

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 9-97

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on October 15, 1996, upon the BCMR's receipt of the applicant's request for correction of his military record.

This final decision, dated September 26, 1997, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a Reserve [REDACTED] on active duty, asked the Board to correct his record by modifying an officer evaluation report (OER) for the period February 1, 1994 to July 31, 1994 (first disputed OER) and by removing an OER for the period August 1, 1994 to December 16, 1994 (second disputed OER) and by replacing it with a report for continuity purposes only. He also asked that his failure of selection for integration and for a permanent commission in the regular Coast Guard be removed from his record. He asked that his record be corrected to show that on January 12, 1995, he was selected for a permanent commission in the regular Coast Guard by the integration panel for that year.

The Coast Guard recommended the following partial relief in this case:

1. Remove the second disputed OER (including the OER reply and endorsements) from the applicant's record and replace it with an OER for continuity purposes.
2. Expunge all prior records for non-selection for integration.
3. Convene a special integration panel to consider the applicant's corrected record. If he is found fully qualified for integration, correct the record to show that integration occurred as of the date the applicant signs the oath of office.

The applicant responded to the views of the Coast Guard and argued for complete relief.

EXCERPTS FROM RECORD AND SUBMISSIONS

Applicant's Contentions

The applicant contended that the CO/reviewer for the disputed OERs created a hostile work environment. He alleged that the disputed OERs "were prepared under the influence and direction of the commanding officer whose conduct reflected bias and racial harassment and discrimination against the applicant . . ."

The applicant also contended that the second disputed OER "was prepared in violation of regulations, reflects bias and apparent racial prejudice, resulted from unlawful influence by the commanding officer on the supervisor, is based on mistakes of fact regarding the identity of the applicant as responsible for conduct done by others, and fails to address a substantial portion of the period during which applicant was assigned temporarily to another command."

The first disputed OER contains no marks lower than 4. It also contains the following comments that the applicant contended are in error or unjust and should be removed from the OER:

greater and consistent enforcement of shipboard regs as inport
OOD [officer of the deck] is still needed; [block 9.h., first disputed
OER].

although divisional subordinates follow his lead, needs to be
more assertive enforcing same stds w/others; [block 10.d., first
disputed OER]

requires more seasoning/maturing as tough decision maker, a
skill required for CO/XO position afloat or ashore [block 11, first
disputed OER].

The second OER is a very negative report with marks ranging from 2 (on a scale of 1 to 7) in block 12 (rating the applicant as a qualified officer) to several 3s and 4s in other areas of the report. The comments are damaging. Many of them take the tone of the following comment taken from block 11:

Although book smart & knowledgeable in rudimentary seamanship skills, his pursuit for future seagoing assignments is thwarted by below average leadership skills & inability to enforce & follow stds . . . as a result, these assignments should be avoided. Additional nurturing necessary prior to filling any visible billet which includes the requirement for significant interpersonal relations or interaction.

The applicant was assigned as the Deck Watch officer on the Coast Guard Cutter [REDACTED] On July 13, 1994, a new commanding officer reported aboard.

The applicant described his record prior to the arrival of the CO as that "of a fine and capable young officer, both ashore and at sea." He stated that he was qualified as a boarding officer and as an underway OOD. The applicant stated that he was in training for his own shipboard assignment as a CO, and he was being groomed for such an assignment by the Coast Guard's Military Personnel Command. According to the applicant, he was one of the brightest, most talented and most promising of the Coast Guard's young "African-American officers," with unlimited career potential.

The applicant stated that the arrival of the new CO presented a challenge to all on board and life became a "trying experience for all." The applicant stated that it was he who bore the brunt of the CO's dissatisfaction. One officer serving with the applicant at the time stated that it seemed as if the CO had a grudge against the applicant. Another officer who served with the applicant stated that the CO stated publicly that the applicant had "an attitude problem."

The applicant provided the following examples of the type of maltreatment he allegedly received from the CO:

--Within two weeks of coming on board, the CO sarcastically challenged the applicant's performance of duties as OOD by questioning "what's wrong with this picture?" while viewing the ship listing slightly after fueling. It was not long thereafter that the CO told others that the applicant was a "slick, smooth talker" who would not give the CO a straight answer.

--In August 1994, the CO caused the applicant and his wife, who is white, to feel uncomfortable during a wardroom gathering when the CO stated to the applicant and his wife upon their entrance into the restaurant "I thought this was a wardroom function." The applicant claimed that the CO's comments made he and his wife uncomfortable.

--Two days prior to the applicant's being relieved of duty in October 1994, the CO became very angry at the applicant with respect to the incident described below because the CO thought that the applicant was making a mockery of the command. The applicant stated that even though he was following the orders of the senior watch officer, he was blamed for the incident. The applicant's supervisor described the incident as follows:

I [the supervisor] had just been "chewed out" by [the CO] in the cabin due [to] the lack of professionalism in bridge watchstanders. I was given guidance by the Captain that he wanted a very professional

bridge watch. I knew that this is not really what he wanted because he liked to chat with watchstanders, he craved all of the attention on him, not the watch. However, at his guidance, while I was still "hot" about the issue, I called all bridge watchstanders, petty officers and up to the wardroom. Among the many things I passed was there will be no idle chatter on the bridge, all conversations would be professional; you will address the Captain as Captain and be sure to greet and salute him whenever you see him; you will stand your watch, forward of the console so that anyone not busy shall act as a lookout. At one point I said, "give him what he wants, snap to attention, be sure to greet him, and tell him you can't talk now because [you are] on watch." This guidance from me overstated what I wanted. Moments later, [the applicant] went on watch. Not long after that the Captain visited the bridge. Everyone on watch came to at least parade rest, one seaman said sir to him twice, and someone told him they could not talk because they were on watch. The Captain left the bridge livid, looking for me. I did not own up to exactly what I had told the watchstanders and the blame got placed squarely on [the applicant].

The applicant stated after this incident on the bridge, that he could do nothing to please the CO. He stated that he informed his supervisor that he was going to seek an early transfer from the ship. According to the applicant, the supervisor went straight to the CO with this information. The CO immediately relieved the applicant of all duties and took the steps necessary to have the applicant transferred from the ship. The applicant stated that the CO wrote a very derogatory letter to the Military Personnel Command, which was tantamount to a "relief for cause" letter. The applicant stated that on November 1, 1994, he was ordered off of the cutter and transferred to a shore command.

The applicant stated that on December 1, 1994, he applied for integration into the regular Coast Guard. He received a highly unfavorable endorsement from the CO, and he was denied integration.

On January 17, 1995, after his integration request had been denied the applicant filed a civil rights complaint alleging that the CO had discriminated against him because of his race. The applicant stated that he was advised by a rear admiral not to pursue the civil rights complaint since the applicant could not prove race discrimination on the part of the CO. The rear admiral advised the applicant to apply again for integration. In 1996, the applicant was denied integration a second time.

Evidence Submitted by the Applicant

The applicant submitted a statement from his supervisor, a statement from his previous CO, several statements from his fellow officers, and a statement from his

wife in support of his contentions. He also submitted a copy of his civil rights complaint, a copy of a preliminary investigation into certain alleged misconduct on the part of the CO, and a copy of a letter published in "THE BULLETIN." Some of the statements are summarized below.

1. The supervisor stated that on the second disputed OER he was "coerced into lowering at least two marks . . . to 3s and . . . was told to drop human relations to a 5." He stated that he was under great pressure from the CO about the applicant. The supervisor stated that he "would receive counseling sessions from the Captain . . . [that] would often last upwards to 90 minutes with some lasting up to three hours."

2. The applicant's previous CO wrote that he was satisfied with the applicant's performance in most all particulars. He stated that the applicant "had one weakness--the enforcement of regulations regarding standing inport quarterdeck watches." This CO stated that the applicant was a good watchstander. He stated that he was aware that the applicant was being groomed for command of a patrol boat. However, this CO stated that at the time of his transfer, the applicant was not ready for that command assignment because "he was too easy on the troops."

3. The applicant's fellow officers stated that the applicant and the CO/reviewer did not get along very well. One officer stated that "it seemed . . . that the [CO] had a grudge against [the applicant], or didn't like the way [he] dealt with things. [The CO] was a micro-manager. I never saw any 'attitude' at all from [the applicant], but I think there were times the [CO] was perceiving [the applicant] as insubordinate. I never thought [the applicant] was out of line." This officer also stated that the applicant's "watchstanding was a bit different from others. He was loose and relaxed, while still being professional. I don't think the CO liked that."

4. Another of the applicant's colleagues wrote that the applicant was competent, with a style of leadership that was professional but relaxed. He stated that the Captain was either uncomfortable with the applicant or did not like his style. This officer stated that the applicant was always respectful to the CO.

5. Another of the applicant's colleagues wrote that the applicant was a confident and knowledgeable ship driver. This officer described working for the CO as follows:

The transition to [the CO] was a stress-filled time, and serving with him was always stressful. There was frustration throughout the ship. This frustration directly contributed to three officers (eventually) being relieved of their duties, caused a devoted Boatswain Chief Warrant Officer to short tour and retire, and drove several chiefs to put in retirement letters earlier than planned. Although this may not be true,

the crew perceived that [the CO's] goal was absolute perfection, and those who did not achieve that goal feared the consequences.

6. The supply officer who is now retired stated that the applicant was a fine officer and a very competent watchstander, with a very good rapport with the crew. This officer stated that the applicant was blamed, either by the CO or by his supervisor, for all that was wrong in the operations department. The supply officer stated that because of the environment created by the CO, he had to transfer from the ship due to stress. The supply officer claimed that the CO used the medical transfer as an excuse to write a bad evaluation of his performance, which the CO quickly telexed to Headquarters.

Views of the Coast Guard

As stated earlier, the Coast Guard recommended that the following partial relief be granted to the applicant, as follows:

1. Remove the second disputed OER (including the OER reply and endorsements) from the applicant's record and replace it with an OER for continuity purposes only.
2. Expunge all prior records of non-selection for integration.
3. Convene a special integration panel to consider the applicant's corrected record. If he is found fully qualified for integration, correct the record to reflect integration occurring as of the date the applicant signs the oath of office.

The Coast Guard rejected all of the applicant's contentions except for one. The Service found that the supervisor very likely felt that he had been directed by the CO/reviewer to lower certain grades that the supervisor had previously given the applicant on the second disputed OER. The Coast Guard stated the following:

On retrospective reconsideration, however, Applicant's Supervisor maintains that he would not have written the [second disputed] OER . . . the way that he did. The Supervisor says that he was "coerced" into lowering at least two marks in the Leadership Skills section to (3's) and the mark in the Human Relations dimension to a (5). The Reviewer (commanding officer) apparently conveyed his displeasure with he marks at a meeting held with the Supervisor. According to the Supervisor, the Reviewer directed, both verbally and with a marked up copy of the draft OER, that specific marks should be lowered and certain comments changed. . . . The Supervisor paints a picture of himself as a less than optimum operations officer, a poor communicator, weak willed and under intense scrutiny from the commanding officer, also his reporting officer. He saw the meeting

with the Reviewer as another one of the many performance counseling sessions he had had with the commanding officer . . . and in his desire to please , acquiesced to the Reviewer's perspective. On the other hand the Reviewer, who in addition to being three grades senior to the supervisor and described by several individuals, including the executive officer . . . as strong willed and very demanding individual, believed he was having an open debate. Given the Reviewer's authority in rank and position, and his apparent strong personality, coupled with the Supervisor's insecurities of character and the competence, it is understandable how the conflicting characterizations of the meeting between the two individuals were derived. As senior member of the rating chain, the Reviewer should have been more cognizant of the tenor of his interactions with the subordinate rating officials to ensure that his words and actions were not being misinterpreted.

With respect to the contested comments in the first disputed OER, the Coast Guard stated that it was not clear how the CO/reviewer tainted the OER process. The Coast Guard stated that the CO did not assume the reviewer's role for the first disputed OER until the last two weeks of that reporting period. According to the Service, The CO/reviewer did not have a significant opportunity to observe the applicant in order to form his own opinions as to the applicant's performance. The Service pointed out that the disputed comments are in line with those provided by the previous CO. Moreover, the Service stated that it was the reporting officer, not the reviewer, who wrote the disputed comments. The Coast Guard stated that the applicant has not provided convincing evidence that the reviewer for the first disputed OERs acted improperly.

The Coast Guard agreed with the applicant that the second disputed was instrumental in the applicant's non-selection for integration. With respect to backdating, the Service stated that 14 U.S.C. 211 requires Senate confirmation of the appointments of officers integrated into a permanent regular status. Oaths of office are sent out to be signed by the officer accepting integration based upon that confirmation. Therefore, backdating an oath would not be consistent with Senate action.

Applicant's Response to the Views of the Coast Guard

The applicant agreed with the terms of the Coast Guard's recommendation for partial relief. However, he disagreed with the Coast Guard's view that he has not shown error or injustice with respect to the first disputed OER (disputed comments). The applicant argued that the first and second disputed OERs are inextricably linked, so that if one OER is in error the other must be also.

The applicant stated that the members of the rating chain were the same for both disputed OERs. He stated that although the reporting period for the first disputed OER ended on July 31, 1994, the OER was not completed until September 28, 1994, long after the reviewer had begun his antagonism toward the applicant.

The applicant argued that the first disputed OER was signed less than two weeks before the CO issued a letter of censure to the applicant, on October 11, 1994. It was signed only one week prior to the applicant being publicly "berated" by the CO.

The applicant stated that the statements he submitted support his competence as an officer and watchstander, and that the CO's evaluation of the applicant's performance was inaccurate. The applicant stated as follows: "The verified statements support the application . . . [that the CO] was 'a screamer, a bully . . . [who] verbally abused [people] in the presence of subordinates. He had no self control'"

The applicant also argued that the Coast Guard failed to address the above issues as well as the discrimination allegation. The applicant offered the following excerpt from the supply officer's statement:

I know about what happened to [the applicant] both the way he was treated and the way he was fired from the ship, and *I think it was discrimination..* The Captain had discriminated before, and I should have gone to Equal Opportunity about it. [Emphasis in original]

In conclusion, the applicant stated the following:

[The] applicant has established that there was a working environment which was plainly hostile to him and through which the [CO] "so intimidated" the Supervisor that he was unable to rate [the] applicant fairly. . . . The burden has now shifted to the Coast Guard to prove the other comments were fair, but that is a burden they can not carry. The benefit of the doubt must go to [the applicant].

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10, United States Code. It is timely.

2. The Board concurs in the Chairman's determination that the applicant can be disposed of without a hearing. 33 CFR § 52.31. The documents in the record provide an adequate basis for a decision.

3. With respect to the second disputed OER, the Coast Guard agreed with the applicant that the CO/reviewer had engaged in undue command influence by directing the marks and comments to be assigned to the applicant by the supervisor.

4. By engaging in the conduct identified in Finding No. 4, the CO who was the reviewer on the second disputed OER violated Article 10-A-4g.(3)) of the Personnel Manual. This provision states in pertinent part: "The Reviewer may not direct in what manner an evaluation mark or comment is to be changed. . ." (Emphasis in original.)

5. The second disputed OER for the period August 1, 1994 to December 16, 1996 is in error and unjust and should be removed from the applicant's record and replaced with a continuity report.

6. The applicant has failed to prove an error or injustice with respect to the first disputed OER. He alleged that the two disputed OERs are so intertwined that if one falls the other must also. That argument is without merit. The first disputed OER covers a period of approximately six months, with the reviewer/ CO being in the rating chain for only two weeks of that period. The report is an above average report that both praises and criticizes the applicant.

7. The disputed comments criticize the applicant's lack of assertiveness in enforcing shipboard standards and regulations. The applicant has failed to show that the disputed comments are not an accurate reflection of his performance for the period covered by the first disputed OER. The applicant's previous CO stated that for the period under review, the applicant exhibited the shortcomings mentioned in the disputed comments. This previous CO served as the Reviewer, except for the last two weeks of the reporting period. He was, therefore, in a position to observe the applicant's performance. The previous CO stated that the applicant had "one weakness -- the enforcement of regulations regarding standing inport quarter deck watches. He needed to tighten up on that. . . ." The applicant's previous CO also stated that "my view was that [the applicant] was not ready for [command] by the time I was relieved, since he was too easy on the troops." The previous CO's statement is consistent with the disputed comments on the first disputed OER.

8. The applicant does not offer any reason for the Board to question the objectivity or integrity of the previous CO.

9. The applicant submitted several statements to the effect that the CO/reviewer for the disputed OERs was very demanding and seemed to dislike the applicant more than the other officers. Even if this is true, it does not necessarily

make the comments in the first disputed OER inaccurate. If the evaluation of the applicant's performance for the period covered by the first disputed OER is accurate, it is irrelevant that the CO may not have especially liked the applicant.

10. There is insufficient evidence in the record to establish that the rating chain for the first disputed OER failed to evaluate the applicant in a fair and objective manner.

11. Accordingly, the applicant should be granted partial relief, as recommended by the Coast Guard.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The military record of [REDACTED] USCG, shall be corrected in the following manner:

The OER for the August 1, 1994 to December 16, 1994 shall be removed and replaced with a report for continuity purposes only.

The applicant's failures of selection for integration shall be expunged.

A special integration panel shall be convened to consider the applicant's corrected record. If he is found fully qualified for integration, the applicant's record shall be corrected to reflect integration occurring as of the date the applicant signs the oath of office.

All other requests are denied.

