

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1999-171

FINAL DECISION

[REDACTED]:

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on May 4, 1999, upon the Board's receipt of the applicant's complete application for correction of his military record.

This final decision, dated June 29, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a retired [REDACTED] asked the Board to correct his military record by removing an officer evaluation report (OER) for the period July 15, 1996 to April 30, 1997 (disputed OER). He also requested that any and all administrative actions taken against him based on this OER be invalidated, including his permanent removal from the 1997 Commander Promotion list and his failure of selection by the 1998 Commander Selection Board. He further requested that his retirement status be corrected to show that he retired at the rank of commander (CDR) with a date of rank of July 1, 1994, "in accordance with the BCMR's decision in Docket No. 193-94 - based on his selection by the 1996 CDR selection board." The applicant also requested retroactive pay and allowances from July 1, 1994 to June 30, 1999 in accordance with the Board's decision in BCMR No. 193-94.

In this case, the applicant challenges the disputed OER on the grounds that it:

- A. Was affected by alleged conduct by [applicant] during the period of time between July 15, 1996 and February 18, 1997,
- B. Detrimentially relied on evidence from the CGIS investigation which found the allegations against [Applicant] to be unsubstantiated,

- C. Was influenced by improper subject matter,
- D. Was signed by a disqualified Reporting Officer,
- E. Was used to permanently remove [applicant] from the 1997 [CDR] Promotion List, and
- F. Caused [Applicant's] failure of selection before the 1998 [CDR] Selection Board."

BACKGROUND AND HISTORY

The applicant received his commission as an ensign on [REDACTED] He was promoted to lieutenant junior grade on [REDACTED] to lieutenant on [REDACTED]

[REDACTED] Since then, he has served as the [REDACTED]. He received the disputed OER while assigned to this command.

After his record was corrected in accordance with BCMR Docket No. 193-94, he was selected for promotion to commander in 1996 and placed on the 1997 promotion list. On January 31, 1997, the Senate confirmed the 1997 promotion list. The applicant was then frocked (permitted to wear the insignia of a CDR) as a commander, but he was never promoted from that list. The applicant's name was eventually removed from the promotion list after several investigations and after a board of officers recommended that his name be removed from the promotion list. The Secretary of Transportation approved that recommendation and the applicant's name was removed from the 1997 promotion list.

Chronology

The following is a chronology of pertinent events that occurred prior to, concurrent with, and after the preparation and submission of the disputed OER.

On February 14, 1997, Coast Guard Investigations issued a Notice of Investigation concerning allegations of sexual harassment by the applicant. The notice states that a former student of the applicant alleged that he had been telephonically harassing her since she attempted to end all contact between them. The allegations arose when the student was questioned concerning two anonymous letters that were received by her command. The letters described her in disparaging terms. She stated that she believed the applicant wrote them.

On May 13, 1997, the applicant's CO sent a letter to CGPC requesting that the applicant's promotion be delayed, because of accusations of sexual harassment and obstruction of justice, "until these matters are resolved." On May 21, 1997, CGPC informed the applicant that, based on the information in the CO's letter, his promotion was being withheld in accordance with Article 5.A.13. of the

Personnel Manual. The letter stated, "You will be advised of our intent to initiate administrative action if deemed necessary."

On June 23, 1997, Coast Guard Investigations issued a report of investigation concerning the allegations of sexual harassment. The report stated that the investigation had failed to prove that the applicant had sent the letters, but it concluded that he was a "likely suspect." The investigation also stated that the applicant and the student "may have provided false statements to [investigators] during an investigation into their inappropriate relationship when she was a cadet at the academy." The report stated that the investigation was closed.

On July 31, 1997, the applicant's CO received a report of an informal investigation (not the CGIS investigation) he had initiated after receiving the Report of Investigation on June 23, 1997. The informal investigation concerned the applicant's alleged misuse of government telephones and email. The report stated that between July 1, 1996, and January 31, 1997, the applicant had placed 408 long-distance phone calls to his former student's personal phone number. The frequency varied from just one call per day to as many as 18 calls per day. The applicant was also found to have called another female junior officer long-distance up to 6 times per day during January 1997. Both recipients of the applicant's calls confirmed that the calls did not concern official business.

The report concluded that the applicant was guilty of failing to obey orders, larceny, wrongful appropriation, and false pretenses. It also concluded that there were aggravating circumstances that weighed against the applicant. The investigator recommended that all but the false pretense charge be dropped and that the applicant be taken to captain's mast on the false pretenses charge. However, on August 25, 1997, the applicant signed an "Acknowledgment and Election" form stating that, after consulting with his private attorney, he chose to refuse NJP proceedings.

On September 12, 1997, the applicant's CO wrote to CGPC requesting that the applicant's record be reviewed to determine his fitness for promotion and to consider whether he should be separated from the Service. The CO stated that both the formal and informal investigations into the applicant's conduct were complete. He concluded that the investigations provided sufficient evidence to prove the allegations "by a preponderance of the available evidence," but not "beyond a reasonable doubt."

On December 18, 1997, the applicant's rating chain completed a special OER to document the applicant's misuse of government telephones.

On June 16 and 17, 1998, a Special Board of three Coast Guard captains met to consider the applicant's removal from the promotion list. On June 29, 1998, the Commandant endorsed the Special Board's recommendation that the applicant be removed from the promotion list. On June 30, 1998, the Secretary of Transportation signed an order removing the applicant's name from the promotion list.

On September 17, 1998, the applicant filed an application (BCMR Docket No. 1999-116), which was denied, seeking promotion to commander.

On May 4, 1999, the applicant filed another application, BCMR No. 1999-108, seeking removal of the special disputed OER, removal of failures of selection for promotion to CDR, and promotion to CDR. This application was denied by the Board on April 27, 2000.

Current Allegations

The applicant alleged that an earlier draft of the disputed OER had been prepared, but its submission had been delayed by the reporting officer until he could review the CGIS investigation. The reporting period ended April 30, 1997 and the reporting officer signed the OER on July 14, 1997. The applicant claimed that once the reporting officer reviewed the CGIS investigation he revised the earlier draft of the disputed OER to delete the promotion and command recommendations. He alleged that the reporting officer altered the earlier version of the disputed OER based on the information contained in the investigative report, even though he never used the word "investigation" in the disputed OER.

The applicant submitted an unsigned copy of page 3 of the earlier version of the disputed OER, which contained the following pertinent comment in block 11:

[A] dynamic professional officer, he is clearly well-qualified for promotion and is an ideal candidate for Senior Service School. Without reservation, I strongly recommend him for promotion and positions of greater trust and responsibility including command afloat or shore.

The disputed OER is an above average report, consisting of marks of 5s and 6s, with a 5 in block 12. The applicant alleged that after the reporting officer reviewed the CGIS investigation, block 11 of the disputed OER was rewritten, without the promotion and command recommendations, to read as follows:

... has my complete trust and confidence. . . He anticipates the future, is never caught unprepared and has significantly improved operation within the Supply Section and the Mil[itary] Per[sonnel] Office through the implementation of various initiatives. A dynamic professional officer, selected for O-5 and is a strong candidate for Senior Service School.

The applicant alleges that the use of information contained in a pending GGIS investigation in an OER was prohibited by the Personnel Manual that was in effect at the time the disputed OER was prepared. He further argued that the Personnel Manual prohibits commenting on an investigation where the reported-on officer has not been made a party to the investigation. He also argued that information from an investigation that is disputed cannot not be used in an OER.

The applicant argued that the reporting officer violated Article 10-A-4.g.(1) of the Personnel Manual, by using information from the CGIS investigation as a basis for changing the comments from those in the earlier draft of the disputed OER to those in the disputed OER. Article 10-A-4.g.(1) of the Personnel Manual stated that

[m]embers of the rating chain shall not comment on or make reference to any pending criminal proceeding. . . . disciplinary action (non-judicial punishment), PRRB, CGBCMR, or any other ongoing investigation (including discrimination investigations). 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. The finality of a proceeding is governed by regulations applicable to its convening. . . . This restriction does not preclude comments on appropriate, undisputed, supportable, and relevant facts, so long as no reference is made to the pending proceedings.

Specifically, the applicant claimed that the CGIS investigation was a pending matter at the time it was reviewed by the reporting officer on June 23, 1997. In support of this allegation, the applicant submitted a copy of an e-mail message to him from his supervisor. The supervisor stated that "the OER was changed removing outstanding judgement and strong recommendation for promotion. I know that it was held up for a considerable period of time, I am not sure if it was after the complete investigation was finished or not but I am sure that it was after the initial investigation was sent to [reporting officer]."

The applicant asserted that it had been the Coast Guard's position in a previous BCMR application that the investigations were pending until final action was taken to remove the applicant from the commander promotion list on June 30, 1998. The applicant stated that if true, the investigations were pending at the time the disputed OER was drafted, signed, and submitted and should not have been used as a basis for evaluating his performance in the disputed OER.

In addition, the applicant stated that he had disputed the information contained in the investigative report. He stated that disputed information should not have been used in the disputed OER, because to do so would violate the above provision. He also argued that it was unfair to base comments on the CGIS investigation because that report stated that the allegations against the applicant were not substantiated.

The applicant stated that the purpose of the restrictions contained in the regulations was to protect the reported-on officer's due process rights. He argued that the prohibition against using disputed information from a pending investigation preserves the officer's entitlement to confront the evidence against him and his accuser. The applicant stated that the regulations contemplate an evidentiary proceeding to provide the officer a forum for the exercise of his rights. According to the applicant, if these guarantees are circumvented, the rating officer becomes judge and jury, while the rated officer has no

contemporary opportunity to present a defense to avoid the entry of the disputed information or accusations into his official record.

The applicant alleged that because of the reporting officer's involvement in the investigation, he became an interested party to that investigation, and therefore, should have been disqualified from serving in the rating chain, pursuant to Article 10-A-2.g.(2)(b) of the Personnel Manual. He stated that the reporting officer was not satisfied with the report of investigation provided by CGIS and sent the agents back with instructions on how to gather additional information.

With respect to the administrative investigation (not the CGIS investigation), the applicant stated that the reporting officer was actively involved in obtaining phone records and other documents as evidence against the applicant. The applicant stated that the reporting officer personally directed the efforts to his staff in gathering evidence against him during the last week in June and first week in July 1997. The applicant stated that after the evidence was assembled, the reporting officer directed the executive officer (XO) to file a report of offense form containing charges against the applicant. The applicant stated that these actions by the reporting officer converted him from an observer to an interested participant in the investigative process.

The applicant stated that the disputed OER led to his permanent removal from the 1997 commander promotion list. He stated that it also led to his failure of selection before the 1998 commander promotion board. The applicant stated that without the disputed OER, in combination with other Coast Guard errors, he would have been promoted to commander. The applicant stated that he is not requesting reinstatement to active duty, but asks that his retired status be corrected to show that he retired on June 30, 1999, as a commander.

Views of the Coast Guard

On May 8, 2000, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the Board deny relief in this case.

The Chief Counsel stated that this is the fifth case filed by the applicant challenging various actions taken against him as a result of his involvement with a junior officer. See BCMR dockets Nos. 1993-194, 1998-094, 1998-116, 1999-108, and the current case. The Chief Counsel stated that this case can be distinguished from the prior cases in view of the overall laudatory nature of the disputed OER and the lack of a nexus between the disputed OER and the applicant's removal from the 1997 CDR promotion list and his subsequent non-selection to CDR before the 1998 CDR selection board.

The Chief Counsel stated that having failed to prove, in Docket No. 119-116, that the Coast Guard's action to remove him from the commander promotion list was illegal or unjust or to prove in BCMR No. 1999-108, that the

special OER should be removed from his record, the applicant now challenges the disputed OER in an effort to receive retroactive promotion to CDR.

The Chief Counsel stated that to establish that an OER is erroneous or unjust, an applicant must show a misstatement of a significant hard fact or a clear violation of a statute or regulation. Germano v. United States, 26 Cl. Ct. 1446 (1992). The applicant must overcome the strong, though rebuttable, presumption that rating officials acted correctly, lawfully, and in good faith in executing their duties. Arens v. United States, 969 F. 2d 1034, 1037 (1992). The Chief Counsel stated that absent a showing that error or injustice affected the challenged record, it is inappropriate for the Board to second-guess the evaluations of those responsible for evaluating the reported-on officer under Coast Guard Regulations.

The Chief Counsel stated that the information contained in the disputed OER is factually accurate and presents a highly favorable appraisal of the applicant's performance. The disputed OER does not contain a single negative comment nor are there any numerical marks lower than a 5, in a report which averaged a laudable 5.74 percent average. The applicant has not pointed to any misstatements of hard fact or any inaccuracy in the disputed OER. Therefore, the Board should conclude that the disputed OER contained a factually accurate and favorable evaluation of the applicant's performance during the period covered by the disputed OER.

The Chief Counsel stated that the applicant has failed to prove that the submission of the disputed OER was unjustifiably delayed or was materially altered as a direct result of the information contained in the CGIS investigation. In this regard the Chief Counsel stated the following:

... Applicant's Supervisor signed and submitted the disputed OER on 25 June 1997, fifty-six (56) days after the end of the reporting period. It is the responsibility of the supervisor to forward the OER ... to the Reporting Officer normally ... no later than ten (10) days after the end of the reporting period. Article 10.A.2d.(2)(1), CGPERSMAN. It is then the responsibility of the Reporting Officer to ensure the OER is forwarded to the Reviewer normally ... no later than 30 days after the end of the reporting period. Consequently, the Reporting Officer has 20 days to complete his OES responsibilities. Since Applicant's Reporting Officer signed the disputed OER on 14 July 1997, he, in essence, fulfilled his responsibilities under the regulations to submit the disputed OER within the 20 days provided a reporting officer.

... In the instant case, Applicant has failed to provide evidence demonstrating that the delay caused by his Supervisor materially affected the accuracy of the disputed OER or that he suffered harm as a direct result of the delay. Applicant has also failed to show his Reporting Officer delayed the submission of the disputed OER date to materially after the OER by using disputed information from a

pending investigation . . . [T]he Reporting Officer only delayed the submission timeline after consulting with, and receiving the concurrence of, the Commander, Coast Guard Personnel Command (opm).

The Chief Counsel stated that to conclude that the draft OER is presumptive evidence of bias or malfeasance on the part of the reporting officer is not supported by the evidence and distorts that evidence. The Chief Counsel stated that the draft OER was prepared in its entirety by the supervisor, including the reporting officer's portion of the OER. The reporting officer reviews it and makes changes as necessary. The Chief Counsel stated that in this case, the reporting officer edited the language in Block 11 of the disputed OER to accurately reflect the applicant's status and potential as an O-4 selected, but not yet promoted to O-5. The Chief Counsel stated that as a recently selected Commander, a promotion recommendation in the disputed OER would have referred to the applicant's promotability to Captain (O-6), not to Commander (O-5) as the applicant appears to infer.

The Chief Counsel stated that the reporting officer should not have been removed from the rating chain. He stated that the Commanding Officer had a professional responsibility to determine if wrongdoing occurred and was required to investigate the matter as provided by Article 4-1-12 of Coast Guard Regulations. He stated that under the applicant's interpretation, "any commanding officer who suspect a subordinate officer of wrongdoing would be automatically removed by reason of personal interest from that officer's OER Rating Chain." That interpretation would be a perverse result, unintended by the regulations.

The Chief Counsel asserted that there is no nexus between the applicant's failure of selection before the 1998 CDR selection board and the disputed OER. He stated that the special OER documenting the applicant's misuse of the telephone system would have provided sufficient cause to remove the applicant's name from the 1997 CDR promotion list and to cause his failure of selection by the 1998 CDR selection board. The disputed OER, which is very positive, would have been an asset before either the special board or the 1998 CDR selection board.

Applicant's Response to the Advisory Opinion

On May 31, 2000, the Board received the applicant's response to the views of the Coast Guard. He asked the Board to reject the Coast Guard's position and grant relief. He further stated:

[T]he rating chain did not comply with the Coast Guard's own regulations governing the submission of the challenged OER. The Coast Guard Personnel Command assisted the rating chain in the erroneous submission [of the disputed OER]. The presence of the improperly prepared OER in [my] record was an injustice to [me]. It created an inaccurate record and was part of the file which was

submitted to a Special Board and became the basis for the permanent removal of [my] promotion to Commander. [I] deserve[] the correction of this error and retroactive promotion to the rank of Commander.

The applicant stated that this petition is factually related to the others that he filed, but it contains legally distinct issues. Specifically, the applicant alleged that the disputed OER was not prepared and submitted in accordance with the Personnel Manual. The applicant restated his contention that the disputed OER was delayed until the reporting officer received the CGIS investigation, at which time, the reporting officer impermissibly downgraded the contents of the disputed OER. The applicant stated that there was no other reason to delay submitting the OER than to include information from the CGIS investigation, especially since the reporting officer and CGPC were already discussing the preparation of a special OER.

The applicant restated his contention that he was not afforded the rights of a party in that investigation and had no input into it, despite his numerous requests to be afforded such rights. He claimed as he did in earlier applications, that the CGIS investigation found that the allegations against him were not substantiated.

The applicant also restated his contention that the reporting officer should have been disqualified from the rating chain because he had become an interested party to the investigation.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, BCMR Docket Nos. 193-94, 1998-116, and 1999-108, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant alleged that the reporting officer improperly used information from the CGIS investigation in the OER, even though the applicant was not made a party to the investigation and even though the applicant disputed the information in the investigation. The applicant claimed this was a violation of Article 10-A-4g.(1) of the Personnel Manual, which stated that "[m]embers of the rating chain shall not comment on or make reference to any pending . . . ongoing investigation (including discrimination investigations). . . . 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*." (Emphasis added.)

4. The fact that the applicant was not a party to the CGIS investigation or the informal investigation for that matter is irrelevant to the disputed OER, because Article 10-A-4g.(1) stated in pertinent part: "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." No reference is made at all to either of the investigations in the disputed OER.

5. The applicant would argue that the reporting officer also violated the Personnel Manual by using disputed information from the pending CGIS investigation as a basis to remove the earlier recommendations for promotion and command. Contrary to the applicant's argument, the CGIS investigation was completed and closed on June 23, 1997, prior to the submission of the disputed OER. As stated earlier, no mention is made of the investigation(s) in the disputed OER, nor is there a discussion of the applicant's alleged telephone misuse or sexual harassment in the disputed OER.

6. The Board finds nothing wrong with the reporting officer's actions, even if he did change the wording of block 11 of the earlier draft OER after he reviewed the CGIS investigation. The Personnel Manual gives the reporting officer the right to base his evaluation of the applicant's performance on "... other reliable reports and records." However, as stated above, the report in question does not mention the CGIS investigation or the conduct that was investigated.

7. Moreover, the evidence presented by the applicant does not persuade the Board that the reporting officer changed the wording of the disputed OER to delete the specific recommendations for promotion and command based on the CGIS investigation. The reporting officer certainly does not say this in the disputed OER. The page of the earlier OER presented by the applicant is not signed by the reporting officer, which indicates that it was only a draft. If the reporting officer changed his mind about the wording of the recommendations for promotion and command, the Board cannot say that it was because of his review of the CGIS investigation. Although the supervisor stated that the investigation was held up, he also stated "I am not sure if it was after the complete investigation was finished or not but I am sure that it was after the initial investigation was sent to him."

8. The applicant also questioned whether the reporting officer should have removed himself from the rating chain for the disputed OER because he had become an interested party by directing the investigation against the applicant. Section 10-A.2.g.2.b. of the Personnel Manual defines disqualified as including "relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the [s]upervisor, [r]eporting [o]fficer, or [r]eviewer raises a substantial question as to whether the reported-on

officer will receive a fair, accurate, evaluation." The Board finds that the disputed OER contradicts the applicant on this point. It is a highly favorable, above average report, which has not been shown to contain inaccurate marks or comments.

9. The Board finds that the reporting officer was acting in his official capacity when he convened the administrative investigation into the applicant's alleged telephone misuse. Article 1-F-2.g. of the Investigations Manual states that an "officer in command of the unit or activity concerned is primarily responsible for initiating an investigation into any incident arising in the command." The type of investigation is within the discretion of the convening authority, in this case the reporting officer. He decided on an informal investigation, subsequent to the CGIS investigation, which does not allow for the designation of parties. The CO of another unit, not the reporting officer, requested the CGIS investigation into the applicant's alleged sexual harassment of another officer.

10. The applicant alleged, but offered no corroboration, that the reporting officer developed a personal interest in the CGIS investigation or conflict by suggesting where CGIS agents might obtain additional information or by convening his own command investigation. Even if true, the Board fails to see how these actions caused the reporting officer to have the kind of personal interest in this case that would disqualify him from the rating chain. This is so particularly in light of the very complimentary disputed OER prepared by the reporting officer.

11. The Boards finds no nexus between the disputed OER and the applicant's removal from the 1997 promotion list and his failure of selection before the 1998 promotion board. The disputed OER is a very complimentary OER and contains no mention of the CGIS investigation or alleged misconduct. The special OER, which spoke to the command investigation, was sufficient in and of itself to cause the applicant's name to be removed from the 1997 promotion list and his 1998 failure of selection for promotion to CDR.

12. The Board notes that it has already ruled on applications by the applicant challenging the removal of his name from the 1997 CDR promotion list and requesting the removal of the special OER documenting his misuse of the telephone system. We will not revisit those issues in this application.

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

14. The applicant has failed to establish an error or injustice in this case. Accordingly, his request for relief should be denied.

ORDER

The application of
(Ret.), for the correction of his military record is denied.

, USCG

