

UNITED STATES DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY

Application for Correction of
Coast Guard Record of:



BCMR Docket
No. 56-96

DECISION OF THE DEPUTY GENERAL COUNSEL ACTING UNDER
DELEGATED AUTHORITY


I have reviewed the recommended Final Decision of the Board for Correction of Military Records (Board). The decision would remove from the applicant's record an officer evaluation report (OER) for the period May 1, 1993 to June 30, 1994 on the grounds of injustice, finding that the OER was impermissibly based on an inclination to review the applicant based on religious considerations and contained comments concerning conduct during a time period outside the marking period. --

I disagree with the Board's conclusion that the OER exhibited an "inclination" to evaluate the applicant negatively on the basis of religion. An applicant must comply with the regulatory requirement to submit "substantial proof" of error or injustice to overcome the strong presumption that the military superiors involved discharged their duties correctly, lawfully, and in good faith. 33 CFR 52.21; *Collins v. United States*, 24 Cl. Ct. 32, 35 (1991), *aff'd*, 975 F.2d 869 (1992); *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). Other than discussing the "religious terminology" used in the OER, the applicant offered no evidence about the alleged "religious prejudice" in his rating chain. Religious bias against the applicant by at least the supervisor would seem inconsistent with comments in an earlier OER by the same officer, which specifically praised his "high moral character."

However, I agree with the Board that the low mark in judgment given the applicant due to the overseas shipment of books incident was unfair, given the shipment's charitable purpose and the applicant's credible and unrebutted assertion that he had explicitly ordered that they should be transported at no expense to the government. Moreover, I also find credible and essentially unrebutted the applicant's claim that he in fact did not approach several foreign nationals to do missionary work, in the manner asserted in the Sanctions Liaison letter. Although ordinarily a statement signed by an official of a United States Embassy abroad should be deemed reliable, here it was not: the evident source of the adverse information was a junior officer who had earlier made complaints against the applicant, and the person who signed the letter clearly had no first hand knowledge of the events involved.

Accordingly, I find that the OER was tainted by unfair criticism and a reliance upon unreliable information, and, under the circumstances presented, I concur in the relief ordered by the Board on that basis.

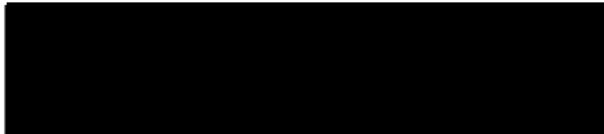
Date: OCT 2 1997



Rosalind A. Knapp
as designated to act
for the Secretary

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

Application for Correction
of Coast Guard Record of:



BCMR Docket
No. 56-96

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on January 11, 1996, upon the receipt by the Board for Correction of Military Records (BCMR or Board) of this application for correction.

This final decision, dated February 10, 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, a Coast Guard commander (CDR), requested that the Board remove from his military record the Officer Evaluation Report (OER) for the period May 1, 1993 to June 30, 1994 (disputed OER). In the alternative, the applicant requests that certain comments made in the disputed OER be deleted, and that several dimension scores and his comparison mark be raised. He alleges, inter alia, that the OER contains comments relating to his performance that are "based on religious prejudice" in violation of Article 10-A-4g of the Coast Guard Personnel Manual. In addition, he alleges that the OER included conduct which occurred outside the reporting period in violation of Article 10-A-4g.(3)(g) of the Personnel Manual.

The applicant submitted an application for relief, a memorandum in support of his application for correction, copies of several provisions of the Coast Guard Personnel Manual, and an article from the Coast Guard newspaper "Commandant's Bulletin," that related a story involving Coast Guardsmen volunteering their time to assist in humanitarian efforts in Guatemala.

Opinion of the Personnel Records Review Board (PRRB)

On December 4, 1995, the PRRB issued recommendations in response to the applicant's petition to either remove the disputed OER in its entirety from his military record, or to delete certain comments, raise a number of performance

dimension scores, and raise the comparison mark.

Language in the Disputed OER Allegedly Connoting Religious Emphasis

The PRRB concluded that the comments in section 4c of the disputed OER "placed undue influence on religion and should therefore not have been used." PRRB Findings, Conclusions and Recommendations, page 3. Accordingly, the PRRB recommended that the word "missionary" be redacted from the disputed OER. The PRRB concluded that it would not redact the word "preach" from the same comments because "[t]he word "preach" by itself does not have as strong a religious connotation, but when used in context with "missionary" begins to convey unnecessary religious inference. The redaction of "missionary" will eliminate the contextual inference." Id. With respect to use of the word "missionary" in section 9f of the disputed OER, the PRRB stated that "...when used in context, the word does not place undue emphasis on religion as did its earlier use in section 4c." Id. The PRRB made this determination based on whether it believed the words demonstrated a strong religious connotation in the context of the disputed OER's narrative. The PRRB did not consider the possibility of discriminatory intent on the part of the reviewer, stating only that its decision was made "[r]egardless of intent." Id.

Substantive Actions Described in the Disputed OER

With respect to the substantive comments made in the disputed OER, the PRRB concluded that marks used to support dimensions 9b and 9c were "very clear."

Applicant was held accountable for asking his petty officer to carry books for him on an overseas flight as part of the petty officer's personal baggage. Instead of heeding applicant's instructions, the petty officer shipped a box of books to [REDACTED] at government expense. While the PRRB noted that an investigation of the incident cleared the applicant of any wrongdoing, the fact that the subordinate sent the books to [REDACTED] at government expense was deemed applicant's responsibility, even though the petty officer disregarded applicant's explicit instructions.

Without specifically stating so in its findings, the PRRB believed that the letter from the sanctions officer at the American Embassy in [REDACTED] was a "reliable report" that could be used in the applicant's OER. The PRRB determined that the rating chain did not place "undue emphasis on religion" in quoting directly from official correspondence from the sanctions officer at the American Embassy in [REDACTED]. According to the letter, the applicant was said in section 9f. to have "acted inappropriately by approaching several [REDACTED] officials to perform missionary work."

Conduct Outside the Marking Period

The PRRB determined that "[i]f indeed the incident (applicant's alleged conduct while visiting a [REDACTED] school) occurred two days before the end of the previous reporting period in April as the applicant contends, and the strictest interpretation of 10-A-4g.(3)(g) is applied, then discussion of this conduct in the...(disputed) OER would have been prohibited."

The PRRB noted that the applicant "has provided no additional documentation or evidence to support his contentions" in addition to the brief he submitted to the Board with his application for relief.

Response of the Applicant to the Views of the Coast Guard

On July 10, 1996, the applicant submitted a response to the Coast Guard's views. The applicant reiterated his concern that language having religious connotations was used in the disputed OER. The applicant contended that this resulted in an evaluation that violated Article 10-A-4g.(3)(d) of the Coast Guard Manual because it expressly compared him to others in a manner that placed an emphasis on religion, thereby rebutting the presumption of regularity afforded OER's.

The applicant also stated that he found the reporting officer's reliance upon the letter from the American Embassy in [REDACTED] to be "inappropriate and irregular." According to the applicant, the source of the information in that letter was "a disgruntled member" of his command. The applicant introduced evidence that [REDACTED] the individual who signed the letter from the American Embassy in [REDACTED] faxed a draft of this letter on October 1, 1993 to [REDACTED] a Coast Guard officer, nine days prior to its issuance.

The applicant again alleges that the disputed OER describes conduct that occurred outside the reporting period. Specifically, the applicant alleged that he visited with [REDACTED] teachers at their school on April 28, 1993, two days prior to the start of the period that covered the disputed OER.

Further Views of the Coast Guard

On August 12, 1996, the Chief Counsel of the Coast Guard submitted additional views in response to those of the applicant. The Service said that the "[applicant's] self-evaluation and self-serving interpretation of the events surrounding the disputed OER are insufficient to establish an error or injustice Applicant also makes several assertions without substantial proof to support them." In effect, the Coast Guard suggested that the applicant's statements should

not be considered credible evidence.

Summary of Applicant's OERs

Summary of Marks on Comparison Scale

<u>Period of Report</u>	<u>Mark on Comparison Scale (Block 12)</u>
6/29/95 to 3/31/96	5 (out of 7)
7/1/94 to 6/28/95	5 (out of 7)
5/1/93 to 6/30/94	2 (out of 7)
7/11/92 to 4/30/93	5 (out of 7)
3/21/92 to 7/10/92	5 (out of 7)
7/1/91 to 3/20/92	5 (out of 7)
5/1/90 to 6/30/91	4 (out of 7)
AVERAGE MARK	4.43 (4.83 without disputed OER)

Disputed Comments Contained in the OER

The following is a complete listing of all the negative comments contained in the disputed OER. The third comment (quoted from section 11 of the disputed OER) is based on the first and second comments (made in sections 4c and 9f, respectively).

1. "Has had problem keeping personal _____ interest / work separate from his official duties. Unit personnel reluctant to bring personal problems (pending divorce etc) to CO because he tended to preach/try to impose personal beliefs rather than be helpful/supportive." (Block 4c).
2. "Exhibited poor judgment/responsibility: 2 examples: shipped a box of donated books he'd collected to _____ at govt expense. . . he'd intended this box be carried IMLET mbr personal luggage, but box was shipped w/ IMLET gear which incurred excess weight charge . . . CGHQ rcvd ltr from Sanction Liaison Officer, American Embassy, _____ following trip to view IMLET training. Ltr said CO acted inappropriately by approaching several _____ officials to perform missionary work also said 'a valued official contact in the _____ Customs Service was offended by this approach and complained to the Embassy officer.'" (Block 9f).
3. "Unfortunately, [the applicant] departs IMLET as a CO whose judgement on several occasions was unacceptable. [The applicant] was counseled on these matters several times but failed to get the message. Because of these problems, I

do not recommend him for another command or an independent duty assignment at this time." (Block 11).

Observations

Evidence comes in many forms, including statements made by the applicant. The weight given to such statements depends on, among other things, the applicant's credibility, and other evidence in the record lending credence to the applicant's statements. Insisting on corroborative testimony as the Coast Guard requests in this case is not necessary.

Substantive Conduct Described in the Disputed OER

With respect to substantive issues, the disputed OER contains two examples that led to a determination that applicant used "poor judgment / responsibility." An analysis of the evidence demonstrates that conduct was in one case unfairly exaggerated, and in the other case, not based on a "reliable report," as required by Article 10-A-2e.(2)(a).

The first example concerns a shipment of books to [REDACTED]. Applicant made uncontroverted statements that if the books could not be taken as personal luggage, the books should be left at the airport. His petty officer did not follow these directions, proceeding instead to ship the books at government expense. CGHQ cleared the applicant of any wrongdoing. Is it poor judgment to trust a subordinate to follow a request, where parameters are set forth that clearly provide the subordinate with clear direction? The Board does not think so.

The second example concerned a letter purportedly authorized by the American Embassy in [REDACTED]. Among other things, the author claims that a [REDACTED] customs official was "offended" by the applicant's "missionary work." The Board is not persuaded by the reliability of this report. First, the report is based on hearsay. The author did not directly observe this activity. In addition, there is evidence in the record demonstrating that one of applicant's junior officers [REDACTED] received a telecopied draft of this letter nine days prior to its issuance. Evidence also suggests that [REDACTED] as disgruntled as a result of an adverse recommendation from the applicant. Finally, there is no indication that the letter was endorsed by the State Department or the American Embassy.

Language in the Disputed OER Connoting Religious Emphasis in Violation of Article 10-A-4g.(3)(d)

In reviewing Article 10-A-4g.(3)(d) of the Coast Guard manual, the question the BCMR must ask is not simply whether certain words have "strong" religious

"connotations," but whether the reviewing officer expressly evaluated applicant in such a way that an emphasis was placed on religion. All negative comments made on the applicant's OER contained references to religion. As discussed above, an analysis of the evidence in this case undermines the substance of the negative comments contained in applicant's OER. All other comments in the narrative portion of applicant's OER presented applicant's performance in a positive manner. An inference can be drawn that the reviewer allowed his judgment to be clouded to some degree by religious prejudice. A comparison score of 2 based on these negative comments does not appear justified.

A reviewer is prohibited from discussing conduct outside of the marking period, which was, in this case, May 1, 1993 to June 30, 1994. Applicant's contention that he visited the Romanian schools on April 28, 1993 is uncontroverted by the evidence in this case.

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 BCMR 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 alleged that the disputed OER should be removed from his military record because it contained comments "based on religious prejudice" and "comments concerning conduct during a time period outside the marking period."

4. The applicant alleged that such comments were prohibited under Article 10-A-4g of the Personnel Manual.

5. Article 10-A-4g.(3) of the Personnel Manual provided that members of the rating chain shall not . . .

"(d) Expressly evaluate or compare one officer to another officer with regard to, or emphasis on . . . religion";

"(g) Discuss Reported-on Officer's performance or conduct which occurred outside the reporting period."

6. The Board accepts the uncontroverted statements made by the applicant concerning the date he visited a [REDACTED] school (April 28, 1993). Because this conduct occurred outside the marking period, its use in the OER is prohibited under Article 10-A-4g of the Personnel Manual.

7. The letter from the American Embassy in [REDACTED] is not a "reliable report" as defined in 10-A-2e.(2)(a) and therefore cannot be considered in the applicant's OER.

8. Even if the substantive incidents described in paragraph 6 and 7 above were procedurally permitted to be considered in an OER, the references therein to the applicant's religious ("missionary") activities, expressly evaluated the applicant with other officers with regard to, or with an emphasis on religion. All negative comments in the OER contained some form of religious terminology. Instead of measuring the degree or strength of the religious term in context with the surrounding language in the narrative as the PRRB did, the use of the terminology in three places, all of which were examples of negative conduct, demonstrates an inclination on the part of the reviewer to evaluate this Coast Guard officer based, at least in part, on religion.

9. The applicant has proved that the Coast Guard committed an injustice with respect to the disputed OER by rebutting the presumption of regularity afforded to the conclusions made in an OER.

10. Accordingly, the application should be granted.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application to correct the military record of [REDACTED]
[REDACTED] JSCG, is granted, as follows: The OER for the period May 1, 1993,
June 30, 1994 shall be removed from the applicant's record and replaced with a
report for continuity purposes only.

