

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 24-97

FINAL DECISION

[REDACTED]

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on November 21, 1996, upon the BCMR's receipt of the applicant's request for correction of his military record.¹

This final decision, dated December 5, 1997, is signed by the three duly appointed members who were designated to serve as the Board in this case.

Applicant's Request for Correction

The applicant is a retired² Coast Guard Commander (CDR; pay grade O-5) who was a Reserve Program Administrator (RPA).

The applicant asked the Board to correct his officer evaluation report (OER) for the reporting period from April 1, 1993 to June 30, 1994 (disputed OER). The applicant alleged that the block 12 comparative scale mark on the disputed OER was lowered by the Reporting Officer (RO) as a result of pressure by the Reviewer. The mark was lowered from "strongly recommended for accelerated promotion" to "distinguished performer; very competent, highly respected professional." The RO told the applicant that he would not change his recommendation unless the applicant concurred. The applicant alleged that he agreed, and the mark was lowered, as result of the concurrence and a "threat" by the Reviewer to write a Reviewer's Comment himself if the change was not made. The applicant alleged that superiors in the rating chain are forbidden to make changes in a portion of the OER for which they are not responsible. Block 12 was the responsibility of the RO.

¹ The application was sent to the Coast Guard on November 25, 1996. The Board did not receive the views of the Coast Guard until October 30, 1991.

² The applicant retired on [REDACTED]

Furthermore, the applicant alleged that the RO had the right to perform his rating chain responsibilities without such interference.

The applicant also asked the Board to remove in its entirety the special OER which he received for the reporting period from June 12, 1995 to September 12, 1995 (disputed special OER). The disputed special OER was based on an investigation into allegations that the applicant used government time and services to further a private business, had had contact with Russian nationals, and had lent a copy of a Navy publication concerning a 76mm gun to a civilian firm. The investigator told him he had found nothing that could be considered criminal or specifically damaging, and that "there was virtually nothing to the [investigation]." After the investigation, the applicant was not charged with any offense or taken to mast or court martial or given an administrative reprimand. The applicant said the only reason for the special OER was that his Reviewer was out to "get" him and "harbored [animus] towards RPAs in general[]."

The applicant admitted that "he should not have used government resources at all for a private purpose," but he alleged that the disputed OER should be invalidated "because it convicts without due process of law" and denies him guaranteed "procedural protections."

The applicant also contended that the application of the Engels test, 230 Ct. Cl. 465 (1982), would result in the removal of his passover for promotion to Captain by the PY96 RPA promotion board. He asked for an opportunity to be considered for promotion on the basis of a corrected record.

Views of the Coast Guard

On October 30, 1997, the BCMR received the Coast Guard's advisory opinion. The Chief Counsel of the Coast Guard recommended that relief be denied, except for two technical changes.

Disputed OER

The Chief Counsel denied that there was any error or injustice in the disputed OER. According to him, the Reviewer did not err in returning the disputed OER to the Reporting Officer or in informing the RO that the Reviewer intended to disagree with the RO's recommendation as to the applicant's comparative scale evaluation. The Chief Counsel said that there was no prohibition against lowering the applicant's evaluation from "recommended for accelerated promotion" to "distinguished officer," particularly since the RO left the decision on this point to the applicant himself.

Disputed Special OER

The Chief Counsel said that the applicant was not entitled to have the special disputed OER removed. According to the Chief Counsel, the only error that the applicant has shown in the special disputed OER was the mention of a criminal investigation. The applicant admitted that "he provided technical information to persons not authorized to receive it," and he admitted that "he used Government resources in furtherance of his business."

The applicant's allegation that the special disputed OER was the result of prejudice by the Reviewer was summarily rejected by the Chief Counsel on the ground that it "is not supported by evidence." The applicant has not shown justification for removing documentation of his misconduct from his record, and he is not entitled to the rights of a party with respect to the investigation. The Coast Guard did not err by relying on the investigation without according the applicant party rights.

In this case, according to the Chief Counsel, the applicant does not claim that the special disputed OER is factually inaccurate; the facts are accurate. The Chief Counsel said that the applicant's actions were not "diabolical," but he did say they were a "misuse of his position."

Response of the Applicant to the Views of the Coast Guard

On November 13, 1997, the BCMR received the applicant's response to the Coast Guard's advisory opinion. Following is part of the first allegation:

1. The Coast Guard has unreasonably delayed this proceeding. Its submission leaves the Department literally no time to perform its critical statutory function of review by a "board[] of civilians". . . . Note also that we had requested a ruling prior to the October 1997 RPA selection board; the advisory opinion did not even reach us until after that board convened. This is extremely unfair because the applicant] now must wait yet another year. . . .

The applicant reiterated his earlier allegations: that the rating chain violated the Personnel Manual when the Reviewer threatened to inject "damaging" comments if the Reporting Officer did not lower his mark on block 12; that the applicant's use of government personnel was very limited; and that the applicant did not know that a person he contacted was a Russian national.

Excerpts from Record

Excerpts from Disputed Special OER:

This special report is the final action from a completed OCGDTHIRTEEN (ole) report of investigation into allegations of misuse of government resources. The investigation documented, through his own admission, [the applicant's] limited use of government personnel, time and resources in a personal business capacity." [He loaned a weapons publication to a prohibited party, and he failed to report contact with Russians.] Although these actions show a serious lapse in judgment requiring documentation in this Special Report, . . . no offense occurred that would warrant action under the UCMJ.

Excerpts from OER Reply to Disputed Special OER"

2. I have a cursory non-financial involvement with a business group that is looking to market vessels to overseas customers. On three occasions, in response to inquiries by this group I prepared short written answers (mostly page or less) and a yeoman typed them for me. . . . I was contacted by an acquaintance from an equipment supply company [regarding a particular weapon]. Since I am co-located with the Readiness Branch, I went to their reference library and faxed information to the company from "Jane's Naval Weapon's Systems" on the weapon.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions 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.

2. The Chairman has recommended disposition of the case without a hearing. 33 CFR 52.31 (1993). The Board concurs in that determination.

3. The applicant asked that the mark on block 12 of his disputed OER be moved one mark to the right, because this mark ("strongly recommended for accelerated promotion") was the one that was originally assigned him by his Reporting Officer. His Reviewer, however, objected. The Reviewer told the Reporting Officer that if he did not agree to lower the mark to "distinguished performer . . .," he "would write a Reviewer's Comment lowering the mark." The Reporting Officer allowed the applicant to choose whether he wanted a lower mark on block 12 or Reviewer's comments; he chose a lower mark.

4. The Reviewer did not commit an error or injustice with respect to the disputed OER. Article 10-A-2f.(2)(d) of the Personnel Manual says that a Reviewer "may not . . . direct" in what matter an evaluation mark is to be changed, but it does not say that a Reviewer is prohibited from stating his views. In fact, Article 10-A-2f.(2)(c) of the Manual provides that the Reviewer "[i]f necessary, adds comments on a separate sheet of paper further addressing the performance and/or potential of the Reported-on Officer." Article 10-A-4(11)(f). of the Manual encourages a Reviewer to resolve inconsistencies "by return of the report to concerned members of the rating chain or by personal discussion."

5. The applicant also asked that the disputed special OER be deleted from his record on the ground that the investigator told him "there was nothing to it" and the District Legal Officer thought the matter was trivial. The applicant also asked that it be deleted on the ground that the investigation was initiated by his Captain who was prejudiced against RPAs. He allegedly told the applicant that in "30 years of service, [he] never met an RPA [he] thought was much of an officer."

6. The applicant has not shown that the Coast Guard committed an error or injustice in conducting an investigation of the applicant and in preparing a special OER. The investigator's statements do not rebut the facts revealed by the investigation, especially those admitted by the applicant. More significantly, the applicant does not present any evidence rebutting the facts related in the special OER. "Although," as the Coast Guard says, "he minimizes the misconduct discussed in this OER in his OER Reply and in his brief, Applicant admits to the essential facts."

7 The Board finds that technical changes recommended by the Coast Guard should be made.

8. In all other respects, the application should be denied.

ORDER

The application to correct the military record [REDACTED]
[REDACTED] BCG (Ret.) is denied, except as follows:

(a) Correct the disputed special OER by deleting the following words from section 2: "as a result of an OCGDTHIRTEEN (ole) investigation."

(b) Correct the disputed special OER by deleting the first sentence of section 9f., and by rewriting the second sentence of section 9f to read as follows: "Through his own admission, [the applicant] made limited use of government personnel, time and resources in a personal business capacity."

