

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

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2000-065

FINAL DECISION

[REDACTED]

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14, United States Code. It was docketed on February 9, 2000, upon the BCMR's receipt of the applicant's complete application for correction of his military record.

This final decision, dated October 12, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a [REDACTED] on active duty, asked the Board to correct his record by directing that the reviewer comments that he submitted with his application be attached to the officer evaluation report (OER) for the period from April 13, 1996 to March 31, 1997 (subject OER). The applicant also requested that his failure of selection for promotion to captain before the 1999 captain selection board be removed from his record. After filing his application with the Board, the applicant again failed to be selected for promotion to captain by the 2000 captain selection board, which convened on July 17, 2000.

EXCERPTS FROM RECORD AND SUBMISSIONS

The applicant received the subject OER while serving as the assistant chief, [REDACTED]. His supervisor and reporting officer on the OER were naval officers. The reviewer failed to attach comments to the OER as required by Article 10-A-2f(2) of the Personnel Manual. This provision requires that reviewer comments be attached to an OER when the reporting officer is not a Coast Guard officer.

The applicant stated that upon reviewing his record at Coast Guard Personnel Command, he discovered that there were no reviewer comments attached to the OER and the box indicating that comments were attached was whited out. Subsequently, the reviewer prepared comments to be attached to the OER. CGPC refused to add the comments to the OER because it had already been validated and placed in the applicant's record. The applicant was told that he would need to file an application with the BCMR to have the reviewer comments added to the OER. Except for the omitted reviewer comments, the applicant had no other problems with the subject OER.

With respect to his failures of selection for promotion to captain, the applicant stated that the absence of comments by a senior Coast Guard officer on his performance for the period covered by the subject OER adversely affected his opportunity for selection to captain by the 1999 captain selection board. Included in the reviewer comments is a specific recommendation for the applicant's promotion to captain. The applicant asserted that this promotion recommendation would have improved his opportunity for selection before the 1999 captain selection board.

The reviewer gave the applicant a 5 (out of a possible high of 7) in block 12. He wrote the following comments, in pertinent part:

[The applicant] was the right senior officer to step into the position of leadership to chart the [REDACTED] planning direction. His extensive experience in Joint and Naval operations are unique in the Coast Guard officer corps. His outstanding initiative to refine our streamlining process provided the [REDACTED] program manager with three additional 05 active duty billets for reprogramming. [The applicant] has also taken the lead in the development of new doctrine for the Naval Coastal Warfare . . . community.

[The applicant] is an exceptional senior leader and would be an outstanding candidate for a position as a headquarters program manager for defense operations, intelligence or vessel traffic service programs. He would also be an ideal candidate for a senior liaison officer billet to the Joint Staff [The applicant] is the right person to lead the Coast Guard's defense readiness mission in an environment of streamlined staff's and to broaden the recognition of the Coast Guard's contribution to National Security.

I recommend [the applicant] for promotion to CAPT now.

Applicant's CDR and LCDR Performance Record

There are seven CDR OERs in the applicant's record. His marks consist mostly of 6s, with occasional 4s, 5s, and 7s. The comments were mostly complimentary, except for those noted by the Coast Guard in its nexus analysis. See page 3 of this decision. The applicant's block 12 marks from his Naval reporting officer were 6, 6, 6, 5, 5. Only four of these five OERs had the required reviewer comments and block 12 marks. The reviewer's block 12 marks were 6, 5, 5, and 5. The applicant's other block 12 marks on the remaining two CDR OERs in his record were a 4 and a 3.

There are four LCDR OERs in the applicant's record. His block 12 marks on these OERs are 4, 5, 5, and 4.

Views of the Coast Guard

On August 15, 2000, the Board received the advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the Board grant partial relief to the applicant.

The Chief Counsel stated that the applicant is correct that reviewer comments were required for the OER in question. He further stated that the reviewer comments provided with the application should be entered into the applicant's record after being reworked to comply with the format prescribed in Article 10-A-4e. of the Personnel Manual. The Chief Counsel stated it is necessary for the BCMR to direct that the reviewer's comments be attached to the subject OER because the addition of the reviewer comments would be a modification to the subject OER, which has been reviewed and placed in the applicant's record.

With respect to removing the applicant's failures of selection for promotion to captain, the Chief Counsel made the following recommendation: "Applicant should be considered by the next O-6 Selection Board after the Board renders its final decision, not the next two Selection Boards as requested." With respect to the issue of nexus between the error and the applicant's failures of selection, the Chief Counsel relied on a memorandum from Commander, Coast Guard Personnel Command (CGPC), which stated the following:

Although the Coast Guard erred in not providing the reviewer comments and recommends granting partial relief, there is little evidence of any nexus between the lack of reviewer comments and Applicant's failure of selection.

Applicant's OER for the period 93 05 01 to 94 07 11 was his departure OER from [REDACTED] and was within the seven year window the Board was directed to consider as the most significant portion of the record per Chapter 14 of the Personnel Manual. This OER was the officer's first as an O-5 and the rating chain remained the same as for the prior OER. The OER contained several comments pointing to concerns regarding certain aspects of the Applicant's performance. For instance, in section 3h, "Typically first div chief to act on new tasks, but often with insufficient research; sacrificed quality for speed on some issues." In section 5e, the Supervisor states, "OERs and EPEFs submitted on time w/accurate inputs & documentation, but frequent admin errors" and in 6c, "quick study on new issues, generated outputs quickly, but frequently needed rework." These are not comments one would expect to find in an OER at the end of a successful tour and certainly not in the OER of an officer moving into the senior officer ranks. We believe the [selection] Board should be far more influenced by these comments plus the comparison scale mark in block 12 of the OER than by the addition of the Reviewer comments requested by the Applicant.

Applicant's Response to the Views of the Coast Guard

On August 23, 2000, the Board received the applicant's response to the advisory opinion. He disagreed that he should have only one additional opportunity to be considered by the captain selection board with a corrected record.

The applicant interpreted the Chief Counsel's recommendation - that the Applicant should be considered by the next O-6 Selection Board after the Board renders its final decision, not the next two Selection Boards - as recommending that he have two opportunities before the captains selection board with a corrected record. He stated

that the Chief Counsel's recommendation was made on June 7, 2000, prior to the convening of the 2000 captain selection board. According to the applicant, if the BCMR had rendered its final decision prior to the 2000 captain selection board, and had granted the recommended relief, two captain selection boards would have had the opportunity to review his complete record.

With respect to the issue of nexus, the applicant offered the following:

Per [the Personnel Manual] reviewer comments are mandatory when the reporting officer is not a Coast Guard commissioned officer. This safeguard requirement implies that an . . . OER that is completed by a non-Coast Guard officer, in my case a Navy O6, has the potential of being viewed by a Selection Board as less accurate and of less value than one completed by a Coast Guard officer. The 1997 reconstructed reviewer comments specifically recommend me for selection to O6 "now." The reviewer in this case is a Coast Guard flag officer currently on active duty. Since all evaluations are subjective by their nature and every Selection Board must evaluate an officer's record in an inherently subjective manner, the correction to my 1997 OER has the potential of resulting in a favorable outcome of a future Selection Board.

[I]t is the opinion of CGPC that a future O6 Selection Board would be more influenced by my 1994 OER than a corrected 1997 OER. My 1994 OER covered a 15 month 11 day period. During that period I was an O4 for 15 months and an O5 for 11 days. . . . It is just as plausible that a future selection Board would be swayed by a 1997 report citing superior performance and potential written by a current flag officer versus a 1994 "quasi-O5" report. My record reflects specific O6 promotion recommendations in the past five years from three different Coast Guard flag officers. The correction to my 1997 OER will increase that to four. It is possible that the correction to my 1997 OER could provide a preponderance of favorable information needed for a future board to select my record for promotion.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's submissions and military record, 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 Coast Guard conceded that an error exists in the applicant's record because the subject OER was added to the applicant's record without the required reviewer comments. Therefore, the Board finds that the reviewer comments submitted by the applicant with his BCMR application should be added to the subject OER, after it is reviewed by CGPC for conformity with the requirements of the Personnel Manual.
3. Notwithstanding the Coast Guard recommendation that the applicant be given only one additional opportunity for selection after the BCMR decision in this case,

the Board finds that a nexus exists between the error in the applicant's record and his failures of selection before the 1999 and 2000 captain selection boards. In determining whether a nexus exists between the errors or injustices and the applicant's failures of selection, the Board applies the standards set forth in Engels v. United States, 230 Ct. Cl. 465 (1982). The standards are as follows: "First, was the claimant's record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that he would have been promoted in any event?" Engels at 470.

4. With respect to the first prong of the Engels test, the Board finds that applicant's record appears better with the reviewer comments added to the subject OER. With respect to the second prong, the Board also finds that it is not unlikely that the applicant would have been promoted in any event. Although the applicant's first CDR OER rated him a 3 in block 12, the Board is not persuaded that this single mark of 3 would have made the applicant's selection to captain unlikely, if the applicant's record had been correct when reviewed by the pertinent selection boards. In contrast to the single mark of 3, the Board finds that the applicant's last 6 CDR OERs show a continuous trend of improvement in the applicant's performance. With another strong recommendation for promotion by a Coast Guard captain, i.e. the reviewer comments in this case, the Board is not persuaded that the applicant would not have been selected for promotion to captain with a corrected record.

5. Therefore, the Board finds that the applicant should have two additional opportunities to compete for selection to captain based on a corrected record.

5. Accordingly, the applicant's request for relief should be granted.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of _____, USCG, for correction of his military record is granted as follows:

Modify the OER for the period April 13, 1996 to March 31, 1997 by adding the reviewer comments that were submitted with the BCMR application, after the comments have been formatted to comply with the requirements of the Personnel Manual. Block 14 of the OER shall be checked to indicate that reviewer comments are attached.

Remove the applicant's 1999 and 2000 failures of selection for promotion to captain. If the applicant is selected for promotion to captain by the first selection board to consider him on the basis of a corrected record, his date of rank, once he has been promoted, shall be the date of rank he would have had if he had been selected for promotion by the 1999 captain selection board, with back pay and allowances.

