

DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of  
Coast Guard Record of:



BCMR Docket  
No. 55-97

DECISION OF THE DEPUTY GENERAL COUNSEL

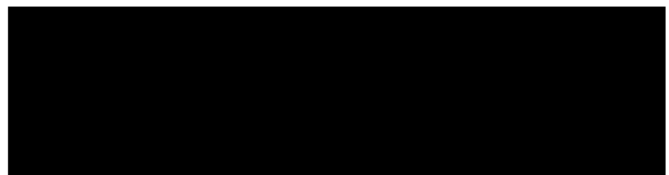
\_\_\_ I approve the recommended Order of the Board.

\_\_\_ I disapprove the recommended Order of the Board.

\_\_\_ I concur in the relief recommended by the Board.

☒ I concur in the relief recommended by the Board as  
modified by the concurring opinion.

DATE: May 5/1898



Deputy General Counsel,  
Delegate of the Secretary  
Department of Transportation

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FINAL DECISION



This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on January 22, 1997, upon the BCMR's receipt of the applicant's request for correction of his military record.

This final decision, dated March 26, 1998, 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 chief warrant officer - 3 (CWO3). He alleged that three of his officer evaluation reports (OERs) were prepared for "other than evaluative reasons" and represented "deliberate attempts" to keep him from advancement. He asked that these three OERs be deleted from his record and replaced with OERs for continuity purposes only. The first disputed OER covered the period from July 1, 1994 to December 31, 1994; the second disputed OER covered the period from January 1 to August 31, 1995; and the third disputed OER covered the period from September 1, 1995 to February 29, 1996.

In December 1996, the applicant was passed over for selection to W-4, by the 1996 W4 Warrant Officer Selection Board. The applicant asked the BCMR to direct that a special selection board be convened to consider him for selection on the basis of a record that did not include the disputed OERs, or that he be considered an "in zone" candidate before the 1997 W4 selection board. The applicant was passed over by the 1997 board. The applicant also asked the BCMR to direct that his non-selection by the 1996 W4 selection board be "nullified as much as the law allows."<sup>1</sup>

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<sup>1</sup> The final decision in this case was due January 22, 1998. The deadline for the decision was extended to March 22, 1998 after the applicant's counsel asked the Board for a 60-day extension.

The applicant submitted four statements in support of his assertion that the disputed OERs were written in a manner that was intended to keep him from advancement due to the part he played in investigations against his executive officer. The EO (executive officer) was, he alleged, "seeking vengeance on the applicant for a series of whistleblowing investigations that were conducted against the officer."

### **Views of the Coast Guard**

On December 12, 1997, the Board received an advisory opinion from the Chief Counsel of the Coast Guard recommending that the Board deny relief in this case. The Chief Counsel stated that an OER is erroneous or unjust only if the applicant showed a misstatement of a significant hard fact or a clear violation of a statute or violation. The Chief Counsel said the applicant did not make such a showing.

The applicant alleged that he was evaluated by his EO on the basis of improper reasons and with deliberate intent to keep him from advancement because he had taken part in investigations of that officer. The Chief Counsel said that it was the responsibility of the applicant to provide the evidence to support these allegations.

The Chief Counsel argued that the applicant provided statements from four witnesses, but that three of them "give no factual basis for their speculation." The statement of the fourth former coworker was, according to him, "apparently based on second-hand information." All the statements alleged that the EO demonstrated personal bias against the applicant and that the bias, rather than the EO's professional judgment, regarding the applicant was the basis for the applicant's low OER marks.

The Chief Counsel noted, however, that the applicant has not provided proof of this bias. The Chief Counsel declared that "there is no valid basis for Applicant's complaint," and that the letters from the CO and from other reporting chain officials reinforce the presumption that the disputed OERs were fair and professional. The Chief Counsel also recommended that the applicant's failure of selection for CWO4 be unchanged "because it is unlikely that he would have been selected in any event."

### **Applicant's Response to Coast Guard Views**

On December 16, 1997, the Board sent a copy of the advisory opinion of the Coast Guard to the applicant, with an invitation to him to respond to those views within 15 days. The applicant asked for and was granted a 60-day stay with respect to

the time for response.<sup>2</sup>

The applicant said that the essence of the case was that the disputed OERs were prepared in retaliation for complaints that the applicant made against the reporting officer. The applicant alleged that the Coast Guard advisory opinion discounted the statements of the witnesses.

### Summary of Record and Submissions

The four witnesses who submitted statements in support of the applicant were convinced that the executive officer lowered the applicant's marks and comments to deny him advancement.

**Witness** [REDACTED] a CWO4 (BOSN), who served with the applicant in Philadelphia for 2 1/2 years. The three disputed OERs on the applicant "are unjust," and are having an "unfortunate impact" on the applicant. The Applicant was "marked artificially low." EO's behavior was "erratic"; the EO "professionally punished [applicant] for being a whistleblower."

**Witness** [REDACTED] a Chief Petty Officer (TCC) at the Headquarters support command. He said that the EO had "contempt" for applicant and was seeing to it that the applicant's career was over. Applicant performed very well under unfair circumstances. It was alleged that the EO gave him a "daily dose of humiliation."

**Witness** [REDACTED] a LT. She said that the disputed OERs were written in a manner intended to end his career, the EO abused applicant, the applicant was consistently unfairly treated, and "It is highly probable that [applicant's] OER's are written artificially low in order to be sure that he is not selected for promotion."

**Witness** [REDACTED] a CWO (F&S) : He said that the applicant had been "handled unfairly." He said that the EO wrote "substandard OERs" on the applicant. He also said the EO was "seeking vengeance" for whistleblowing and treating applicant with "tremendous malice."

One of the witnesses said that the EO took an "almost psychotic dislike" to the applicant. The applicant said the other two members of the rating chain "could not have but been influenced" by the invective and inappropriate behavior by the reporting officer.

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<sup>2</sup> The applicant also asked the Board for a copy of a particular Report of Coast Guard Investigation, but was told that the Board does not normally receive copies of such reports. The applicant was advised to request the report under the Freedom of Information Act.

The four statement writers were two warrant officers, a chief, and a lieutenant. The rating chain members on the three disputed OERs were an ensign, a commander, and a captain.

### 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. The application is timely.

2. The applicant asked the Board to delete three disputed OERs from his military record and to delete his failure of selection to the grade of CWO4 by the 1996 warrant officer selection board.

3. The applicant submitted written statements to show that a member of each rating chain, the ship's EO, had treated him unfairly because the applicant was a whistleblower who had reported questionable professional conduct of the EO to the Inspector General (IG).

4. None of the statements disputed the accuracy of any specific marks or comments on the three disputed OERs. The applicant alleged that the EO was so angry that the applicant had dealt with the Inspector General that he could not write an objective evaluation.

5. The applicant's opinion that his executive officer had a personal bias against him for his involvement in the IG's investigation is supported by some credible evidence. However, the four people who submitted statements on his behalf did not identify any particular mark that was lower than merited as a result of error or injustice, although they alleged that they were all lowered because of vengeance and similar emotions. The members of the rating chain denied being influenced by the EO in their evaluation of the applicant.

6. The applicant's marks on the OER comparison mark (block 12) on the three disputed OERs were somewhat lower than those on the three OERs before and after the three disputed OERs. On the OER for the period ending 6/30/97, he had a "5," for the period ending 6/30/94, he had a "4," and for the period ending 12/31/93, he had a "5." On the two disputed OERs, he had a mark of "4" on the comparative scale.

7. There was one exception, however. On the third disputed OER, the applicant had a "2" on the comparative scale, while a majority of his marks were 4s and none were below 4.

8. In the absence of any Coast Guard justification for a 50% drop (from 4 to 2) in the applicant's comparative scale, and in light of evidence of bias by the EO, the mark on block 12 on the third disputed OER should be changed from "2" to "4."

9. In light of this correction, and in light of the fact that the applicant was passed over, in December 1996, for selection to CWO4, the Board should apply the Engels case to determine whether the failure of selection should be removed. *Engels v. United States*, 230 Ct. Cl. 465 (1982). It should be, because the applicant's record appears worse than it would in the absence of the error, and because it is not unlikely that the applicant would have been promoted in any event. The Coast Guard disagreed. It alleged that he would not have been promoted in any event.

10. The Board finds that it was more than likely that he would have been promoted.

**[ORDER AND SIGNATURES ON THE FOLLOWING PAGE]**

ORDER

The application to correct the military record of [REDACTED] [REDACTED] USCG, is granted in part and denied in part. The mark on block 12 on his OER from September 1, 1995 to February 29, 1996 shall be changed from a "2" to a "4," and his failure of selection for CWO 4 before the 1996 and 1997 W4 selection board shall be removed. All other requested corrections shall be denied.

[REDACTED]

\*see also concurring opinion


[REDACTED]

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CONCURRING OPINION

 Member:

I concur in the Final Decision of the Board in this matter. In addition to the relief granted in that decision, I find a basis for eliminating the third and fourth sentences from block 11 of OER for the period from September 1, 1995 to February 29, 1996. The third sentence contains derogatory information on leadership ability that is inconsistent with the individual marks for leadership that he received elsewhere in the report. The fourth sentence contains a recommendation for assignment of at his current level of responsibility and rank. This recommendation, which does not recognize promotion potential in appears to have been influenced by the derogatory information on leadership ability in the third sentence of block 11.

