

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-077



FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on January 26, 2017, and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated September 22, 2017, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a [REDACTED] in the Coast Guard Reserve, asked the Board to correct his record by removing "an erroneous and derogatory comment" from his July 29, 2011, Officer Evaluation Report (OER). The OER in question is a Duty Under Instruction (DUINS) OER, as he was taking courses at the [REDACTED] during the reporting period. The applicant alleged that the comment, "Did not complete all [REDACTED] degree requirements within the allotted time," is "fundamentally untrue." He also asked that the graduation date be removed, as it is incorrectly listed as July 29, 2011.

The applicant explained that at the time of the DUINS OER, he had not yet completed his degree. However, he argued, the school policy allowed for three years to complete the program, and the Coast Guard had no policy to supersede the school's policy. The applicant claimed that he finished the program a semester early by graduating in December of 2011. Regarding the timing of his application, he stated that he was not provided with a copy of the DUINS OER prior to its submission in his record. He stated that he did not see it until October 2016, when he requested a copy of his record.

In support of his application, the applicant provided a letter from the Registrar's office at the [REDACTED]. The letter states that the applicant graduated on December 14, 2011, with a Master of Science of [REDACTED]. The applicant had begun the program in 2009. At that time, the school's catalog stated, "Part-time students must complete

all requirements by the end of the summer quarter of the third year after initial enrollment.” The letter further states that the applicant “completed all requirements within the three year time frame.”

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on active duty on [REDACTED]. He became an officer on [REDACTED]. He remained on active duty until he entered the Selected Reserve on [REDACTED]. The applicant has served several periods of active duty since then, but has largely remained on inactive duty in the Reserve.

The DUINS OER at issue here covers the period of May 1, 2010, to July 29, 2011. It was validated and entered in his record by the Personnel Service Center on July 25, 2012. The applicant’s primary duty is listed as “DUINS – [REDACTED] [REDACTED]. Immediately under the primary duty, the comments in block 2 state, “Part-time graduate student at the [REDACTED] [REDACTED]: Masters of Science in [REDACTED]. Graduation date 29JUL2011.” The comments in block 3 include a list of the applicant’s completed courses, grades, grade point average, and thesis title. This section further includes the following disputed comments: “Did not complete all [REDACTED] degree requirements within the allotted time. Degree can be awarded once thesis is completed by Nov 2011.” All of the eighteen categories in which officers are evaluated are marked as Not Observed.¹

The applicant graduated from the [REDACTED] on December 14, 2011, with a Master’s of Science in [REDACTED].

VIEWS OF THE COAST GUARD

On July 14, 2017, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he adopted the findings and analysis provided in a memorandum on the case prepared by PSC. PSC recommended that the Board grant alternative relief in this case. PSC stated that the DUINS OER period ended on July 29, 2011. The applicant received his degree on December 14, 2011, and therefore had not graduated during the DUINS OER reporting period. The current Coast Guard Performance, Training and Education Manual, CIM 1500.10C, Article 10.E.39. states that the [REDACTED] is a two-year program. PSC stated that the previous version of this manual, which was in effect in 2011, does not address the [REDACTED]. PSC acknowledged the letter the applicant provided from the registrar’s office, which states that a part-time student must complete the requirements within three years.

PSC provided an email exchange from April 2017. An employee at PSC had asked if there was any policy or documentation regarding whether there was an allotted time period in which to complete the [REDACTED]. The PSC employee stated that the previous manual did not address this issue and that the school stated that students have three years. Lieutenant Commander C of

¹ Officers are usually evaluated on a scale of one to seven, with seven being the best, in eighteen performance categories. According to COMDTINST M1000.6A, Article 10.A.5.c.3.a., the Personnel Manual which was in effect at the time, all of the categories must be marked as “Not Observed” in a DUINS OER.

the Commandant's [REDACTED] office responded and stated that he was unable to find any documentation that would require program completion in two years. He recommended that the Coast Guard go by the school policy which authorizes three years.

PSC therefore recommended that the Board grant alternative relief by removing the graduation date listed in block 2 of the OER because it is incorrect and by changing the phrase "within the allotted time" to "during this reporting period" In block 3. PSC argued that the record reflects that the applicant completed his degree requirements within three years but not during the DUINS OER reporting period. No other relief was recommended.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 24, 2017, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited a response within 30 days. No response was received.

APPLICABLE REGULATIONS

Article 10.A.5.c. of the Personnel Manual, COMDTINST M1000.6A, in effect in 2009 states the following regarding DUINS OER preparation:

2. Section 2. Description of Duties and Attachments.

a. Identify the institution or school attended and its location, the program or degree sought or earned, and the expected duration or completion of the program (e.g., Primary Duty: DUINS – UNIVERSITY OF SAN DIEGO)...

3. Section 3 through 10.

a. The "Not Observed" circle shall be used for all marks. Leave section 9 (comparison or rating scale) blank..

b. As applicable to the program being attended, course titles, grades, and grade point average for each semester covered by the OER shall be listed in Block 3f.

c. No other comments are authorized in these sections.

Article 10.A.4.j.4. of the Personnel Manual states the following:

After an OER has been validated, Commander (CGPC-rpm) or Commander (CGPC-opm-3) will forward the original, stamped OER to CGPC-adm-3 for scanning into the Military Personnel Data Record (PDR) system. CGPC-adm-3 will then mail the original, validated OER to the Reported-on Officer.

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 submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.² The disputed DUINS OER is dated July 29, 2011; it was validated by PSC in his record on July 25, 2012; and so it was presumably mailed to the applicant, as required by Article 10.A.4.j.4. of the Personnel Manual then in effect. Therefore, although the applicant alleged that he was unaware of the disputed OER comments until recently, the preponderance of the evidence shows that he knew of the alleged error in his record in 2011, when he received the OER in the mail and would have reviewed the grades and comments for accuracy. Therefore, his application is untimely.

3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.³ In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without “analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review”⁴ to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that “the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review.”⁵ Although the applicant in this case did delay filing his application, the evidence of record reveals a significant, prejudicial error in his record, as explained below, and so the Board finds that it is in the interest of justice to excuse the untimeliness of the application.

4. The applicant asked that the Board remove the graduation date and a comment from his July 29, 2011, DUINS OER because he alleged that they are erroneous. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁶ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁷

5. The Personnel Manual in effect in 2011 describes what information may be included in block 2 of a DUINS OER. Article 10.A.5.c.2. states that the “expected duration or completion of the program” is to be identified in this block. The applicant’s DUINS OER incorrectly states that his graduation date was July 29, 2011. However, the record shows that the applicant was awarded his [REDACTED] degree on December 14, 2011. Block 3 indicates that when the OER was prepared, his rating chain expected that the applicant would be turning in his thesis in November 2011, because it states, “Degree can be awarded once the thesis is completed by Nov 2011.” The Board therefore finds that the applicant has proven by a preponderance of the evidence that his graduation date is incorrectly stated in block 2 of his July 29, 2011, DUINS OER. The

² 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

³ 10 U.S.C. § 1552(b).

⁴ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁵ *Id.* at 164, 165; see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

⁶ 33 C.F.R. § 52.24(b); see Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the “clear and convincing” evidence standard recommended by the Coast Guard and adopting the “preponderance of the evidence” standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

⁷ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

Coast Guard should remove the comment “Graduation date 29JUL2011” and replace it with “Expect graduation DEC 2011.”

6. The Personnel Manual in effect in 2011 also specifically states what information is to be included in blocks 3 through 10. The manual states that “no other comments are authorized in these sections” other than what is listed in Article 10.A.5.c.3. In block 3 of the applicant’s DUINS OER, his classes, grades, grade point average, and thesis title are all properly included. However, block 3 goes on to state, “Did not complete all [REDACTED] degree requirements within the allotted time. Degree can be awarded once the thesis is completed by Nov 2011.” Because the manual specifically states that no other comments are authorized, and because the applicant did complete his degree within three years, the Board finds that these statements should be removed from the DUINS OER.

7. The applicant has proven by a preponderance of the evidence that an error exists in his record. The Coast Guard should correct the comment, “Graduation date 29JUL2011,” in block 2 of his DUINS OER to “Expect graduation DEC 2011.” The Coast Guard should also remove from block 3 the comment, “Did not complete all [REDACTED] degree requirements within the allotted time. Degree can be awarded once the thesis is completed by Nov 2011.” No other relief is warranted.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of [REDACTED], USCGR, for correction of his military record is granted as follows:

On his DUINS OER for the period of May 1, 2010, to July 29, 2011, the Coast Guard shall remove the comment "Graduation date 29JUL2011" from block 2 and replace it with the comment, "Expect graduation DEC 2011."

The Coast Guard shall also remove these comments from block 3 of the DUINS OER: "Did not complete all [REDACTED] degree requirements within the allotted time. Degree can be awarded once the thesis is completed by Nov 2011."

No other relief is granted.

September 22, 2017

