

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 1998-023

FINAL DECISION

██████████ Chairman:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on October 29, 1997, upon the receipt by the BCMR of the applicant's request for correction of her military record.

The final decision, dated December 10, 1998, was signed by three duly appointed Members who were designated to serve as the Board in this case.

APPLICATION FOR RELIEF

The applicant, an ensign (O-1) on active duty submitted an application to the BCMR alleging that she suffered discriminatory and prejudicial treatment while serving on the CGC ██████████. She asked for the removal of her OER (officer evaluation report) for the period from October 1, 1996 to March 31, 1997 (disputed OER). The application was based on the argument that the "facts do not adequately reflect [her] performance" and on the ground that she "was not counselled as required." On the disputed OER, the applicant had five marks of "2" (out of a possible "7") and 11 marks of "3" (out of a possible "7"). These 16 below-average marks were matched by negative written comments such as "she has not succeeded in commanding the respect of the crew;" she is not recommended for promotion; and "[r]equired inordinate amount of guidance to complete all but routine tasks."

The applicant alleged that she was not given the same opportunities as her peers "due to [her] double minority status."

The applicant claimed that her low marks and comments were due to discrimination. According to Block 12 (comparison and distribution) on the disputed OER, the reporting officer rated her as a "2" (qualified officer) out of a possible "7" (distinguished officer). On Block 11 (leadership and potential), the reporting officer said her "potential & knowledge did not appreciably improve," and

tasks that require "initiative & analytical thought, seem beyond her grasp." She was not recommended for promotion on the disputed OER. Her reporting officer also said she had not shown the proficiency for a successful tour afloat.

The applicant charged race discrimination and sexual harassment against former officers of the CGC [REDACTED]. She submitted to the Board a 12-page account of alleged incidents, that was sent to the Atlantic Area Office of Civil Rights.¹ The incidents allegedly took place on the [REDACTED] from June 1996 through April 1997.

The following allegations were made by the applicant:

* "[T]he only other African-American female classmate of mine has also been short toured for 'poor performance.' "

* The applicant and a white female, classmates at the Coast Guard Academy, reported to the [REDACTED] at the same time. The white classmate was treated as a valuable member of the crew, but the applicant was not. She "felt like an outcast."

* A lieutenant (LT) allegedly chastised her in a loud voice in the presence of others. On another occasion, the LT shouted at her and was unprofessional. The applicant said that she felt that "this treatment was blatant discrimination based on my race."

* The applicant alleged that she was rumored to have said that if she "did not like anything on the ship [she] would allege sexual harassment or discrimination." She denied the rumor.

* The applicant said that in February she "put braids in [her] hair to celebrate Black History Month." The Captain told her he didn't know if it was professional. He later said he guessed it was, but he commented on the high cost of braiding hair. "It was apparent," said the applicant, "that the Captain realized that these inquiries were inappropriate because he would always cease the discussion immediately if someone else approached. "

* "[N]o one took up a collection on her grandfather's death or conveyed any condolences. "

* The applicant believed that she was in a hostile environment aboard CGC [REDACTED]. She was never given any positive feedback; only negative counselling was offered.

* The Captain told her that her OER "would reflect [her] poor

¹ The applicant did not, however, file an EEO (equal employment opportunity) complaint,

performance, and that he could not recommend [her] for promotion."

VIEWS OF THE COAST GUARD

On October 26, 1998, the Chief Counsel of the Coast Guard recommended that no relief be granted to the applicant. The Chief Counsel recommended dismissal of the application on the ground that the applicant (1) failed to exhaust all effective administrative remedies under 33 CFR § 52.13(b); and (2) failed to articulate a specific factual or procedural error or failed to show that her performance was impeded by the alleged conduct.

The applicant's claim was based solely on discrimination, but she failed to file a complaint on that basis with the military civil rights process. The military civil rights process has the capacity to investigate a claim on its own, which the BCMR cannot do. The BCMR, unlike the civil rights process, is not an investigative body. It must rely on the factual record submitted to it. The Chief Counsel said that the BCMR should not therefore not consider an application until the administrative remedy is "exhausted."

The Chief Counsel said that DOT's Office of Civil Rights [DOCR] has authority to investigate discrimination complaints. The applicant had stated in a document submitted to the BCMR that she had filed an informal and a formal complaint of discrimination. The Coast Guard, however, found that she never filed either a formal or informal civil right's complaint.

According to the Chief Counsel, "the Board lacks the record necessary for it to grant Applicant the relief she has requested on the basis of discrimination, her sole stated basis for relief." He said that the Board should dismiss an application if there are disputed facts, "no EEO investigation," and no valid basis to excuse the applicant in not pursuing the administrative remedy.

The Chief Counsel also stated that the application should be dismissed on the merits, because its allegations "are uncorroborated and unsubstantiated." He said that the Government does not have to disprove applicant's contentions. The burden of producing substantial corroborative evidence rests on the applicant.

OTHER VIEWS OF THE COAST GUARD

The commanding officer of the CGC [REDACTED] had a very different view of the applicant's performance than did the commanding officer of the CGC [REDACTED]. According to the [REDACTED] commanding officer, "the shortcomings identified during [her first tour] did not materialize on [REDACTED]." He said that while on [REDACTED] she "aggressively pursued, and completed, the difficult challenges of qualification as a Deck Watch Officer on a major cutter."

Her OER for the period from October 1, 1997 to March 31, 1998, her OER on the [REDACTED] was very different from the disputed OER. On Block 12, on the OER ending in March 31, 1998 (comparison scale), she received a mark of "6" (Exceptional Officer)

APPLICANT'S RESPONSE TO COAST GUARD VIEWS

On October 29, 1998, the Board sent a copy of the views of the Coast Guard to the applicant. The Board also invited the applicant to submit a response to any recommendation of the Coast Guard.

On November 19, 1998, the applicant notified the Board that she was ready for it to decide her case.

FINDINGS AND CONCLUSIONS

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

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

2. The applicant asserted that the disputed OER with respect to her service on the CGC [REDACTED] should be removed from her record because the officers and crew of that ship allegedly treated her in a discriminatory fashion, because she was a female and an African-American.

3. The applicant submitted a 12-page memorandum setting forth the discrimination that she suffered and that was reflected in the disputed OER.

4. In this memorandum, the applicant alleged at least eight incidents of discrimination aboard the [REDACTED]. None of these submissions was accompanied by any corroborative evidence or proof that any of the incidents took place. There was, for example, no statement by any officer or member who served with her on the CGC [REDACTED].

5. A commander (CDR) who was a mentor to the applicant while she was on the [REDACTED] told her she might not be successful in being selected for LTJG with the disputed OER. The CDR noted that she was happy on her next patrol. Her commanding officer and members of her rating chain on her next ship, the CGC [REDACTED] gave her good marks and comments and she was selected for LTJG.

6. The Coast Guard alleged that the applicant failed to file a discrimination complaint. The Coast Guard also alleged that the applicant stated that she filed an informal complaint of race and sex discrimination. Neither party submitted proof of this point.

7. On August 27, 1998, the applicant was selected for promotion to the grade of lieutenant junior grade.

8. The applicant has not proven that the Coast Guard committed any error or injustice. Accordingly, her application should be denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application to correct the military record of
, USCG, is denied.

