

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

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 72-96

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on February 6, 1996, upon the receipt by the BCMR of the applicant's request for correction of his military record.

This final decision of the BCMR, dated March 18, 1997, is signed by the three duly appointed members who were designated to serve as the Board in this case.

Applicant's Coast Guard Request for Correction (PRRB)

The applicant asked the Personnel Records Review Board (PRRB) to remove from his record his officer evaluation report (OER) for the period ending April 30, 1993 (disputed OER). He alleged that the disputed OER was completed 42 days after the due date, and that its lateness "seriously reduced the likelihood of [his] selection for promotion." On August 3, 1994, the PRRB recommended denial of the application. The PRRB found that it would not be out of the ordinary for the supervisor and/or reporting officer to make changes to a draft OER submitted by a reported-on officer. It also found that the OER was not invalidated, and there was no error in the fact that the reporting officer had signed the OER as supervisor as well as reporting officer, because the original supervisor had retired. The PRRB also found that an OER reply does not correct an OER; that the late submission of an OER by the rating chain does not automatically invalidate an OER; and that the applicant did not overcome the presumption of regularity with respect to the OER. The Commander, Military Personnel Command (MPC) approved these recommendations.

Applicant's Request for Correction (BCMR)

On February 6, 1996, the BCMR received an application for relief from the applicant along with two affidavits by the applicant and a copy of a memorandum originally submitted to the PRRB.

The applicant asked the BCMR to remove the disputed OER from his record. He asked the BCMR to replace that OER with the text of an OER that was originally recommended to the reviewing officer for that period by the reporting officer. The applicant also asked that the next commander selection board (CDR) should consider him as an officer who had only been passed over once. He again alleged that the OER was late and was not submitted by the reviewer until just prior to the convening of a promotion board.

The applicant submitted two affidavits to the BCMR in order to supplement the findings and conclusions of the PRRB. He said, for example, that "[t]he resulting final OER showed [him] to be the lowest rated LCDR among the District staff by far. This assessment . . . would not be borne out with those outside of my rating chain. The applicant suggested that his difficulty with the reviewer came from his activity as a member of an enlisted member's Marks Appeal Board. He said it was "probable" that his support for raising a member's marks was viewed as "not playing ball" with those in authority.

On May 24, 1996, the applicant's attorney wrote to the Commandant and requested somewhat different relief: "An acceptable alternative . . . would be a finding by [the Commandant], in my client's favor, reported in writing to the BCMR . . . or a retroactive promotion (to O-5) initiated by you through the Secretary of Transportation/Congress /and the President of the United States." On October 7, 1996, the BCMR was notified that the applicant would henceforth represent himself.

Views of the Coast Guard

On January 9, 1997, the Chief Counsel of the Coast Guard submitted the advisory opinion of the Service in this case. The Service recommended denial of relief. The Coast Guard included in its submission an attachment that had been prepared by the Commander of the Coast Guard Personnel Command (PC) on June 11, 1996, which also recommended that no relief should be granted to the applicant.

The Coast Guard quoted provisions of the Personnel Manual that indicated that officers were to be rated "against the standards" rather than against other officers. The Service said that the fact that an officer's own characterization of his performance differs from that of his rating chain "does not invalidate the OER."

The Chief Counsel said that the only error in this case on the part of the Service was its delay in forwarding the disputed OER. The Service said that if the OER had been submitted on time (June 15, 1993), it would not been entered in the applicant's record until approximately July 15. The applicant could not have

considered his "comeback" copy late until approximately July 29. The applicant in fact admitted that he received his official copy on August 4. [The selection board was held in early August 1993.]

The Coast Guard alleged that the applicant has not shown that the delay was material. "[A]ny prejudice to Applicant's record from the 42 day delay in submitting his OER was eliminated by the Military Personnel Command's prompt processing of the OER after it was received."

The Coast Guard also alleged that the applicant made a more basic error: "[H]e has not presented substantial evidence in support of his claim."

Response of the Applicant to the Views of the Coast Guard.

On January 22, 1997, the applicant submitted a rebuttal of the views of the Coast Guard.

The applicant claimed that the alleged "prompt processing" of his late OER, may have been a "rush job" that may have "prevented an accurate review of the OER." If they had sufficient time, they "might have kicked it back because the numbers were too low for the comments written."

The applicant had complained about the reduction of his OER marks by the reviewing officer. He alleged that "[t]he only logical explanation" for this lowering of his marks "would seem to be" his involvement on the enlisted members Marks Appeal Board.

The applicant also said that the Coast Guard's failure to submit his disputed OER on time "was significant." He did not define "significance," but he asked "Why the bias against me? I . . . was in the promotion zone. I should have been given priority."

FINDINGS AND CONCLUSIONS

The Board makes the following findings of fact and conclusions of law on the basis of the submissions and military record of the applicant, the submissions of the Coast Guard, and applicable law:

1. The Board has jurisdiction of the case pursuant to section 1552 of title 10, United States Code.

2. The applicant requested an oral hearing. The Chairman considered the request but recommended disposition of the case without a hearing, pursuant to 33

CFR § 52.31 (1993). The Board concurred in that recommendation.

3. The applicant asked the BCMR to remove the OER for the period ending April 30, 1993 and to substitute an earlier version of that OER. The applicant also alleged that the disputed OER was filed 42 days late, and that this delay "seriously reduced [the] likelihood of [his] selection for promotion.

4. The Coast Guard admitted that the 42-day delay was an error, but denied that this error was material. The applicant admitted that the disputed OER was processed by the Coast Guard faster than usual, and that this speed made up much of the delay. The applicant, however, contended that the Coast Guard processed this OER as a "rush job" which may have prevented an accurate review of the disputed OER.

5. The applicant introduced no evidence that the Coast Guard compensated for the delay in this case by conducting a "rush job." Moreover, the applicant has not shown that he suffered an error or injustice as a result of either the delay or the speed in processing.

6. The applicant alleged that it was wrong for the officer to sign the disputed OER as supervisor and reporting officer. There was no error, since the original supervisor had retired and the command had designated the reporting officer to serve also as supervisor. A change in supervisor does not invalidate an OER.

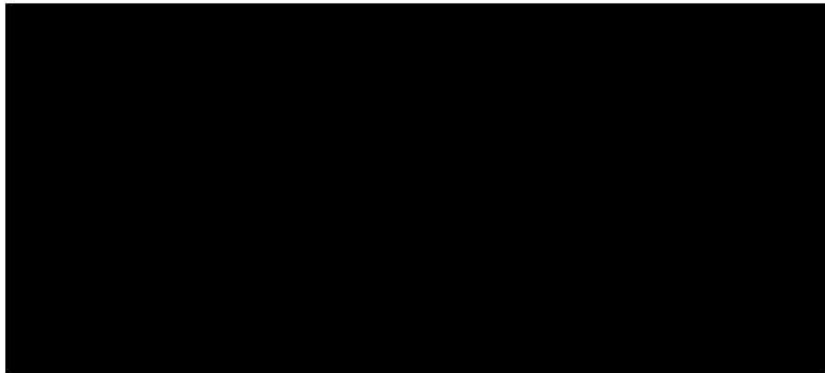
7. The applicant has not established by a preponderance of the evidence that the Coast Guard committed an error or injustice.

8. Accordingly, the application should be denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application to correct the military record of [REDACTED]
[REDACTED] USCG, shall be denied:



See concurring and minority report



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CONCURRENCE AND MINORITY REPORT

[REDACTED]

I concur with the DISMISSAL of [REDACTED] application. This Minority Report is filed pursuant to 33 CFR § 52.62.

[REDACTED] requested a hearing before the Board and requested the Board to use its authority under 33 CFR § 52.61(b)¹. I write separately to address [REDACTED] request for the Board to exercise its authority to request additional evidence under 33 CFR § 52.61(b), and (2) to the extent applicable, his request for a hearing before the Board.

I believe a decision on the substantive issues presented would turn on activity that occurred in [REDACTED] rating chain. Specifically, what conversations took place and why did he get a lower rating. Cf. Skinner v. United States, 594 F.2d 824, 219 Ct. Cl. 322 (1979). See also, Coast Guard Personnel Manual Article 10-A-2, generally and e.g., Article 10-A-2(f)(2)(d) ("The Reviewer may not, however, direct in what manner an evaluation mark or comment is to be changed (emphasis in original)"). The record submitted does not allow us to find in [REDACTED] favor.

As [REDACTED] suggested, more evidence is needed. [REDACTED] attempted to gain the cooperation of those in his rating chain, but to no avail. Then, [REDACTED] looked to this Board for help in his quest for additional evidence. However, the Board's powers are limited to hearings to receive additional evidence, and to request the parties to submit additional evidence under § 52.61. Both of these mechanisms require the cooperation of the parties because the Board does not have subpoena powers, nor does it have other traditional judicial powers that Article III courts and other courts possess.

¹ 33 CFR § 52.61(1997) Deliberations and decision:

(a) * * *

(b) When the Board finds that the facts have not been fully and fairly disclosed by the records, testimony, and any other evidence before the Board, the Board may request the applicant and/or the Coast Guard to obtain and submit such further evidence as it considers essential to a complete and impartial understanding of the facts and issues.

(c) through (f) * * *

Also, there is no judicial mechanism for discovery. Because of these limitations, the Board is unable to give [redacted] the tools he needs to acquire additional evidence. And the Board is left with the record as submitted.

Respectfully submitted,

