

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 138-96

FINAL DECISION

[REDACTED]

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on July 22, 1996, upon the BCMR's receipt of the applicant's request for correction of his military record.

This final decision, dated November 21, 1997, is signed by the three duly appointed members who were designated to serve as the Board in this case.

Applicant's Request for Relief

The applicant served as a [REDACTED] with the grade of lieutenant (jg). In 1993 and 1994, he was passed over for promotion to lieutenant, on the basis of his officer evaluation report (OER) for the period from January 1, 1993 to June 30, 1993 (disputed OER). The applicant alleged that the disputed OER was prepared in violation of two important provisions of the Personnel Manual. "

The applicant asked the Board to remove the disputed OER and replace it with a report for continuity purposes only. The applicant also asked for the removal of failures of selection for promotion to lieutenant. In 1983, the applicant graduated from [REDACTED]. He then served as a [REDACTED] rising to the grade of [REDACTED]. He resigned his [REDACTED] and accepted a direct commission at a lower grade (O-2) in the Coast Guard.

Section 3 of the disputed OER said the applicant is progressing "somewhat more slowly than his peers." He alleged that comparison comments are prohibited by Article 10-a-4d.(4)(b). He also objected to a comment that said there was an "expectation" as to his advancement without his being briefed as to that expectation. The applicant also alleged that superiors in the rating chain directed the marks or comments that were to be put in the disputed OER by a subordinate.

The applicant's attorney said that there was error, even if the reviewer did

not direct that the supervisor's portion of the OER be altered and even if the reporting officer misstated the reviewer's comments. Either way, "pressure was brought to bear . . . [and t]his violates the Personnel Manual."

The applicant also argued that the applicant's prior service record as an [REDACTED] officer should have been presented to the Coast Guard selection boards that passed over him. "It is seriously contrary to public policy for any branch of the service to [deny] the validity of personnel evaluations generated in that other branch."

Views of the Coast Guard

On April 28, 1997, the Coast Guard Personnel Command [CGPC] submitted the following recommendation to the Military Justice Division of the Chief Counsel's office. The CGPC recommended that the following phrase be deleted from the disputed OER: "... who has progressed toward [REDACTED] somewhat more slowly than his peers." The CGPC recommended that no other relief be granted.

On May 29, 1997, the BCMR received an advisory decision of the Coast Guard recommending partial relief in this case. The partial relief was that described by the CGPC opinion of April 28, 1997.

The Coast Guard also said that Section 11 of an OER is extremely important to promotion boards because it is where the Reporting Officer makes his recommendation as to potential for promotion and increased responsibility.

The Coast Guard said it has been long standing practice of the Service not to include prior service performance information in the Coast Guard PDR [personnel data record]. The Coast Guard, under title 5, can only maintain information that is relevant and necessary. Prior service information should not be maintained because the Service does not consider the records of prior service officers either relevant or necessary. Coast Guard officers are not, furthermore familiar with the other armed forces and their particular responsibilities

Applicant's Response to the Views of the Coast Guard

On July 16, 1997, the BCMR sent a copy of the views of the Coast Guard to the applicant. The applicant was invited to submit a rebuttal or other responses to the Board. No rebuttal or other response was received by the Board.

PRECEDENTS AND APPLICABLE REGULATIONS

BCMR Docket No. 103-80 involved a request to correct an lieutenant's military record by inserting his Navy fitness reports into his Coast Guard record. In 1978, the applicant asked the Commandant to send him copies of all Navy fitness reports held by the Coast Guard. He also asked that copies of any Navy fitness

reports not held by the Coast Guard be requested from the Navy. The Commandant did not decline to do so. In response to his request, the applicant received all but two of his Navy fitness reports.

The applicant failed of selection for promotion to lieutenant commander [LCDR]. His Navy fitness reports were not considered by the selection board. When he inquired as to the reason, he was told by the Commandant that "as a matter of policy, records of service in another armed service are not delivered to Coast Guard personnel boards." The BCMR held that Coast Guard committed an injustice by not submitting the Navy records to the selection board. According to the BCMR, in this case, that was docketed in 1980, the applicant "brought this matter to the Coast Guard's attention . . . by requesting that copies of his fitness reports be obtained from the Navy." The Board found that the Coast Guard should have informed the applicant of its policy so that he could have sought review of that policy prior to the convening of the selection board.

Docket No. 362-91 was a similar case. The records of his Navy fitness reports were not presented to his commander selection board even though they were physically in [his] record at the time the board met." The BCMR found that the applicant suffered an injustice when he was considered for promotion on the basis of a record that did not include his 1974 to 1981 Navy records. The BCMR denied the application, however, on the ground that the applicant's record did not appear worse that it would have if the Navy records had been included because they covered the period outside the seven years of prior service that is "considered most significant."

Commandant Instruction (COMDTINST) M1080.10:

The personnel data records [PDR] of the Coast Guard are governed by this instruction. The instruction provides that the PDR system is the system whereby the Coast Guard retains only those specific documents necessary to manage the Coast Guard military workforce. The PDR system does not retain all documents.

In Docket No. 362-91, the BCMR held that M1080.10 "should not be applied to officer records because its purpose is to reduce paperwork in the Coast Guard rather than to facilitate the finding of error and injustice in official records. Error and injustice are more important than paperwork reduction.

Personnel Manual (COMDTINST M1000.6A), Article 5-A-4e.
Communication with the Selection Boards.

(1) Each officer eligible for consideration by a selection board may send a communication through official channels to the board, to arrive not later than the date the board convenes, inviting attention to any matter of record in the Armed Forces concerning him/herself. . . .

14 U.S.C. § 253(b). Each officer eligible for consideration by a selection board . . . may send a communication through official channels to the board . . . inviting attention to any matter of record in the armed forces concerning himself. . . .

FINDINGS AND CONCLUSIONS

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

2. The applicant requested an oral hearing. The Chairman, pursuant to § 52.31 of the Board's rules, recommended disposition on the merits without an oral hearing. The Board concurred.

3. The applicant asserted that his personnel performance records, as an officer in the [REDACTED] should have been included in the materials transmitted to the 1993 and 1994 Coast Guard promotion boards.

4. Section 253(b) of title 14 of the United States Code, and Article 5-A-8e.(1) of the Coast Guard Personnel Manual, provide that each officer eligible for consideration by a selection board is authorized to send a communication, including a prior service performance record, to that selection board. The communication invites attention to any "matter of record in the Armed Forces" concerning the applicant. The only limitations are that the communication must arrive at the Board no later than the day that it convenes, and the communication must not criticize or reflect adversely on any officer.

5. The applicant did not take advantage of his rights under section 253(b) and took no steps in that direction. The BCMR granted relief in an analogous case, BCMR Docket 103-80. The applicant in that case asked the Commandant to collect and send his Navy records to the applicant's selection board; the Commandant purportedly agreed to do this but did not.

6. The Coast Guard committed an error in violating another part of the disputed OER: Article 10-A-4d.(4)(b) of the Personnel Manual which declares that a Supervisor shall "compare the officer's performance and qualities against the standards--NOT to other officers." The supervisor said that the applicant was a responsible pilot "who has progressed towards [REDACTED] somewhat more slowly than his peers."

7. The Coast Guard acknowledged that this statement was improper and

recommended that it be redacted from block 3h of the disputed OER.

8. The disputed OER appears better with this sentence removed from block 3. While the OER is weaker with this comment, its presence does not make the record as a whole appear substantially worse. The remainder of the disputed OER reflects the same deficiency that was captured by the comment; the fact that the applicant was not progressing as rapidly as possible.

9. The applicant has not shown prejudice, as required by the Engels test, so it would not be appropriate to remove his failures of selection. Engels v. United States, 230 Ct.Cl. 465, 470 (1982).

10. Accordingly, the language from block 3h of the disputed OER should be removed, but no other relief should be granted.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

Final Decision: BCMR No. 138-96

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ORDER

The application to correct the military record of [REDACTED]
[REDACTED] USCG, is granted by removing the following words from block 3h of the
OER from January to June 93: "responsible copilot who has progressed towards First
Pilot somewhat more slowly than his peers." No other corrections shall be made.

