

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:



BCMR Docket
No. 2000-130

DECISION OF THE DEPUTY GENERAL COUNSEL

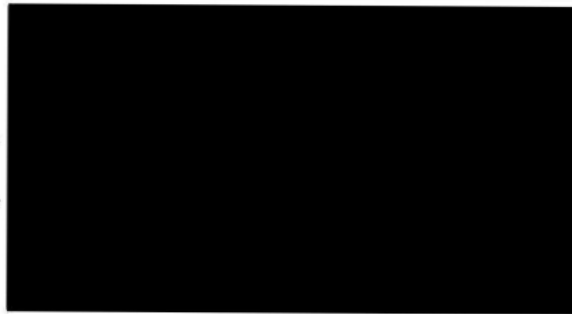
☒ I approve the recommended Order of the Board.

☐ I disapprove the recommended Order of the Board.

☐ I concur in the relief recommended by the Board.

DATE:

June 16, 2000



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FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was docketed on May 15, 2000, upon the Board's receipt of the applicant's complete application for further correction of his military record.

This final decision, dated June 15, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant asked the Board to remove five Reserve officer evaluation reports (OERs) from his record. They are for the periods from February 21, 1994 to September 16, 1994 (first disputed OER); September 17, 1994 to January 29, 1995 (second disputed OER), a report for continuity purposes only; January 30, 1995 to April 30, 1995 (third disputed OER), a report for continuity purposes only; October 1, 1995 to July 31, 1996 (fourth disputed OER); and February 12, 1996 to February 23, 1996 (fifth disputed OER). The fifth disputed OER is not in the applicant's military record.

This is a request for relief in addition to that granted in BCMR No. 1994-214. In that case the Deputy General Counsel acting under delegated authority ordered the applicant's record corrected in the following manner:

1. The applicant's officer evaluation reports (OERs) for the periods January 1, 1993 to June 30, 1993 and July 1, 1993 to November 8, 1993, and all attachments shall be removed from his record and replaced with reports for continuity purposes only.

2. The 1994 failure of selection for extension on active duty shall be removed from the applicant's record.

3. The failure(s) of selection before the IDPL [inactive duty promotion list] lieutenant selection board(s) shall be removed from the applicant's record.

4. Applicant's record shall be further corrected to show that he was not released from active duty on February 21, 1994, but continued to

serve on active duty, with no break in service, until February 5, 1999, the day prior to his acceptance of a commission in the [REDACTED]

5. The applicant shall receive back pay and allowances, subject to appropriate off-sets, from the date of his improper release from active duty (February 21, 1994) until February 5, 1999.

6. The applicant's June 30, 1997 discharge from the Coast Guard shall be voided. The Coast Guard shall issue the applicant a new DD Form 214, consistent with this order.

Applicant's Current Claim

The applicant, now a member of the Air National Guard, claims that since he was reinstated to active duty in the regular Coast Guard as of February 21, 1994, the OERs he earned as a member of the Coast Guard Reserve should be removed from his record. He argued that maintaining the Reserve OERs in his record creates an internal inconsistency. He argued that a member on active duty cannot also perform reserve duty. He further stated as follows:

Permitting those OERs to remain in [my] record subverts the relief granted and leaves [my] record in a totally confused state by indicating that [I] was in the Reserve at times [I have] now been determined to have been constructively on active duty. . . .

Of the five Reserve OERs, two are favorable, two are continuity reports, and one ([REDACTED]) [the first disputed OER] [footnote deleted] is critical. [I am] willing to have the favorable OERs expunged along with others, in the interest of consistency.

As suggested in my [attorney's] April 28, 2000 e-mail, all five Reserve OERs should be replaced by a single active duty continuity OER covering the period from February 21, 1994 to February 5, 1999.

Views of the Coast Guard

On May 19, 2000, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the Board deny removing the OERs, but stated that he would have no objection to modifying the disputed OERs to remove all significant references to the Reserve. The Chief Counsel agreed that the present condition of the applicant's record is confusing, but offered the following remedy instead of removing the OERs:

The Coast Guard proposes to reformat Applicant's OERs as follows to reflect active rather than reserve service:

- a. Reform the 940221-940916 OER to show that Applicant was assigned to [REDACTED]. Redact all [R]eserve references from the OER.
- b. Substitute a regular continuity OER for 3 [R]eserve continuity OERs for the period covering 940917 to 950930. Applicant will be assigned to [REDACTED] for purposes of this OER.
- c. Redact all [R]eserve references from the 951001 - 960731 OER.

The Chief Counsel stated that the law is clear that the Board should be extremely circumspect in removing valid performance information when determining appropriate relief, even when error or injustice is found. The Chief Counsel quoted the following from BCMR No. 151-87, cited in BCMR 106-91: "In the absence of compelling circumstances, an OER should not be ordered expunged unless the Board finds that the entire report is infected with errors or injustices alleged; that every significant comment in the report is incorrect or unjust; or that it is impossible or impractical to sever the incorrect/unjust material from the appropriate material."

The Chief Counsel stated that the Reserve OERs are not in error. He stated that the purpose of this current application is to fashion a remedy that would result in the applicant's record appearing outwardly as an active duty officer record rather than an active duty officer who was released from active duty and then served in the Select Reserve. The Chief Counsel asserted that the Coast Guard could accomplish this objective through the reformatting of the existing Reserve OERs to remove indicia of Reserve status.

Finally, the Chief Counsel stated that the applicant's proposed remedy is contrary to the Board's decision in the original case. In that case, the Board considered and rejected the applicant's allegation that his Reserve OER for the period February 21, 1994 to September 16, 1994 (which was below average) was in error or unjust. The Chief Counsel stated that any action to remove this OER in its entirety would effectively overturn the Board's original decision.

Applicant's Reply to the Views of the Coast Guard

On May 23, 2000, the Board received the applicant's reply to the advisory opinion. He stated that he "believe[d] the relief requested . . . is both proper and appropriate" and that the Coast Guard's position should not be embraced by the Board. He stated that the Coast Guard has conceded that one cannot receive Reserve OERs if he or she is on extended active duty.

The applicant stated that the editing proposed by the Coast Guard is more extensive than any that the Board has approved in the past. The applicant specifically delineated the editing that he believed was necessary to remove all references to the fact that he served in the Reserve, particularly with respect to the first disputed OER.

The applicant argued that the Coast Guard's proposal would violate the cardinal rule that 10 U.S.C. section 1552 "only confers on the Secretary the power to correct

records in favor of a serviceman and never against him." Doyle v. United States, 599 F.2d 984, 1000 (Ct. Cl. 1979), modified in other respects, 609 F.2d 990 (Ct. Cl. 1979), cert. denied, 446 U.S. 982 (1980). With respect to the first disputed OER, the most damaging of the five disputed OERs and the one not removed by the Board in the original case, the applicant stated the following:

What the Coast Guard proposes to do with [the first disputed OER] would tremendously increase the power of that OER. Specifically, it would take an OER that was written to describe performance of duty at 20 drills over a 7-month period (amounting to roughly 160 hours) and inflate it into an evaluation of seven months of full-time day-in and day-out military service. To do so would be extremely unfair because it would dramatically amplify the evaluation . . . and unconscionably overstate the rating chain's opportunity to observe (unless the Coast Guard also plans to invent some "days not observed" . . .).

The applicant stated that there was no need to address the merits of the Coast Guard's argument that the Board refused in the original decision to remove the first disputed OER in light of the decision to void the applicant's release from active duty and to deem him to have been retained on active duty until he accepted a commission in another branch of the Service.

The applicant stated that in neither of the two BCMR cases cited by the Coast Guard had a drilling reservist been restored to active duty.

Supplemental Information Submitted by the Coast Guard

On June 1, 2000, the Coast Guard submitted for the Board's review examples of the two substantive OERs modified to delete references to the Reserve. These documents were telefaxed to the applicant through his attorney on June 2, 2000.

Applicant Response to the Additional Information

On June 2, 2000, the Board received the applicant's response to the Coast Guard's proposed modifications. He objected to the modified OERs and restated his request that they be removed from his record. He stated that the many gaps in the sample modified OERs are a clear signal to the reader that record corrections have been ordered. The applicant argued that this was prejudicial in and of itself. He stated that the modified OER as submitted by the Coast Guard is an elaborate fiction. With that assertion, he asked how the reporting officer for the first disputed OER could be the commanding officer and how the supervisor could be the "Commander [REDACTED]." He further queried that if [REDACTED] was the applicant's command, to what subordinate command did the reporting officer belong? The applicant argued that it is not credible, as the proposed modified OER would note that he was allegedly on active duty in [REDACTED] while living in [REDACTED]. The applicant also questioned the manner in which the Coast Guard proposed to modify the fourth disputed OER.

The applicant stated that he is disturbed by the Coast Guard's failure to include the fifth disputed OER in the applicant's military record. He stated that he could not agree to any disposition that subjected him to the disadvantage of the first disputed OER but fails to credit him for the fifth disputed OER. He claimed such would be entirely unfair. He asked that the Board ensures that his client's military record include the fifth disputed OER, if it does not expunge the disputed OERs.

FINDINGS AND CONCLUSIONS

The BCMR makes the following findings and conclusions on the basis of the applicant's record and submissions, the Coast Guard's submission, the final decision in BCMR Docket No. 1994-214, and applicable law:

1. The BCMR has jurisdiction of this case pursuant to section 1552 of title 10, United States Code. The application was timely.

2. The applicant has not alleged that the evaluation of his performance in the five disputed Reserve OERs is inaccurate. Rather, his objections rest on the claim that they are inconsistent with the relief ordered in BCMR No. 1994-214. The Board in that case, in addition to removing OERs and several failures of selection for promotion to LT, ordered the applicant's record corrected to show that he was not released from active duty on February 21, 1994 but remained on active duty until February 5, 1999. Of course, the correction amounted to giving the applicant constructive active duty credit, since he did not actually serve on active duty from February 21, 1994 to February 5, 1999. He was released to the Reserve on February 21, 1994, where he earned the five disputed OERs.

3. While the Board would agree that the applicant could not be on active duty and in the Reserve at the same time, the Board is not persuaded, as the applicant has argued, that it is necessary to remove the disputed Reserve OERs to cure that inconsistency. The Board also agrees with the applicant that it would be much too difficult to attempt to modify each disputed OER to remove any and all references to the Reserve. However, neither the extensive modification of the OERs, as suggested by the Coast Guard, nor their removal, as suggested by the applicant, is necessary to cure the problem about which the applicant complains. The Board finds that placing an explanation in the applicant's record stating that - as a result of a record correction, pursuant to 10 U.S.C. § 1552, a period of constructive active duty was created for which there are no active duty OERs - will explain the existence of the Reserve OERs and the absence of active duty OERs for this period.

4. There is precedent for applying this remedy in cases similar to that of the applicant. In BCMR 96-88, the Board restored an inactive duty Reserve officer to active duty with constructive service credit. In that case, the Board ordered the following relief, in pertinent part: "4. All of his Reserve OERs shall be included in his Personnel Data Record (PDR). 5. The following explanation shall be included in his PDR: '[the applicant's] Personnel Data Record includes periods of active duty for which there are no Officer Evaluation Reports. These are the result of administrative error that the

Secretary of Transportation corrected in accordance with 10 USC 1552. No adverse inference of any kind is to be drawn from these gaps."

5. Additionally in BCMR 284-90 (Application for Reconsideration), the Board restored an officer who served in the Reserve to active duty, giving him constructive active duty for the period he spent in the Reserve. The Board did not remove the inactive duty Reserve OERs, nor was an explanation placed in that applicant's record.

6. In the case of Yee v. United States, 206 Ct. Cl. 388 (1975), the Court did not object to the placement of an explanation in the record to cure an injustice created by a gap in the Plaintiff's record, as a result of AFBCMR action/inaction. The Court granted all relief (removal of failures and reinstatement to active duty) as requested by Yee, but stated it might have reached a different conclusion if the "Air Force either put in plaintiff's files an adequate explanation that his 5-year gap in OERs had been caused by an injustice committed by the Air Force itself, or delayed plaintiff's evaluation by Selections Boards until an appropriate number of OERs could have been accumulated." Id. at 395.

7. The Board finds that by placing an explanation in the applicant's Personnel Data Record, it has addressed the concern of both the applicant and the Coast Guard that the applicant has a record that accurately reflects his performance, as nearly as possible under the circumstances. The Board believes that by directing the Coast Guard to place the explanation in the applicant's record it has complied with the direction set out in Yee that military correction boards "have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief." Id. at 388.

8. Even without placing an explanation in the record, the Board fails to see how leaving the Reserve OERs in the record will be any more prejudicial than having a DD Form 214 in the record showing that the applicant spent 7 years , 11 months, and 14 days on active duty and only attained the rank of a LTJG.

9. Accordingly, the Board finds that the Coast Guard should place the following explanation in the applicant's record:

The applicant's Personnel Data Record includes a period of constructive active duty, from February 21, 1994 to February 5, 1999, for which there are no Officer Evaluation Reports. The lack of such OERs is the result of administrative error that the Secretary of Transportation corrected in accordance with 10 USC 1552. No adverse inference of any kind is to be drawn from the absence of active duty OERs during the period of constructive active duty.

10. The applicant submitted to the Board a copy of the fifth disputed OER (which is not in the military record) covering the period from February 12, 1996 until February 23, 1996. The appropriate Coast Guard Personnel should review this copy of the OER. If it meets the requirements of the Personnel Manual, it should be placed in the applicant's record.

ORDER

The military record of [REDACTED] USGC, shall be corrected by placing in the applicant's record the following explanation:

[REDACTED] Personnel Data Record includes a period of constructive active duty from February 21, 1994, to February 5, 1999, for which there are no Officer Evaluation Reports. The lack of such OERs is the result of an administrative error that the Secretary of Transportation corrected in accordance with 10 USC 1552. No adverse inference of any kind is to be drawn from the absence of active duty OERs during the period of constructive active duty.

The copy of the OER for the period from February 12, 1996, until February 23, 1996, that was submitted to the Board by the applicant shall be reviewed by the appropriate Coast Guard Personnel. If it meets the requirements of the Personnel Manual, it shall be placed in the applicant's record.

All other relief is denied.

