

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:


BCMR Docket
No. 1998-019

DECISION OF THE DEPUTY GENERAL COUNSEL

- I approve the recommended Order of the Board.
- I disapprove the recommended Order of the Board.
- I concur in the relief recommended by the Board.

DATE:

Dec. 7, 1998



Deputy General Counsel
Delegate of the Secretary
Department of Transportation

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FINAL DECISION

[REDACTED]

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on November 3, 1997, by the filing of an application for relief with the BCMR.

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

The applicant, a lieutenant (LT) in the Reserve, asked that his date of rank as a LT be changed to the date he would have received such rank if he had been selected for promotion in 1993, with reinstatement to his original position on the inactive duty promotion list (IDPL). The applicant was selected for promotion to LT in 1994.

EXCERPTS FROM RECORD AND SUBMISSIONS

The applicant complained that the officer evaluation report (subject OER) for the period from May 1, 1992, to February 7, 1993, was not included in his record when it was considered by the 1993 LT promotion selection board. The Reserve selection board met on November 1, 1993.

The applicant stated that although he was not receiving pay for his drills (category H) during the period covered by the OER, it still reflected that he was gainfully employed as a civilian and he was an asset to the Coast Guard. He argued that if the OER had been in his record when it was considered by the 1993 selection board, he would have been selected for promotion.

The applicant stated that he had received a copy of a letter, dated November 29, 1993, from the Commander, [REDACTED] Coast Guard District, to his Reserve unit commanding officer (CO). This letter informed the CO that the November 5, 1993, faxed copy of the OER was not received in time to be considered by the 1993 LT selection board. The Commander also informed the CO that he was returning the

OER for further corrections. This letter also stated that the OER had been returned once before, on June 21, 1993, for corrections.

The applicant stated that in 1993 District Headquarters personnel and Coast Guard Headquarters personnel told him that nothing that could be done about the fact that the subject OER was not included in his record when it was placed before the 1993 LT selection board.

The applicant stated that he did not discover the existence of a possible remedy for the alleged error until June 1997. He stated that, in June, while reviewing the Reserve Policy Manual for an unrelated matter he came across Para. 7.A.8.c. of that manual. This provision states in pertinent part, as follows:

"c. Officers are not considered to have failed of selection if they were not considered by a selection board due to administrative error.

(1) If they are selected by the next successive selection board and promoted they shall be given the date of rank and position on the Inactive Duty Promotion List (IDPL) in the grade to which promoted that they would have held had they been recommended by the first selection board (14 U.S.C. 739(b))."

In a letter dated June 18, 1997, based on the above provision, the applicant asked the Commander, Coast Guard Personnel Command (CGPC), to give him the date of rank and position on the IDPL that he would have had if he had been selected for promotion by the 1993 selection board.

The Commander, CGPC, responded that he did not have the authority to grant the applicant's request. He told the applicant to apply to the Board for Correction of Military Records for relief.

Applicant's OERs

During the period covered by the subject OER, the applicant was the assistant administrative officer of his unit, supervised 6 enlisted personnel, performed collateral duties, and attended 15 of 15 drills. His grades consisted of 4s (on a scale of 1 to 7, with 7 being the highest) except for a 5 in looking out for others and a 5 in initiative.

The comments in the subject OER were flattering and indicated that the applicant drilled while receiving no pay. Some of the positive comments in the subject OER included the following: effective officer, readily participated in Reserve unit responsibilities, developed team concept, led by example as team leader, and worked well in independent assignment.

The applicant was given a mark of 3 in block 12, the comparison and distribution scale on the subject OER. This OER contains the only 3 that the applicant has received as an officer. The applicant's marks on the immediate previous OER averaged 4.6, with a mark of 5 in block 12. His marks on the subject OER averaged 4.1, with a mark of 3 in block 12.

On the two subsequent OERs, the applicant received a mark of 4 in block 12 on one OER and a mark of five on the other. The first one of these OERs covered a period of approximately one year and the other covered a two week period of active duty. The applicant's duties on the subsequent OER that covered the longer period were essentially the same as on the subject OER.

Views of the Coast Guard

On September 4, 1998, the Board received the views of the Coast Guard submitted by the Chief Counsel. The Chief Counsel recommended that no relief be granted to the applicant.

The Chief Counsel provided the following chronology with respect to the subject OER:

The Applicant submitted his OER for the period 92 Mar 23 (sic) to 93 Feb 07 on 7 February 1993. His supervisor and reporting officer signed the OER the same day. That OER was returned to the Applicant's Reserve Unit in June 1993 for correction and was submitted again in November 1993 to Commander, [REDACTED] CG District (rs) for processing. That revised OER was once again returned to Applicant's Reserve Unit for correction during November 1993 and a final corrected version of this OER was signed, reviewed, approved, validated, and ultimately entered into Applicant's service record in April 1994.

The Chief Counsel argued that this case should be denied because it is untimely, and the applicant has not provided any basis or reason why it is in the interest of justice to waive the untimeliness. The Chief Counsel stated that the applicant was notified by letter dated November 29, 1993, that the OER was not included in the record that went before the 1993 LT selection board. Based on the record presented, the applicant should have filed an application with the Board by November 28, 1996. His application was not filed with the Board until November 3, 1997.

The Chief Counsel stated that the applicant was considered and not selected for promotion by the 1993 Reserve lieutenant selection board, in November 1993. The Chief Counsel stated that "[a]lthough the applicant telephonically contacted [both] his [CO] and executive officer [XO] to determine the status of the OER, the applicant never informed Commander, Military Personnel Command in writing

that his OER had not been received within the 90 day period after the end of his marking period."

The Chief Counsel stated that although the applicant stated that he was told by Headquarters' personnel that nothing could be done, the BCMR regulations were available to him, since the regulations are public record. The Chief Counsel stated that the applicant has not presented prima facie proof that the Coast Guard did in fact misinform him as to the availability of any administrative relief for the error he alleged.

The Chief Counsel stated that the principles underlying the statute of limitations are: efficient use of government resources, prompt resolutions of claims, and loss of evidence. The Chief Counsel stated that these interests weigh against excusing untimeliness in the present case because it puts an unreasonable burden on the Coast Guard to attempt to identify, locate and finally ask some unknown Coast Guard official to recollect a phone conversation that supposedly took place four to five years ago.

The Chief Counsel asserted that the absence of the February 1993 OER from the applicant's record was either harmless or to his benefit. The Chief Counsel stated that absent the error, the applicant would not have been promoted by the 1993 selection board. The Chief Counsel stated that while the applicant's service record is generally good, the subject OER documented a noticeable drop in his overall performance and the applicant's record was actually stronger without it. The Chief Counsel stated that the applicant has not disputed that the subject OER itself was an accurate measure of his performance. The Chief Counsel stated that the applicant has not met his burden of producing prima facie evidence of a nexus between the subject OER and his failure of selection.

The applicant was subsequently selected for promotion in 1994. The Chief Counsel argued that the applicant's selection is unlikely to have occurred without the additional two OERs from 1994 (one of these was for a two-week period of active duty). These two additional OERs indicated a substantial improvement in the applicant's performance (in block 12 on one OER the applicant received a 4, on the other he received a 5) from the 1993 OER and served to mitigate the detrimental effect of the 1993 OER which was in the applicant's record when it was reviewed by the 1994 selection board.

The Chief Counsel stated that since the applicant's record was considered by the 1993 selection board, Article 5.A.4.f.2 of the Personnel Manual (Para. 7.A.8.c., Reserve Policy Manual) is not applicable in this case.

Applicant's Response to the Views of the Coast Guard

On September 8, 1998, a copy of the views of the Coast Guard was mailed to the applicant with an invitation for him to respond. He did not submit a response.

SELECTED PROMOTION BOARD REGULATIONS

Article 10-A-2f.(2)(f) of the Personnel Manual states that the reviewer "[f]orwards the reviewed report to OER administrator in a reasonable time to permit the OER administrator to meet the target date established by article 10-A-2h.(2)(a) for the OER to be received by Commandant (G-PIM-3) 45 days after the end of the reporting period."

Article 10-A-2h.(2)(a) of the Personnel Manual states in pertinent part that "[t]he OER Administrator shall ensure that OER's . . . are received by Commandant (G-PIM-3) not later than 45 days after the end of reporting periods."

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:

<u>"For promotion to</u>	<u>Service Period</u>
"Lieutenant Lieutenant (Junior Grade)	All commissioned Service"

Article 1-C-1 of the Reserve Administration and Training Manual (RATMAN (superseded by the Reserve Policy Manual (1997)) defined training/pay category H as a status for an individual ready reservist who is not required to perform period of IDT (inactive duty training) or periods of ADT (active duty for training), but "[m]ay perform voluntarily with units of Selected or Ready Reserve . . . or enroll in correspondence courses or participate in other nonpaid IDT for retirement points."

FINDINGS AND CONCLUSIONS

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

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

2. To be timely, an application for correction of a military record must be submitted within three years after the discovery of the alleged error or injustice. The Board may still consider the application on the merits, however, if it finds it is in the interest of justice to do so. See 33 CFR 52.22.

3. The Board finds that it is in the interest of justice to excuse the delay in this case. In determining whether to waive the statute of limitations, the Board is required to consider the reason for the delay as well as the likelihood of success on the merits. As the Court stated in Allen v. Card, 799 F. Supp. 158, 164, "[i]f a claim appears particularly meritorious, it may be in the interest of justice to provide a complete review of the merits, even if there has been a delay in bringing the claim. The longer the delay has been and the weaker the reasons for the delay are, the more compelling the merits would need to be to justify a full review."

4. The applicant has provided a reason for his delay. He stated when he became aware, in November 1993, that the OER had not been included in his record when it was considered by the 1993 selection board, he contacted personnel at both District Headquarters and Coast Guard Headquarters about the situation. The applicant stated that he was told there was nothing that could be done about it. The Coast Guard commented that the applicant had contacted the CO and XO about the OER problem. The applicant stated that approximately four years later while searching for other information in the Reserve Policy manual, he came across a provision that suggested to him that some relief may be possible. Soon afterward, the applicant wrote a letter to the Commander, CGPC, requesting relief. The Commander referred the applicant to the BCMR. The applicant's explanation is believable, particularly since he had contacted his CO and XO about the report. Also, it is believable that an individual would accept answers given to him by District and Headquarters' personnel who are supposed to be knowledgeable in a given area. The Board notes how swiftly the applicant acted when he discovered a possible avenue for relief.

5. In Allen v. Card, the Court directed that the BCMR consider the reason as well as the merits of a case in reaching a decision on whether a case should be denied due to untimeliness. The applicant's case has merit. His record was incomplete when it was considered by the 1993 Reserve LT selection Board. The Coast Guard does not deny that the subject OER was not in the applicant's record. It is also likely that the applicant will prevail on the question of removal of his failure of selection. Applying the standard in Allen v. Card, the Board finds that it is in the interest of justice to waive the statute of limitations in this case.

6. The Coast Guard also appears to be asserting the defense of laches. It argued that the principles underlying the statute of limitations (efficient use of government resources, prompt resolutions of claims and loss of evidence) weigh against excusing untimeliness in this case because it puts an unreasonable burden

on the Coast Guard to attempt to disprove the applicant's claim more than five years later. However, an allegation of prejudice is insufficient to prove it. The Coast Guard failed to provide evidence of any of its attempts to verify any conversations that might have occurred in 1993, to describe or prove how resolving this case on the merits results in an inefficient use of government resources, or to identify what records, if any were lost due to the passage of time. The Coast Guard has not demonstrated by sufficient evidence that it has been prejudiced by the applicant's delay.

7. Considering the merits of this case, the Board finds that the OER for the period ending February 7, 1993 was not included in the applicant's record when it was considered by the 1993 selection board. While admitting that the OER was not included in the applicant's record, the Coast Guard appears to blame the applicant for this error. The Coast Guard stated that the applicant did not notify the Commandant within 90 days of the end of the reporting period that he had not received the OER. This argument is not persuasive, particularly, since the problem for the late submission of the OER seemed to be a result of the rating chain's inability to properly complete the OER. It was twice returned to the rating chain for corrections. By not submitting the OER in a timely manner so that it would reach the Commandant 45 days after the end of the reporting period, the Coast Guard violated Articles 10-A-2f.(2)(f) and 10-A-2h.(2)(a) of the Personnel Manual. The Board finds that the applicant's record was incomplete when that record was considered by the 1993 LT selection.

8. Since the applicant's record was considered by the 1993 LT selection board, Para. 7.A.8.c. of the Reserve Policy Manual is not applicable in this case. The Board will apply the test in Engels v. United States, 230 Ct. Cl. 465 (1982) in determining whether a nexus exists between the error and the applicant's failure of selection for promotion to LT.

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.

9. The Coast Guard argued that the applicant's record was stronger without the subject OER. The Coast Guard reasoned that the subject OER indicated a drop in the applicant's performance because some of the grades, particularly the block 12 mark, were lower than on his previous OERs. Notwithstanding the Coast Guard's position, the Board finds that including the subject OER in the applicant's record would have enhanced it before the selection board.

10. The applicant's record (without the subject OER) was not fairly portrayed before the 1993 selection board. The subject OER covered a period of approximately nine months. Without the subject OER in the record, the selection board was left to speculate as to the applicant's assignment, performance, and status for the period from May 1, 1992 to February 7, 1993. The subject OER contains more than just marks. It contains a description of the applicant's duties and the number of personnel he supervised. The subject OER would have also told the selection board members that the applicant performed drills with a selected reserve unit, even though he was not required to drill at that time because of his category H status (non-pay). See Article 1-C-1, RATMAN. The subject OER also indicated that the applicant completed all scheduled drills for that period, and he was actively supporting the goals, programs, and mission of the Coast Guard. Thus, the Board finds that the applicant was prejudiced before the 1993 selection board by not having the subject OER included in his record.

11. The Board finds that it is not unlikely that the applicant would have been promoted by the 1993 selection board with the subject OER in his record. The Coast Guard argued that because of the noticeable drop in his performance on the subject OER, it is unlikely that the applicant would have been promoted in any event. The Board finds that while some of the applicant's grades on the subject OER were lower than on his previous OERs, they were not so inconsistent with other grades received by the applicant as to outweigh the value of having the subject OER in his record (such as, showing that he was a supervisor, participated in the active Reserves, had a specific job assignment, completed all drills, and drilled without pay). The grades in the performance dimensions were slightly lower (.5) than on the previous OER. Although the mark of 3 in block 12 on the subject OER could be considered significant when compared to the 5 the applicant had previously received, the Board is not persuaded that this single mark alone would have made it unlikely that the applicant would have been selected for promotion, particularly since the comments on the subject OER were very positive. They describe the applicant as an effective officer, team leader, and a ready participant. Moreover, the Personnel Manual requires that all commissioned service be considered as significant by a selection board considering an officer for promotion to LT. As the Coast Guard stated, the applicant had a good record.

12. Additionally, the applicant was selected for promotion to LT in 1994, above the zone, with the subject OER in his record. The Coast Guard argues that the applicant's record before that board was stronger because of two subsequent OERs that showed an improvement in the applicant's performance. However, the fact that he was selected, above zone, with the subject OER in his record supports the Board's finding that with a complete performance record that depicted good performance overall, it is not unlikely that the applicant would have been promoted in 1993.

13. Reservists not on active duty, like the applicant, normally drill one weekend per month and often drill without pay, as the applicant did for the period covered by the subject OER. Also, Reservists not on active duty must earn 50 points per year to have a qualifying year of service. See Encl. (1-1), RATMAN. Having the subject OER in the applicant's record would have demonstrated the applicant's commitment to the Coast Guard for that period when he was in a non-pay status. Also, it would have informed the selection board that the applicant had a qualifying year of service while in this non-pay status. In selecting a Reserve officer for promotion, this Board finds that these are important considerations.

14. The Board finds that it is not unlikely that the applicant would have been selected in 1993, if he had gone before that board with a corrected record.

15. Accordingly, the Board finds that the applicant should be granted relief.

ORDER

The application of _____, for correction of his military record is granted. His record shall be corrected by removing his 1993 failure of selection for promotion to LT, and his LT date of rank shall be the date he would have received if he had been selected by the 1993 LT selection board. He shall be reinstated on the IDPL in the position that he would have had, if he had not failed of selection for promotion in 1993. The applicant shall receive any pay that is due him as a result of this correction.

