

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 16-97

DECISION OF THE DEPUTY GENERAL COUNSEL
ACTING UNDER DELEGATED AUTHORITY


☒ 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.

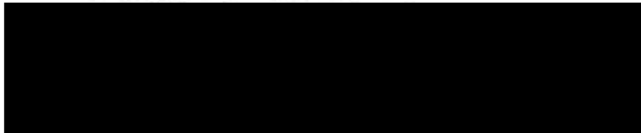
DATE:

May 22, 1998


Deputy General Counsel
as designated to act for the
Secretary of Transportation

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction
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FINAL DECISION



This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on November 5, 1996, upon the BCMR's receipt of the applicant's request for correction of his military record.

The 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 is a Lieutenant Commander (LCDR) who was retired from the Coast Guard on [REDACTED]

The applicant asked the BCMR to remove from his record his special officer evaluation report (OER) for October 1, 1991 to June 9, 1994 (two years and eight months)(disputed OER), on the ground that one component of it was in violation of Coast Guard policy. The applicant contended that the disputed OER mentioned a CGI (Coast Guard Investigations) investigation to which the LCDR was not a party. He asserted that mentioning such investigation was a violation of Article 10-A-4g.(1) of the Coast Guard Personnel Manual. "Reference to a final proceeding is only proper if the officer concerned was made a party to and accorded full party rights during the course of the proceeding." Id.

Views of the Coast Guard

On October 16, 1997, approximately 11 and one half months after this case was commenced, the Coast Guard submitted an advisory opinion recommending that partial relief be granted to the applicant.

The Coast Guard said that the only error that the applicant proved was that the disputed OER mentioned an investigative proceeding. The Service said that this error should be corrected. It recommended that all references to the report of the investigation to which the applicant was not a party should be removed.

The Service said that it did not err by relying on the investigative report without according the applicant the rights of a party to the investigation. If a member is not made a party, the investigation may not be used against the member in lieu of an investigation under Article 32 or a nonjudicial punishment hearing under Article 15. "There is," according to the Coast Guard, "no such prohibition against using an investigation as a basis for an OER."

The Coast Guard said that the applicant is not entitled to have the entire disputed OER removed. The applicant did not challenge the accuracy of the facts set forth in that OER or the fact that the applicant was not selected for promotion by three selection boards prior to the disputed OER. The Service made recommendations to the Board with respect to which comments should be deleted.

Applicant's Response to the Views of the Coast Guard

On October 17, 1997, the BCMR sent a copy of the views of the Coast Guard to the applicant along with an invitation to respond to those views. No response was received from the applicant.

APPLICABLE REGULATIONS

Art. 10-A-3b., Personnel Manual

Special OER's may be directed by the Commandant, commanding officers, higher authority within the chain of command, . . . The circumstances for the Special OER must coincide with one of the below criteria. The authorizing article should be cited in Section 2 of the OER along with a brief description of the circumstances which prompt the OER's submission. . . .

(3) A special OER is required upon final completion of criminal, other disciplinary, or investigative action which does not exonerate or acquit the Reported-on Officer or any other matter on which he or she may be evaluated. . . . This special report will cover the . . .

time frame, during which the conduct, which was the subject of the criminal, other disciplinary, or investigative action occurred.

Art. 10-A-4g.(1), Personnel Manual

Members of the rating chain shall not comment on or make reference to any pending criminal proceeding . . . , disciplinary action Reference to a final proceeding is only proper if the officer concerned has been made a party to and accorded full party rights during the course of the proceeding. . . . This restriction does not preclude comments on appropriate, undisputed, supportable and relevant facts, so long as no reference is made to the pending proceedings.

FINDINGS AND CONCLUSIONS

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

2. The applicant asked the Board to delete his special OER (disputed special OER) that covered the period from October 1, 1991 to June 9, 1994. According to section 2 of the disputed special OER, it was submitted under Article 10-A-3b.(3) of the Personnel Manual. The disputed special OER covered a period of two and 2/3rds years, the period during which the conduct being investigated occurred.

3. The applicant argued that Article 10-A-4g.(1) of the Personnel Manual prohibited "any reference" to a final proceeding unless the officer had been accorded "full party rights" (e.g. right to introduce evidence, to cross-examine witnesses, to examine documentary evidence) during the course of the proceeding.

4. The last sentence in this Article allows comments on "supportable and relevant facts" so long as no reference is made to "pending proceedings." That sentence does not apply to proceedings that have ended and been closed.

5. Article 10-A-3b. of the Personnel Manual requires that section 2 of a special OER cite the authorizing article for that OER. The disputed special OER cites "PERSMAN 10-A-3b.(3)."

6. The Coast Guard agreed to remove specified language from section 2 (description of duties) of the disputed special OER. The language to be removed was as follows: "as a result of a report of investigation referred to this command for action by CCGD5 (ole) on 9 Jun 94." In addition, the Coast Guard agreed to change the first word of the second sentence of this section from "That" to "This."

7. The Coast Guard also agreed to remove the following language from section 8 (reporting officer comments) of the special disputed OER: "This investigation constitutes final action on report of investigation."

8. The entire second sentence should be deleted from section 2 ("That report documents an inappropriate (i.e. overly familiar but not sexual) personal relationship between [the applicant] and a junior officer under his command, and some continued telephonic/written (but not personal) contact after [the applicant's] transfer in May 92.") This sentence must be deleted because, in violation of Article 10-A-4g(1), it refers to the allegations in a report of investigation to which the applicant was not a party.

9. The period of the disputed OER is "91 10 01 to 94 06 09." The reporting officer stated, in section 11 of the disputed OER, that "[d]uring my short period of observation of [the applicant] (since 30 June 1994). . . ." The text of section 11 should be deleted because the reporting officer admits that he did not observe the reported-on officer until after the reporting period for the disputed OER had terminated.

10. No other corrections should be made in the disputed OER.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application to correct the military record of [REDACTED] is granted by removing the following language from the OER for October 1, 1991 to June 9, 1994:

SEC. 2. Delete the following text, after 'PERSMAN 10-A-3b.(3)': "as a result of a report of investigation referred to this command for action by CGGD5(ole) on 9 Jun 94. That report documents an inappropriate (i.e. overly familiar but not sexual) personal relationship between [the applicant] and a junior officer under his command, and some continued telephonic/written (but not personal) contact after [the applicant's] transfer in May 92."

SEC. 8. Delete the following: "This constitutes final action on report of investigation."

SEC. 11. Delete the entire text.

