

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 1999-072

FINAL DECISION

[REDACTED]:

This is a proceeding under section 1552 of title 10 and section 425 of title 14, United States Code. It was docketed by the Board for Correction of Military Records (BCMR) on February 25, 1999, upon the filing of a complete application for correction of his military record.

This final decision, dated January 13, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

Applicant's Request and Current Position:

The applicant asked the Board to remove two OERs (officer evaluation reports) from his record (6/1/92 to 1/31/93 [1st disputed OER] and 2/1/93 to 5/31/93 [2d disputed OER]). Alternatively, the applicant asked the Board to modify these OERs and to modify a third OER (6/1/93 to 11/30/93 [3d disputed OER]) as well. The three disputed OERs were received during the applicant's assignment to the same Marine Safety Office (MSO).

The applicant also asked the BCMR to remove his "passovers" for promotion in 1996, 1997, and 1998, on the ground that the disputed OERs were not "accurate, fair, and objective" evaluations of his performance. He alleged that he was denied fair and equitable consideration "because [his] record included the OER errors and injustices." The supervisor on the first disputed OER and the reporting officer on the second and third disputed OER were the same LCDR. That LCDR allegedly harbored "ill-will" against the applicant and "had it in for him" because he had complained of "notorious favoritism" by this officer.

After these passovers, the applicant was selected for continuation on active duty on a contract basis, which would entitle him to serve on active duty until 6/30/00. The applicant's attorney said "[i]t is believed that service through that date will leave him 39 days shy of the active duty time required to entitle him to remain on active duty through the 20 years required for retirement."

On December 7, 1999, the BCMR received an advisory opinion from the Chief Counsel of the Coast Guard (Chief Counsel) recommending that some relief be granted to the applicant, but that most of the requested relief be denied for lack of proof.

On December 7, 1999, a copy of the advisory opinion was sent to the applicant. On December 17, 1999, the applicant submitted a response to the advisory opinion in which he reiterated his original requests for relief.

Statements and Former Decision Submitted in Support of Application

The applicant submitted statements by six current and former members in support of his application for relief and one former Board decision.

(1) **GSE, First Class Petty Officer.** GSE averred that the applicant is one of the Best." He said that the applicant had "high moral character and dedication to the welfare of those working for him" and this "made him one of the finest officers [GSE] had the privilege to work under."

(2) **SDH, Commander.** SDH said he had only "limited knowledge" of the [applicant's] relationships with [his own] Supervisor, Reporting Officer, and Reviewing Officer" because [SDH] was in a different department and had only limited professional interaction with [the applicant]. He did say that the LCDR who was the applicant's supervisor "has been non-selected for Commander at every opportunity" and that "certain events which occurred in Morgan City [MSO] are "largely responsible for his non-selection."

(3) **STT, Retired, Chief Port Operations.** STT declared that the applicant was "one of the strongest individuals" he ever worked with, one who "never showed favoritism" and one who always kept the "door (fraternization issue) between officer and enlisted closed." STT alleged that there would have been serious problems in his branch had it not been for the applicant's "guidance and leadership."

(4) **MAE, Lieutenant.** MAE alleged that "[most junior officers were afraid to speak up if they had been wronged for fear that they would be singled out as being trouble makers and that it would be reflected on their OERs." MAE said that the applicant was one of the three junior officers who were so "singled out."

(5) **PNP, Retired Petty Officer.** PNP said that the applicant was a "fair and strict supervisor" whose knowledge and leadership ability inspired the members who served with him to always do better and to develop at an accelerated pace.

(6) **DWS, Marine Science Technician 2d Class.** DWS said that a petty officer was accused of fraternization with the LCDR who was on the applicant's rating chains. The petty officer was given extra liberty by the LCDR and went fishing and "cruising" around in the LCDR's car. He alleged that the applicant was scorned by the LCDR when he questioned the PO about the fraternization issue.

1995 BCMR Decision. The applicant also submitted a copy of a decision by the Board awarding relief in a similar case (BCMR 145- 94) and by the Deputy General Counsel sustaining the Board. The applicant in that case was selected for promotion by the 1995 Selection Board "in spite of the disputed OER" and the case was deemed "a testament to the overall superior quality of his record."

Summary of Other Submissions by Applicant

The applicant alleged that he earned a bachelor's degree in 1984 and a master's degree in 1986 while "he was on active duty as an enlisted man in the Navy." He joined the Coast Guard and entered and graduated from Coast Guard officer candidate school in 1986. He served on active duty in the Coast Guard from 1986 to 1989 and from 1990 to the present.

The applicant alleged that the first and second disputed OERs were the product of a personality conflict and bias and prejudice "in retaliation" against the applicant because he had complained about "illegal fraternization" by an officer who was the supervisor on the first OER and the reporting officer on the second and third disputed OER. The applicant alleged he was a "marked man within [the] MSO" after he raised the fraternization issue with that officer.

The applicant stated that specific modifications should be made to these OERs if the Board chooses not to expunge the first and second disputed OERs, provided that modifications are also made to the third disputed OER.

With respect to the first disputed OER, the following modifications should be made:

(1) Delete the words "refuses to compromise under any circumstance" in block 4c as "hardly consistent" with the finding in block 4a that he "encouraged open expression of ideas and respected the views/ideas of others."

(2) Raise the mark in block 5c from a 3 to a 4 and delete specific language in block 5e on the ground of "internal inconsistency."

(3) Raise the mark in block 6b one step to a 4, and delete the fourth and fifth sentences in block 6c on the ground they are inaccurate. "This is the only 3 he has ever received in this category."

(4) Move the mark on the comparison scale from a 4 to a 5. It is the "lowest mark he has ever received on an OER and it reflects the command's ire at him for objecting to fraternization by" the LCDR.

With respect to the second disputed OER, the following modifications should be made:

(1) Delete the following words in block 5e ("relied less upon suggestions & employed stronger directing than previous period") on the ground that the Coast Guard Personnel Manual provide that OERs reflect only events that occur during the period they purport to cover.

(2) Remove several clauses from the first sentence in block 6c and modify the third sentence in block 6c.

(3) Modify the second, third, and fourth sentences in block 8.

(4) Delete the first sentence in block 11.

(5) Move the mark on the continuity scale (block 12) from a 4 to a 5 (out of a possible 7).

(6) Expunge in their entirety the reviewer's comments of August 23, 1993.

With respect to the third disputed OER, the following modifications should be made:

(1) Delete the second sentence in block 8.

(2) Modify the last sentence in block 11 as proposed.

The applicant also asked the Board to remove his three failures of selection for promotion to LCDR and to expunge all references to such passovers from Coast Guard records. He also asked that he be retained on active duty until "no sooner than the June 30 following two additional considerations for promotion to [LCDR] on a corrected record and that, if selected, his date of rank and back pay and allowances be adjusted to what they would have been if he had been selected earlier.

Views of the Coast Guard:

The Chief Counsel recommended that only one of the changes advocated by the applicant (removal of reference to "previous period" in block 5e of the second disputed OER) be adopted.

The Chief Counsel declared that the applicant has failed to meet his burden of proving his allegation that the marks on the disputed OERs were lower than proper because of retaliation. The Coast Guard said that the applicant failed to show that the applicant made a retaliation complaint or that he provided any dates or details as to any alleged retaliation. Both the applicant's commanding officer and the OER Reviewer "state that they have no recollection of the Applicant ever making a complaint to them regarding the alleged matter." The Chief Counsel also said that that applicant has not overcome the strong presumption that the military superiors involved in the case "discharged their duties correctly, lawfully, and in good faith."

The Chief Counsel also asserted that the applicant's OERs amounted to a fair and accurate evaluation of his performance. "Analysis of the evidence in this case supports the conclusion that the challenged OERs represent the honest professional judgment of those responsible for evaluating [the applicant]" under applicable law.

Applicant's Response to Advisory Opinion

The applicant alleged that the Coast Guard's advisory opinion provides a "fog of reasons for rejecting [the] application" but not one of them withstands analysis.

The applicant disagreed with the Coast Guard's allegation regarding the issue of retaliation. The Coast Guard declared that the "applicant never brought his concern about retaliation to the attention of management." The applicant characterized the Coast Guard response as "false" on the ground that he submitted a written request for a transfer to a department headed by a different supervisor/reporting officer, and on the ground that he complained about the July 1993 OER to the executive officer. Under the circumstances, the applicant had no occasion "to demand to see the Captain."

The applicant agreed with the Coast Guard that express references to prior reporting periods should be deleted, but the applicant disagreed in stating that implicit references should also be removed.

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

2. The Chairman has recommended disposition of this case without an oral hearing. 33 CFR 52.31 (1993). The Board concurs in that recommendation.

3. The applicant requested that two of his disputed OERs be expunged and continuity reports be substituted for them. In the alternative, he requested that three of his OERs be modified. He also requested that all of his failures of selection for promotion be removed from his record.

4. The applicant alleged that the three disputed OERs were the product of retaliation by the rating chains since one member of each of the rating chains had been accused of illegal fraternization by the applicant. This officer, an LCDR, was selected to be the applicant's supervisor on the first OER and his reporting officer on his second and third disputed OER.

5. There was no evidence that the applicant submitted a formal complaint to the command or that he ever specified the time and place of the alleged illegal

fraternization. The application alleged that he "raised the situation," but the applicant never detailed how and when the illegal fraternization took place. The applicant's written request for a transfer to another department, and his meeting with the executive officer, were not the equivalent of a formal accusation of retaliation or a request for a meeting with the Captain.

6. The applicant also alleged that the Coast Guard erred in making inconsistent comments in certain OERs. Refusal to compromise is not necessarily inconsistent with respecting the views/ideas of others. One can encourage others to express their personal views, for example, while refusing to compromise when those views/ideas differ from one's own. The Board finds that there were no inconsistencies.

7. The applicant alleged that the text of the OERs referred several times to the applicant's performance in prior reporting periods. In block 5e of the second disputed OER, there was an error because the phrase "previous period" was used. In all the other blocks, there was no error because no such phrase was ever used. In the absence of specific language commenting on performance in a prior reporting period, there is no error.

8. The applicant also alleged that his mark on the comparative scale on the first disputed OER was a 4, the lowest mark he had ever received. He alleged that the low mark reflected "the command's ire at him for objecting to fraternization" by the LCDR. In the absence of specific proof and a formal fraternization complaint, this allegation is not sustained. The fact that an officer is rated average on the comparison scale does not establish an error.

9. The Board's decision in BCMR No. 145-94 is based on different facts than those in the current case. BCMR 145-94 is therefore not a precedent that need be followed in this decision,

10. The Board has considered all of the applicant's other allegations regarding the three disputed OERs and the failures of selections and finds no merit in them, except as noted above with respect to block 5e in the second disputed OER.

11. The application should be denied, with the exception noted, on the ground that there was no error or injustice in the applicant's record.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application to correct the military record of [REDACTED] [REDACTED] USG, is granted. The OER for the period February 1, 1993 to May 31, 1993, shall be corrected as follows:

Delete the entire sentence which contains the words "previous period" from block 5c of the second disputed OER and replace that sentence with the following: "Takes a direct and strong leadership role; used PODO duty situations to make firm decisions & appropriately task duty section; resulted in more coord't/effective respons."

No other relief shall be granted.

