6 in the performance dimensions and marks of 6 in block 12, except on one TAD report he received marks of 4 and 5, with a 4 in block 12 (Comparison Scale and Distribution).

In addition to the 12 LT OERs, seven of the applicant's other LT OERs from December 1, 1990, through April 30, 1994, were corrected, as a result of the BCMR's action in Docket No. 41-93, to show that he was a LCDR at the time he received each of these reports. (The 1994 CDR selection board that did not select the applicant met on August 8, 1994.) His grades on these OERs in the performance dimensions ranged from 4 to 6, with marks of 5 in block 12, except for one OER in which he received a mark of 4 in block 12. His assignments included Command Center Duty Officer at Headquarters Command Center and as Project Officer at Network Engineering Branch, Telecommunication & Information Systems Command.

After the October 8, 1994, CDR selection board, the applicant received a concurrent OER for the period September 25, 1994, to November 30, 1994, evaluating his performance of duty for a 66 day assignment to the Joint Task Force 160, Guantanamo Bay, Cuba. (The applicant described this assignment as a LCDR job.) He received marks of 5, 6, and 7 and a mark of 6 in block 12. He was awarded the Coast Guard Commendation Medal for his performance.

On May 1, 1994, the applicant was assigned to duty as the Deputy Project Manager, Chairman, Technical Evaluation Team, Headquarters. (The applicant also described this assignment as a LCDR job.) His first OER in this job for the period May 1, 1994, to April 30, 1995, rated his performance above average. He received marks of 6 and 7 and a 5 in block 12. This was the applicant's last OER prior to the August 18, 1995, CDR promotion board that selected him for CDR.

There is no indication in the record that any information was missing from the applicant's record when it was considered by the 1994 CDR selection board.

Views of the Coast Guard

The Coast Guard recommended that the Board deny the applicant's request. The Service queried whether the applicant's request should be treated as a request for reconsideration of his original case or as a new case. The Coast Guard stated that

whether the application is viewed as a reconsideration or a new case, it should be denied.

The Coast Guard stated that the applicant seeks to blame the government for its delay in resolving his case, while ignoring the adverse impact of his own delay in not bringing his initial application sooner. The Coast Guard argued that the applicant's 1994 failure is a direct result of his own failure to mitigate the 1985 errors by applying for correction in a more timely fashion. The Service stated that the applicant discovered the alleged errors and injustices in 1985, yet did not submit his initial application for correction until July 26, 1990 (which was BCMR Docket No. 43-91). The Coast Guard stated that the only reason offered by the applicant, at that time, for not filing his application sooner was that he was not aware of the three year statute of limitations.

The Coast Guard argued that the applicant could have avoided the entire issue of timeliness had he submitted his application within three years after the error occurred. The Service noted that the litigation of the applicant's case in the District Court was based on the government's good faith reliance on a reasonable interpretation of the BCMR's statute of limitations codified at 10 U.S.C. 1552(b). Thus, the Service stated that any period required for litigation of this case, and the time necessary to decide the case on remand, should not be attributed to the government as the product of error or injustice.

With respect to the nexus between the alleged error (the BCMR's violation of the 10-month statute) and the 1994 failure of selection, the Coast Guard argued that the applicant has not met his initial burden of proving that an error or injustice made his record as a whole appear worse before the selection board. Engels v. United States, 230 Ct. Cl. 464, 470 (1982). While the applicant is technically correct in stating that he was in pay grade O-4 (LCDR) for only 38 days prior to the 1994 CDR selection board, his OERs from February 1, 1991, reflected the rank of LCDR, in accordance with the Order in BCMR Docket No. 41-93. The Coast Guard stated that the applicant did serve in billets (jobs) slated for LCDRs while he was a LT.

The Coast Guard stated that the applicant's opinion that he may have received more highly regarded LCDR assignments if his record had been corrected earlier is speculation.

The Coast Guard argued that the retroactive changes ordered by the Board in the applicant's record were actually beneficial to the applicant. In this regard, the Coast Guard stated the following:

[T]he retroactive changes ordered by the Board to reflect service as an [LCDR] rather than as a [LT] during this period, which were made necessary by the combined delays, could only have been advantageous to Applicant: the Section 11 comments on leadership and potential,

and the Section 12 comparison scale, which originally rated him in relation to other [LTs] for promotion to [LCDR], appear to be rating him as an [LCDR] for promotion to [CDR] as a result of the change.

Applicant's Response to the Views of the Coast Guard

The applicant stated that the Coast Guard did not provide any material to refute his contention that the BCMR was twice in violation of the 10-month statute during the processing of his case. He further argued that the Coast Guard did not provide any material to refute the assertion that the BCMR did not comply with the request of the U.S. District Court for an expedited decision on remand. The applicant stated that whether the error was in the record or in the process, it is still an error and the BCMR has the obligation to provide relief.

The applicant took issue with the Coast Guard's assertion that he could have sought an amendment of the requested relief, "if it appeared . . . that additional remedial action was necessary." He stated that the Service's opinion infers that he could have known the impact that the illegal delays would cause. The applicant stated that it was incumbent upon the Coast Guard to make him as "whole" as possible following a decision by the BCMR in his favor.

The applicant argued that the Coast Guard's position that he contributed to the delay in resolving his initial application by not bringing his claim within three years of the alleged error or injustice is irrelevant. The applicant stated that the issue of timeliness has already been decided by both the U.S. District Court and the BCMR. The applicant stated that if the BCMR had not violated the 10-month rule in his initial application and ruled earlier on the merits of the case, he could have been promoted to LCDR as early as July 1991.

With respect to the Coast Guard's position that the time spent in litigation in District Court should not be attributable to the government as the product of error or injustice, the applicant described as conjecture, since the government would not have known the effects had the BCMR rendered a quick decision in the first case.

With respect to the Coast Guard's good faith argument, the applicant stated that the District Court's decision proved that the BCMR did not have a reasonable interpretation of "in the interests of justice" and directed the BCMR to examine the merits of the case. The applicant stated that the BCMR certainly did not act in good faith in the remanded case because the Board violated the 10-month statute, even after being asked by the Court to expedite its decision in the case.

SELECTED PROMOTION BOARD REGULATION

Promotion to CDR on active duty is made by a best qualified selection. Article 14-A-1c. of the Personnel Manual states the following: "In a best-qualified

system, the [selection] board is limited to a specific number it may select. Accordingly, in addition to the fully-qualified standard, the board also must select by comparing each officer to all others considered. This procedure enables the board to select from the entire group the limited number whom it believes are the best-qualified." Id.

Article 14-A-3 speaks to selection criteria. Specifically it states the following:

a. General. Personnel boards recommend on either a best-qualified or fully-qualified basis as set forth in law and directed in the precept. The type of information all personnel boards consider is fundamentally the same. However, each board develops its own overall standards and selection criteria. The degree of significance a board assigns to each of the many factors it considers may vary according to the grade level and type of selection the board is making. A board selecting officers for lieutenant may emphasize different factors than would a Captain Continuation Board.

Subsection b. of this provision list the following basic criteria to be applied by selection boards: performance evaluations, professionalism, leadership, and education.

Article 14-A-4d. of the Personnel Manual states the following: "The Performance file contains all performance evaluations, education information, awards and discipline documentation. A board must consider an officer's entire record; however, the following portion of the record to be evaluated is considered most significant:

For promotion to

Commander

Service Period

7 years of immediate previous service or all service in present grade, whichever is greater."

PRECEPT FOR THE 1994 CDR SELECTION BOARD

In a precept dated August 3, 1994, the Commandant provided the following guidance, in part, to the 1994 selection board:

"9. Officers serving in specialties, carrying out operational responsibilities, working in administrative areas or elsewhere, all perform a function vital to the Coast Guard. Every job in the Coast Guard is important. Therefore, the Board is to focus on the officer's performance in each job performed."

FINDINGS AND CONCLUSIONS

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

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code. The application was timely.

2. The Board concurs in the determination that the application can be disposed of without a hearing. 33 CFR § 52.31 (1993). The documents in the record provide an adequate basis for a decision.

3. The Board finds that the issue presented by the applicant in this case is a new matter and therefore not subject to the Board's rules on reconsideration.

4. The applicant's claim that he is entitled to relief in this case because the Board did not issue a final decision in his previous case within the required 10-month processing time is without merit. The applicant has not pointed to any portion of section 425(c) to title 14 as mandating that he is entitled to relief based solely on the Board's failure to comply with the statute. The statute, itself, provides the remedy where the Board has not issued a final decision within the 10-month processing requirement. That remedy is that the applicant is entitled to an order directing that final action be taken by the Board within 30 days and the applicant is entitled to any attorney's fee associated with bringing the action. In the applicant's previous case (BCMR No. 41-93), the delegate modified the Board's decision and approved full relief for the applicant as recommended by the Board. The applicant has not shown that he is entitled to relief in the present case solely by the fact that the Board failed to process his previous BCMR case within 10 months of receipt of a completed application.

The Board acted in good faith when it denied relief to the applicant in BCMR No. 43-91 because of untimeliness in his initial application. If the standards that were set out by the Court in Allen v. Card, 799 F. Supp. 158 (D.D.C. 1992) and Detweiler v. Pena, 38 F.3rd 591 (D.C. Cir. 1994) had been known by the Board earlier, the Board most certainly would have acted accordingly in deciding the applicant's previous case.

5. Whether or not the BCMR violated the 10-month processing requirement, to obtain a correction of his record the applicant must show that that his record is either in error and/or unjust. The applicant has not established by a preponderance of the evidence that he failed of selection for promotion to CDR in 1994 because he

was unable to compete for more challenging and visible assignments or for any LCDR assignment due to the BCMR's failure to process his previous application within 10-months, as required by law.

6. The applicant's claim in this regard is speculative. He has not identified for the Board any job that he competed for or would have competed for and probably would have received during the period in question, if he had not been in a passover status. The only evidence provided by the applicant that he could not compete for more advantageous or LCDR assignments is his own statement that he was told by command detailers that he could not be considered for these assignments because he was a "continued" (twice passed over LT). The Coast Guard in its advisory opinion states that the applicant did serve in jobs slated for LCDRs while he was still a LT. While the applicant might have believed he could not compete for certain assignments as a passed over LT, the evidence before this Board is insufficient to establish this as a fact.

7. The applicant has not presented any evidence that shows holding the rank of LCDR entitles an officer to be assigned to certain jobs. There is no evidence before this Board that suggests that the Coast Guard would have been prevented from keeping the applicant in the same jobs as a LCDR that he held as a LT.

8. Even if the applicant had provided some evidence that he would have been detailed to a certain "high visibility" job if he had been promoted to LCDR sooner, the Board still has no knowledge of what his performance would have been in that job. Performance is more important than merely being in a position. In this regard, the Personnel Manual list the following basic criteria that is to be considered in selecting an officer for promotion: performance evaluations, professionalism, leadership, and education. It would be conjecture for the Board to conclude that the applicant would have been assigned to more "challenging" assignments and more conjecture to conclude that his performance would have been satisfactory. The Board will not correct a record based on conjecture.

9. Even if the Board were to accept that the applicant suffered an injustice in his military record that was created by the BCMR's delay in not timely processing his first BCMR application, the applicant must establish that he was prejudiced by that error or injustice before the 1994 CDR selection board. In determining whether a nexus exist between the alleged error or injustice and the applicant's failure of selection, the Board applies the standards set forth in Engels v. United States, 230 Ct. Cl. 465 (1982).

10. In Engels, the United States Court of Claims established two "separate but interrelated standards" to determine the issue of nexus. The standards are as follows: "First, was the claimant'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 promoted in any event?" Engels at 470.

11. Applying the first prong of the Engels test to the applicant's record, the Board finds that the applicant has failed to establish that he was prejudiced by the alleged error or injustice. The Board finds that the applicant's record does not appear worse than it would in the absence of the alleged error or injustice. The corrective action taken by the Board in BCMR No. 41-93 substantially corrected the applicant's record prior to the 1994 CDR selection board. The two damaging OERs were removed from the applicant's record (replaced with two OERs for continuity purposes only) and seven of his LT OERs were changed to reflect that he was a LCDR at the time he received these OERs. Each of these seven OERs were further corrected to show that the applicant was promoted to the rank of LCDR on February 1, 1991. The applicant does not dispute this date as the date he would have been promoted to this grade had it not been for the errors in his record that were corrected by the BCMR in Docket No. 41-93.

12. The applicant had a substantially complete and accurate record before the 1994 CDR selection board. In the applicant's case, the selection board had no incorrect information, there were no gaps in the applicant's performance record, nor was there anything missing that should have been included. See Yee v. United States, 512 F. 2d 1383, 206 Ct. Cl. 388 (1975) and Weiss v. United States 408 F. 2d 416, 187 Ct. Cl. 1 (1969). He has not shown by a preponderance of the evidence that he would have had any jobs other than the ones he had at the times in question. Moreover, since he did not have any of these jobs, the Board has no way of knowing what his performance would have been in them. He had the OERs from the grade of ensign through LCDR. He had all awards earned during his career up to that point. Of course, the selection board was not aware that the applicant might have been a LT when he received the now LCDR OERs because BCMR applications and related information are not provided to selection boards. See Article 10-A-4g.(3)(b), Coast Guard Personnel Manual. The Commandant has recognized that different jobs serve different purposes, but that each one is important to the Coast Guard. Therefore, the Commandant advised the members of the 1994 selection board to focus on performance in a job rather than the job itself. See Precept for the 1994 CDR selection board. It is presumed that the members of the selection board followed the directions of the Commandant in performing their duties. The applicant has presented nothing to suggest otherwise. The applicant has failed to show that he was prejudiced by any alleged error or injustice.

13. The applicant's claim that he was selected for CDR by the 1995 CDR selection board because of two "high visibility" assignments he received after his promotion to LCDR is speculative. Since the meetings of the selection board are secret, the applicant cannot say that he was selected for this reason. If he was selected because of the two subsequent assignments, then the selection board acted contrary to the Commandant's guidance that the selection board's focus should be performance in the job rather than the job itself. The Board finds it unlikely that

the applicant would have been selected for promotion by the 1994 selection board in any event. Particularly, since he had a substantially accurate and complete record before that selection board. The applicant has failed to establish a nexus between the alleged error and his failure before the 1994 CDR selection board.

14. The applicant has failed to establish an error or injustice in this case. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of
military record is denied.

USCG , for correction of his

