


**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 1998-078

FINAL DECISION ON RECONSIDERATION

 Chairman:

BCMR Docket No. 39-97 was filed under the provisions of section 1552 of title 10 and section 425 of title 14, United States Code. The application was docketed, the proceeding was conducted, and relief was denied.

Relief was denied on January 16, 1998, by three members of the Board, on the ground that the applicant failed to prove an error or injustice with respect to two officer evaluation reports (OERs) and because she did not prove that a basis existed for removing her failure of selection for promotion to captain.

On April 21, 1998, the applicant applied to the Board for reconsideration of the final decision in BCMR Docket No. 39-97, pursuant to the provisions of section 52.67 of title 33 of the Code of Federal Regulations.

On May 18, 1998, the Chairman notified the applicant's attorney that the application for reconsideration "will be docketed for reconsideration." All of the materials in this case at every stage of the proceeding will henceforth be classified under a new docket number, No. 1998-078.

REQUEST FOR RECONSIDERATION

On April 21, 1998, the applicant filed a request for reconsideration of the Board's January 16, 1998 final decision. On October 14, 1998, the applicant amended her request for reconsideration to eliminate her second non-selection for the rank of captain, and to cancel her involuntary retirement orders for July 1, 1999.

The applicant asked the Board to modify two disputed officer evaluation reports (disputed OERs). These reports were for the period 7/3/94 to 3/31/95 (First Disputed OER) and for the period 4/1/95 to 8/25/95 (Second Disputed OER). The

applicant also requested the removal of two failures of selection for promotion to captain.

On January 16, 1998, the following relief requested by the applicant was denied by the Board. Relief on reconsideration was requested:

First Disputed OER: The applicant asked the Board on reconsideration to change the first disputed OER as follows:

- (a) Change the mark in § 4b (human relations) from a "4" to a "5".
- (b) Restore the recommendation for a command position and assignment to a senior service school.
- (c) Delete the sixth sentence in §9f (personal qualities) ("In discussing an innovative idea with Area Commander, pressed her point beyond accepted standards of military courtesy")
- (d) Delete two other clauses, including one that said "conversations with Area CDR apply" and the other that said "except for the question of judgment illustrated in the incident with the Area Commander. I will recommend her ... in my next report if I judge that was an aberration (§§ 10d, 11).
- (e) The applicant requested that if the foregoing changes cannot be made, the entire first disputed OER should be removed from her record and replaced with a continuity report only.

Second Disputed OER: The applicant asked the Board on reconsideration to change the second disputed OER as follows:

- (a) Expunge the second disputed OER and replace it with a continuity-only OER.
- (b) The CO wrote in the second disputed OER that her "skills in handling people are [not] as smooth as they should be. Because of the latter ... I cannot give [her] an unqualified recommendation for command at sea. ..."

VIEWS OF THE APPLICANT

On April 21, 1998, the applicant applied to the Board for reconsideration of these January 1998 denials. The applicant asserted that she met the Board's standards for reconsideration pursuant to § 52.67 of the rules of the BCMR.

The applicant claimed that the submission painted "the true picture of the gender environment" aboard [REDACTED] during the applicant's tenure as executive officer. She claimed that a fresh look should be taken at new incidents

of hazing aboard cutters, and the action taken against a woman officer who acted against inappropriate behavior only to end up having her own career trashed.

During April 1998, the applicant filed a 21-page memorandum in support of the Request for Reconsideration. The memorandum included the following statements and allegations:

The applicant believed that her information illustrates an environment "that did not support the integration of women within the crew."

"The entire ship did not support the integration of women as full and complete partners"

The standards for fairness were violated by the existence of an atmosphere that condoned and supported "discrimination" toward [the applicant] women in general, and sexual harassment as a condition of assignment to [REDACTED]

"[T]he ship's culture was not only unreceptive to the integration of women, it was "discriminatory towards [the applicant] (and other women) based on our gender and sexual harassment. . . ."

I have been held accountable for fixing a problem by being blamed for something "I did not do!"

"The discrimination and sexual harassment issues were additionally unpleasant . . . and caused me to lack confidence in the ethics of my subordinates [and] CO."

The longstanding sex discrimination "would not have been addressed, or even detected, if I had been a male officer."

"The environment aboard [REDACTED] did not support the integration of women and reflected long term gender discrimination."

"Choking the chicken," which relates to male masturbation, was common within the crew. It was not prohibited; "[W]omen were expected to put up with it."

The applicant also said that the reporting officer should recognize a conflict of interest when a key subordinate "raises an issue of significant misconduct within an overwhelming male dominant environment." By objecting to the failure to recognize the misconduct involved in the "line crossing skits" (crossing the equator skits), the applicant threatened his authority.

The applicant alleged she had to intervene because the other officers "were wrong and were insulting [her], their female peers and juniors!" (The CO later admitted that he knew the behavior was wrong.)

The applicant submitted, under the heading "Additional Documentation," newly discovered evidence that allegedly supported reconsideration: She submitted five NEW statements; two "Resubmitted" statements; one NEW "Wake-Up" log from the [REDACTED] one resubmitted Skit Video; one NEW Chronology; and one NEW Sexual Harassment Training Program. The applicant also submitted commentaries on "The First Disputed OER" and "The Second Disputed OER."

On May 8, 1998, the applicant said that the applicant's submission "fully satisfies" the requirements of the rule on reconsideration (§§ 52.67(a)(1) and 52.67(a)(2)). The application in her memorandum indicated which of her exhibits were new. According to the applicant, "[t]hese exhibits contain critical information."

After the Coast Guard submitted its advisory opinion, the applicant submitted supplemental views, which are entitled "Views of the Applicant (2)."

VIEWS OF THE APPLICANT (2)

On May 3, 1999, the Board received from the applicant a series of submissions which allegedly enabled her "to firmly establish the discriminatory climate aboard [REDACTED] and its impact on [her] Officer Evaluation Reports."

The submissions include a 20-page response to the Advisory Opinion of the Coast Guard.

The May submissions include some allegations that are not supported by factual evidence. For example, she alleged that the Coast Guard "... used 'rose-colored glasses to assess the merits' of the case, and the Coast Guard is 'legalistic and obtuse, declining to acknowledge the bigger picture.'"

These assertions are followed by allegations that the applicant's application is within the reconsideration jurisdiction of the BCMR. 33 CFR § 52.67(a).

On May 18, 1998, the Chairman of the BCMR decided that the application would be docketed for reconsideration on the ground they met the requirements of § 52.67. The applicant's submissions started with sweeping generalizations and shifted to signed statements. The generalizations included the following:

- (1) "The two disputed OERs violate the Personnel Manual."

(2) "The biased atmosphere aboard the ship, which the CO failed to cure and in fact abetted, precluded fair evaluations."

(3) "Critical parts of OERs were based on a false picture..."

No applicable provisions supporting these conclusory comments were set forth.

The applicant's submission included many signed statements. They included, inter alia, signed statements by a CAPT, a CDR, 2 LCDR,s, a LT, as well as 2 Chiefs and a Petty Officer. There were also references to other members. One of the Chiefs said that "there is a strong resentment toward women in leadership roles." Another officer (CDR) said she "was acting in good faith " and that " [w]hen Capt. M was relieved by Capt. B . . . the crews attitude began to change. He publicly treated her with respect":

The 5th section of the applicant's comment on the Coast Guard's advisory opinion was entitled "Bias Against Women Aboard [REDACTED] Various crew members and the CO were accused in this section of bias and discrimination toward the applicant.

VIEWS OF THE COAST GUARD

Personnel Command

The Coast Guard Personnel Command (CGPC) found that the applicant supplied additional information to further support her previous contention that there was a discriminatory atmosphere aboard the CGC [REDACTED] The applicant supplied new information, but its volume and content, did not lead to a different conclusion than that of the OER ending August 25, 1995.

New evidence did not, for example, show that the Reporting Officer discriminated against her "because she was a woman." She failed of selection for promotion to captain on two occasions, but CGPC said "promotion to captain is very competitive with an opportunity of selection in zone of 62.17 percent," The CGPC concluded that "it is unlikely that she would have been promoted in any event" because the OER for the period ending August 25, 1995 [second disputed OER] was important to her nonselection."

Chief Counsel

The Chief Counsel of the Coast Guard recommended that the Board affirm its previous "well reasoned decision" in this case. The Chief Counsel stated that a "fresh look" would add nothing to the case. There was, according to the Chief Counsel, no newly discovered evidence, such as improper command influence or reprisals (e.g. reprisals for sexual harassment) on either OER. The second basis

for reconsideration, is "factual or legal" error, if based on applicant's speculative statements.

If the Chairman holds that reconsideration is appropriate, the Board should affirm its previous decision for "lack of proof" and "lack of merit." The applicant's disputed OERs were "a fair and accurate evaluation of her performance."

Advisory Opinion

On February 1, 1999, the Chief Counsel of the Coast Guard recommended that the Board affirm the Board's January 16, 1998 decision on the ground that reconsideration in this case "lacks merit." The applicant had requested a "fresh look," but her application requesting such a look added nothing to the arguments previously considered and properly dismissed in the January 1998 decision. The applicant's new submission merely rehashed her previous application and constituted no more than her own more favorable view of her own performance.

The Chief Counsel said that the applicant's evidence does not rebut the strong presumption that the rating chain executed their duties correctly, lawfully, and in good faith. The Chief Counsel also stated that "[t]o establish that an OER is erroneous or unjust" the applicant must prove error and injustice and make a "prima facie showing of harm to her record as a result of that error." This case demonstrated that the disputed OERs represent the honest professional judgment of those responsible for evaluating the applicant. The Chief Counsel said that there is no substantiated evidence that "the alleged sexual harassment either impeded her performance or led to an error or an injustice in the disputed OERs."

The Chief Counsel summarized the "undisputed sequence of events" in this case:

(1) The Reporting Officer (RO) decided not to recommend the applicant for command at sea "at least two weeks before the crossing the line ceremonies were conducted;"

(2) the RO had signed the second OER "nearly 4 months before the applicant expressed her concerns about the crossing the line ceremonies; " the applicant submitted her letter about the ceremony the same day her CO endorsed her reply.

The Chief Counsel said that the applicant failed to provide the Board with any evidence upon which to change the January 1988 decision. The Chief Counsel said there was no substantiated evidence that the disputed OER was the result of harassment or discrimination or that alleged sexual harassment led to

an error or an injustice. According to the Chief Counsel, reconsideration, in this case, "is nothing more than a request for the Board to change its minds."

The Chief Counsel stated that the Board should affirm its 1998 decision for "lack of proof and lack of merit." To establish that a disputed OER is erroneous or unjust, the applicant must show a misstatement of a significant fact or a clear violation of a statute or regulation.

The applicant, the CO, and the area commander report of investigation all agreed that some of the CGC [REDACTED] "crossing the line" skits were inappropriate. The Chief Counsel stated that the skits were inappropriate, but that they did not they did not amount to "sexual harassment" and the entire ceremony was not "sexually charged." The CO did not condone this inappropriate activity nor was he derelict in his duty. The Chief Counsel found that the "Applicant has not proved otherwise."

The Chief Counsel recommended to the Board that it affirm its previous decision.

APPLICANT'S RESPONSE TO VIEWS OF THE COAST GUARD

On February 1, 1999, the Board sent a copy of the views of the Coast Guard to the applicant. The Board told the applicant that she could respond to the views of the Coast Guard within 15 days. (February 15, 1999).

The applicant said she would probably need additional time to respond. On March 17 and 18, 1999, the Board and the applicant agreed to extend the deadline until May 1, 1999. On May 3, 1999, she submitted her response to the CG (92 days).

SUMMARY OF REGULATIONS REGARDING RECONSIDERATION

Decisions on eligibility for reconsideration are determined by § 52.67 of the rules of the Board for Correction of Military Records.

Section 52.67(a)(1) provides that a final decision can be reconsidered if the applicant presents evidence or information that was not previously considered by the Board; that could result in a determination other than that originally made; and that could not have been presented to the Board prior to its original determination in the exercise of reasonable diligence.

Section 52.67(a)(2) provides that a final decision can also be reconsidered if the applicant presents evidence or information that the Board or Secretary "committed legal or factual error" that could have resulted in a determination other than that made.

Section 52.67(b) provides that the Chairman shall docket or not docket a request for reconsideration depending upon whether it meets the requirements of paragraph (a).

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the submissions of the applicant and the Coast Guard in BCMR Docket No. 1998-078 (and earlier numbers ; the application for reconsideration in that case; the rule on reconsideration (33 CFR § 52.67); and other applicable law and facts:

1. On April 21, 1998, the Board received the applicant's request for reconsideration of the final decision of January 16, 1998, which was docketed as BCMR Docket 1998-078. It was timely.

2. The Board has jurisdiction of the applicant's request pursuant to § 52.67 of title 33 of the Code of Federal Regulations. It was timely because it was filed within two years pursuant to § 52.67(e).

3. Article 10-A-1b.(1) of the Personnel Manual provides that "each commanding officer [CO] must ensure that accurate, fair, and objective evaluations are provided to all officers under their command." The disputed OERs were completed in accordance with Personnel Manual guidelines.

4. The applicant's request for reconsideration was granted under § 52.67(a)(1) and § 52.67(a)(2):

(a)(1) The applicant's request for reconsideration was granted under § 52.67(a)(1). The applicant is required to present evidence or information that was not previously considered by the Board. If there was new evidence it should be considered if it could have resulted in a different determination. Evidence may only be considered if it could not have been presented in the original proceeding.

(a)(2) If there were new evidence or information, it must be evidence or information that could have been presented to the Board prior to its original determination if the applicant had "exercised reasonable diligence."

5. It is the responsibility of the Board, in light of the Chairman's decision under Finding 4, to determine whether the Coast Guard committed an error or injustice in the first final decision. There is, after all, additional new evidence submitted by the applicant and allegations of factual error.

6. The applicant alleged that the Coast Guard performed sexist acts and made anti-female statements. The skit that offended the applicant and allegedly biased the CO against her was performed during a July 1995 celebration of the

crossing of the equator. Skits featured a fuel probe that resembled a penis, and the ship's NATO receptacle that resembled a female orifice. She alleged that an example of the alleged sexist culture took place in 1994, when comments of a "salacious graphic and prurient nature" were made in the presence of the applicant on a bike ride.

7. The Board finds that the applicant has not provided sufficient evidence with respect to the first disputed OER to establish that there were alleged errors and injustices on the part of the Coast Guard. The first disputed OER has not been changed, and the Board finds that the applicant has not demonstrated, by a preponderance of the evidence, that the first disputed OER is inaccurate.

8. The applicant has failed to show that there was an error or injustice with respect to the second disputed OER. Her CO said that the applicant was not a "victim" of anything while he commanded the CGC [REDACTED]. Her CO said instead that she had every "opportunity" to display her readiness "to assume command afloat." The applicant has not presented any evidence that the CO treated her disrespectfully because she was a woman.

9. The issue in this case is whether the marks and comments are sustained by a preponderance of the evidence or should be set aside because she worked in a hostile work environment. The issue is whether she was stronger in human relations or in command potential than she was evaluated. The first and second disputed OER are documents which evaluate her. There is no document under which she evaluates the Coast Guard.

10. The issue is not whether the Coast Guard was unfair to women and sexist. The issue, instead, is whether the Coast Guard was in error or unjust in its marks and comments evaluating her.

11. The applicant has not shown that the Coast Guard committed an error or an injustice. The Board accepts the judgment of the rating chain with respect to all aspects of performance covered by the disputed OERs. The Board is aware that the applicant has not submitted evidence that the chain was wrong.

12. On one OER question, for example, she did not submit any evidence to justify her getting an "5" rather than a "4" in human relations. The CO came to the same conclusion on the other OER. The CO wrote that her "skills in handling people are [not] as smooth as they should be."

On another OER, the CO decided he could not give the applicant a command at sea. The "command" performance potential can't be evaluated on the basis of gender. Whatever one's view on gender, command is a matter of experience and proof.

13. Inasmuch as there are no errors or injustices in the first disputed OER or in the second disputed OER, there is no basis to consider removing her two failures of selection for promotion to captain.

14. The application to correct the applicant's record on reconsideration is denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGES]

ORDER

The Board in BCMR Docket No. 1998-078 has reconsidered its final decision in BCMR Docket No. 39-97 with respect to the correction of the military record of USCG. Her application for final reconsideration decision is denied.

