

DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of  
Coast Guard Record of:

BCMR Docket  
No. 1998-024

FINAL DECISION

Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14, United States Code. It was commenced on November 7, 1997, upon the BCMR's receipt of the applicant's request for correction of his military record.

This final decision, dated May 20, 1999, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a lieutenant (LT) on active duty, asked the Board to correct his record by removing an officer evaluation report (OER) for the period February 1, 1996, to July 31, 1996, (disputed OER). The applicant claimed that the disputed OER was not accurate or reliable.

**EXCERPTS FROM RECORD AND SUBMISSIONS**

The applicant received the disputed OER, in 1986, while assigned to Coast Guard Group [REDACTED]. He alleged that the disputed OER is unjust because the rating chain failed to counsel him on his performance, despite the numerous requests he made for counseling. The applicant stated that "[a]t no point during the marking period in question, did either my executive officer, my direct supervisor, my commanding officer, [or] my reporting officer, ever suggest any dissatisfaction with my performance during the marking period."

The applicant also alleged that in response to inconsistencies noted in the disputed OER, by the Commander [REDACTED] Coast Guard District, the reporting officer directed the supervisor to lower the marks that he had assigned to the applicant. According to the applicant, when the supervisor refused to lower the marks, the reporting officer wrote negative comments in the reporting officer's portion of the OER to satisfy the inquiry by the Commander [REDACTED] Coast Guard District. The applicant asserted that the reporting officer admitted to him that the following statement in block 11 was inaccurate: "[The applicant] has openly expressed his lack of interest in his primary duty." The applicant alleged that the disputed OER is filled with the reporting officer's opinions rather than with factual information. The applicant further alleged that the reporting officer improperly used

the disputed OER to record inaccurate information in order to prevent the applicant from becoming the group operations officer. The applicant claimed that the reporting officer wanted another officer in that job, even though the applicant had been recommended for the position by the previous reporting officer.

The applicant stated that this is not a civil rights complaint, but it is a fact that he was the only non-Caucasian officer at [REDACTED] at that time. He stated that every other officer was allowed to move into a higher position, except for himself, despite the fact that he was the most experienced. The applicant further stated as follows:

Shortly after [the reporting officer's] arrival, it was clear to everyone assigned at Group [REDACTED] that he had no interest in me or my well being and made a concerted effort to and did damage my career. The question begs how can [the reporting officer] endorse each of his officers to "fleet up", but his one non-Caucasian officer who has received stellar evaluations under everyone else is openly denied opportunities at every turn.

The applicant alleged that he did not take any action with respect to the disputed OER and the alleged maltreatment while working for the reporting officer, because he feared reprisals. He stated that any complaints that he would have made against the reporting officer would have had an adverse impact on his career, since the reporting officer's previous job had been as the assignments officer.

### **The Disputed OER**

In the supervisor's portion of the OER, the supervisor rated the applicant a "4" in each category, except for a "5" in the collateral duty/administrative expertise category.

In block 8 of the reporting officer's portion of the OER, the reporting officer stated that he did not agree with the marks of "4" that the supervisor gave the applicant in the operation specialty/expertise and the collateral duty/administrative expertise dimensions. The reporting officer thought that those "4s" should have been "3s". The reporting officer stated that the applicant "lacked the initiative, leadership & professional expertise to [receive] my endorsement to [fleet-up] to [group operations officer]."

In the categories that he was required to complete, the reporting officer assigned the applicant's marks of "4", except for a "3" in initiative.

The reporting officer wrote in block 11 that the applicant was unable to learn from his past mistakes. The reporting officer further stated that the applicant had "openly expressed his lack of interest with his primary duty as [law enforcement]

officer, and it showed in his performance." The reporting officer did not recommend the applicant for operational assignments or command in the future.

The reporting officer rated the applicant as a qualified officer (a mark of 2 out of a possible high of 7) when comparing the applicant, in block 12, with other lieutenant junior grades (LTJGs) that the reporting officer has known in his career.

The applicant did not submit an OER reply to the disputed OER.

#### **Application to the Personnel Records Review Board (PRRB)**

The applicant's allegations were considered by the Personnel Records Review Board (PRRB). That Board did not grant any relief to the applicant. The PRRB concluded that the applicant "[had] not provided convincing evidence to overcome the presumption of administrative regularity in regards to the completion or content of the [disputed] OER. The evaluation rendered was a fair and accurate characterization of Applicant's performance."

#### **Applicant's Article 138 Complaint**

The applicant filed an Article 138 complaint against his commanding officer, who was also the reporting officer. He complained about the reporting officer's treatment of him over a two year period, including the period covered by the disputed OER. The applicant specifically complained about the OERs he had received from the reporting officer.

The investigating officer on the Article 138 complaint found that "[the reporting officer] did not create or nurture a hostile environment toward [the applicant]."

The investigating officer also found that: (1) the reporting officer did not impede the applicant's professional growth, so that the reporting officer could fill the operations officer's job with someone other than the applicant; and (2) the reporting officer did not attempt to coerce or direct the supervisor to lower the marks that the supervisor had assigned to the applicant on the disputed OER.

With respect to the issue of counseling, the investigating officer stated that (1) the applicant did ask for performance feedback via e-mail in September of 1996 and in February 1997; (2) there was no written evidence showing performance or expectation counseling took place in September of 1996 between the applicant and the supervisor; and (3) the reporting officer and the supervisor verbally counseled the applicant about his performance.

According to the Chief Counsel, based on the investigating officer's report, the Commander [REDACTED] Coast Guard District, denied the applicant's request for relief.

On July 29, 1998, the Chief Counsel of the Coast Guard concurred in the action taken by the Commander, ██████████ Coast Guard District on the Article 138 complaint.

#### **Views of the Coast Guard**

On March 17, 1999, the Board received the views of the Chief Counsel of the Coast Guard with respect to this application. He recommended that the Board deny relief to the applicant.

The Chief Counsel stated that as the PRRB concluded, performance counseling occurred on a nearly continuous basis throughout the entire period covered by the disputed OER. The Chief Counsel stated that the e-mail messages sent by the applicant to his supervisor allegedly soliciting counseling were sent after the end of the reporting period covered by the disputed OER. The Chief Counsel concluded that the applicant had not provided the evidence necessary to overcome the presumption that his rating officials acted correctly, lawfully, and in good faith in making their evaluations.

The Chief Counsel stated that the applicant had provided no accompanying credible evidence in support of his allegation that the reporting officer directed the supervisor to change certain marks on the disputed OER. The Chief Counsel noted that the investigating officer on the applicant's Article 138 complaint did not find any evidence that the reporting officer attempted to coerce the supervisor to lower the marks he had assigned to the applicant on the disputed OER.

The Chief Counsel stated that the applicant failed to provide evidence to support his assertion that the reporting officer acted with personal animus or racial prejudice in his treatment of the applicant to make it easier for the reporting officer to bring in another officer to fill the operations job.

The Chief Counsel stated that the applicant's failure to submit a reply to the disputed OER may be considered evidence that he accepted the rating officials characterization of the performance described in those OERs. The Chief Counsel also stated that there is no substantiated evidence that the disputed OER was the result of error or injustice. He stated that the applicant had failed to prove by a preponderance of the evidence that an error or injustice exists in the disputed OER.

#### **Applicant's Response to the Views of the Coast Guard**

On May 12, 1999, the Board received the applicant's response to the views of the Coast Guard. Notwithstanding the denials of his Article 138 complaint and his PRRB application, the applicant maintained that he believed that his reporting officer created a hostile work environment and wrongfully denied him career enhancing opportunities. The applicant stated that he recognized that none of the other officers was willing to corroborate his claim that the reporting officer created a hostile

environment for him, but the lack of any such corroboration does not mean that the hostile work environment did not exist. The applicant further stated as follows:

I understand the Coast Guard must maintain organizational integrity by supporting the officers they select to lead our units. I realize I am not larger than the organization.. Conversely, just because the Coast Guard selects someone to be a commanding officer does not mean that person does not have a propensity for tyranny. It is a fact that [the reporting officer] held command meetings that excluded me. It is a fact that [the reporting officer] offered more support and coaching to certain of his officers than he did to me.

The applicant stated that if it takes corroboration to prove his case before the Board, is it enough for the Board to accept the reporting officer's damaging statements in the applicant's OER without question.

### 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 Board has jurisdiction of this case pursuant to section 1552 of title 10, United States Code. It was timely.

2. The applicant alleged that the disputed OER is unfair because he was not counseled on alleged deficiencies in his performance during the reporting period. There is no evidence of written counseling during the reporting period. Counseling can take many forms and need not always occur in writing; it can be verbal. The evidence in this case, particularly the investigation into the Article 138 complaint, strongly suggests that there were discussions between the applicant and members of the rating chain about the applicant's performance.

3. According to Article 10-A-1c.(9) of the Personnel Manual that was in effect at the time the disputed OER was written, "[p]erformance feedback (or counseling) occurs whenever a subordinate receives from a rating officer any advice or observation related to the subordinate's performance or any other matter on which he or she may be evaluated." This provision of the Personnel Manual further states that "[e]ach officer must be continually alert for the "signals" received in one of these ways from seniors. If the signals are not clear . . . the officer should seek clarification or expansion on his or her own volition."

4. The applicant has not shown that he sought feedback and counseling from the rating chain during the period covered by the disputed OER. E-mails requesting counseling after the reporting period ended do not prove that the applicant made

requests for counseling during the period in question. According to the Personnel Manual, the applicant had a duty to seek counseling during the reporting period, if he were unsure what the members of the rating chain expected of him.

5. The applicant has not established by a preponderance of the evidence that he was not counseled during the reporting period. Nor has he established that he sought feedback, during the reporting period, on areas of his performance that were of concern to him.

6. The reporting officer did not violate any provision of the Personnel Manual by returning the disputed OER to the supervisor for reconsideration. The evidence suggests that the reporting officer thought the marks that the supervisor had assigned in some of the performance dimensions were inconsistent with the applicant's actual performance. Returning the OER for this reason was permissible under Article 10-A-2e.(2)(d) of the Personnel Manual. This provision stated that "[i]f a Supervisor submits evaluations that are inconsistent with actual performance or unsubstantiated by narrative comments, the Reporting Officer shall return the report for correction or reconsideration. . . . The Reporting Officer may not direct in what manner an evaluation mark or comment is to be changed. . . ."

7. The applicant's allegation that -- the reporting officer returned the disputed OER to the supervisor with directions to the supervisor to lower assigned marks -- if true, did not harm the applicant. The applicant admitted that the supervisor refused to lower the grades. Therefore, the Board finds that even if any such action occurred on the part of the reporting officer, the applicant had not demonstrated that he was harmed by it.

8. The applicant has not submitted evidence to show that the reporting officer deliberately wrote an unfair evaluation of his performance so that he would be justified in filling the operations officer job with someone other than the applicant. There is no evidence in the record that the applicant was ever promised the job as operations officer. A recommendation in an earlier OER by another reporting officer was not a promise by the current reporting officer that the applicant would be assigned that job.

9. The applicant has not established that a hostile work environment existed during the period covered by the disputed OER. Neither has the applicant demonstrated that his performance was other than as described in the disputed OER.

10. The applicant has failed to prove by a preponderance of the evidence that the disputed OER is either in error or unjust. Accordingly, this application should be denied.



11. All of the applicant's contentions have been considered. Those not specifically mentioned in the findings and conclusions are determined to be without merit.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of  
military record is denied.



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