

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction
of Coast Guard Record of:



BCMR Docket
No. 65-97

FINAL DECISION



This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on February 5, 1997, upon the BCMR's receipt of the applicant's application for correction.

This is the final decision in this case, dated July 31, 1997. It is signed by three duly appointed members, who were designated to serve as the Board in this case.

Request for Correction

The applicant, a lieutenant, asked the Board to remove from his military record his officer evaluation report (OER) for the period December 1, 1991 to June 19, 1992 (disputed OER). He also asked the Board to expunge his passover by the Promotion Year (PY) 1997 Lieutenant Commander Selection Board.

The applicant alleged that the disputed OER was in error because it was inconsistent and contradictory. Part of the report was written by the applicant's immediate supervisor, who awarded him one 4, ten 5s, and three 6s. The second part was written by the applicant's reporting officer, who gave him one 3, two 4s, four 5s, and one 6. The supervisor said he showed "superb time management," whereas the reporting officer said that he needed "to further focus his energies and attention." The supervisor said that the applicant "quickly learned inspection areas unique to MODUs [mobile offshore drilling units]," whereas the reporting officer said "that he was not ready for either engineering or MODU questions."

The applicant also alleged that he was never counseled on the matters as to which the reporting officer faulted him in the disputed OER. The

applicant also alleged that the published rating chain was violated because the function of the reviewer was performed by the commanding officer, rather than by the executive officer, who should have been the reviewer, according to the published rating chain.

The applicant said that he would accept limited relief or "the more radical surgery of complete removal and substitution of a continuity OER." Granting "make-whole" relief meant, however, removal of his failure of selection. He said that he was entitled to relief from the PY97 passover and to a further opportunity to be considered for promotion on the basis of a corrected record, in accordance with Engels v. United States, 678 F.2d 173, 175 (Ct. Cl. 1982).

Views of the Coast Guard

On July 18, 1997, the Coast Guard recommended to the Board that it grant relief in this case.

The Service found that the application was timely. It also found that the applicant did not establish that the commanding officer was not the properly designated reviewer on the disputed OER. "At most major units," the Coast Guard said, "the commanding officer serves as Reviewer."

The Coast Guard also concluded that the applicant's alleged failure to be counseled regarding shortcomings in performance, prior to receiving the disputed OER, does not invalidate the report. The Coast Guard did conclude that the comments of the reporting officer (RO) were misleading, but that they did not invalidate the disputed OER. The RO's comments could lead a reader "to an unfavorable interpretation of Applicant's marine inspector qualifications."

The Service recommended that the applicant's entire disputed OER be removed from his record and replaced with a continuity OER. It did not recommend redacting the RO's marks and comments because that would itself be misleading in providing the applicant with a stronger record than intended by the RO or reviewer. This would give the applicant an unwarranted competitive advantage over other officers for assignment and promotion opportunities. The Service did note that all of the OERs in the applicant's record, since he was promoted to LT (with one exception), contain recommendations for promotion. (The exception was the reporting officer on the disputed OER who said that "[w]ith more work [he] will be ready for promotion.")

The Coast Guard also recommended that his failure of selection to lieutenant commander be removed and that he be allowed to appear before

the next two selection boards with a corrected record. If selected by the first such board, his date of rank should be back-dated. If so selected, he should also be granted back pay and allowances.

Applicant's Response to the Views of the Coast Guard

On July 18, 1997, the BCMR sent a copy of the views of the Coast Guard to the applicant's attorney.

On July 22, 1997, the applicant's attorney responded by fax that the relief to which the Coast Guard agreed is satisfactory.

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 to determine the issues in this proceeding under section 1552 of title 10, United States Code. The application was timely.

2. The applicant alleged, inter alia, that the Reporting Officer's marks and comments were in error (i) because they were inconsistent with the marks and comments of the Supervisor; (ii) because the Reviewer's portion of the disputed OER was not prepared by the officer who was allegedly designated as such by the established rating chain or the past practice at the unit; and (iii) because the applicant alleged that he had not been counseled on the matters for which the reporting officer (RO) criticized him in the disputed OER; and (iv) because of other alleged errors and injustices.

3. The marks and comments of the Reporting Officer (RO) are very different from the marks and comments of the Supervisor. The Supervisor awarded the applicant one 4, ten 5s, and three 6s. The Reporting Officer, on the other hand, gave him one 3, two 4s, four 5s, and one 6. Despite this degree of difference, the RO stated on block 8 of the disputed OER that he "[g]enerally agrees] with supervisor comments except for comments regarding [the applicant's] qualifications in block 3h." That statement was not accurate.

4. The Coast Guard considered the applicant qualified as a marine inspector. The RO's comments regarding him as not being ready for engineering or MODU questions are unjust. The Coast Guard stated that "none of the [RO's] statements are blatantly false or inaccurate," but they convey the impression that the applicant lacked certain qualifications. It concluded that the RO's comments would lead a reader "to an unfavorable interpretation of [the applicant's] marine inspector qualifications without

sufficient documentary support to do so." The applicant's performance record at a separate duty station, after the disputed rating period, does not support the RO's statements.

5. The applicant's record has been shown to be in error and unjust because, as the Coast Guard found, "[he was] not . . . evaluated in keeping with the intent of the Officer Evaluation System."

6. The Board will not make any additional findings with respect to the other allegations of error and injustice of the applicant inasmuch as it has found that the disputed OER was in error and unjust.

7. The disputed OER should be removed from the applicant's record, and the applicant's failure of selection for promotion to lieutenant commander should be voided. He has established a nexus between the error and his failure of selection.

8. The relief recommended by the Coast Guard should be granted to the applicant, pursuant to the following order.

ORDER

The application to correct the military record of [REDACTED]
[REDACTED] USCG, as agreed to by the Coast Guard, shall be granted as follows:

1. The Coast Guard shall remove from the applicant's record his OER for the period December 1, 1991 until June 19, 1992, and shall replace it with an OER for continuity purposes only.

2. The Coast Guard shall also void the applicant's non-selection, for promotion to lieutenant commander, by the PY97 selection board.

3. The Coast Guard shall allow the applicant to appear before two lieutenant commander selection boards with a corrected record. If he is selected by the first such board, his date of rank shall be back-dated, and he shall be provided back pay and allowances, as if selected by the PY97 lieutenant commander selection board.

4. No further relief shall be granted.

