


DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 29-97

FINAL DECISION


This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on December 12, 1996, upon the BCMR's receipt of the applicant's request for correction of his military record.¹

This final decision, dated January 16, 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, a lieutenant (LT) in the Coast Guard, failed of selection for promotion to lieutenant commander (LCDR) by the 1994 and 1995 LCDR Selection Board. After these failures, he was discharged from the Coast Guard on June 30, 1996. On December 3, 1996, he asked the Board to direct the Coast Guard:

the

- (1) to correctly implement portion of the Board's order in BCMR Docket No. 263-92 which was not so implemented. His attorney phrased this issue as follows: The Coast Guard "materially overstate[d] the period during which the circumstances addressed in the special OER [occurred] . . . To take an isolated incident and pretend that it in fact reflected performance over a sustained period . . . is grossly unfair."

- (2) to void the applicant's 1994 and 1995 failures of selection to LCDR and his 1996 discharge.

- (3) to order that the applicant be retired under TERA (temporary early

¹ On December 18, 1996, the application was sent to the Coast Guard for its views. The Board received the views of the Coast Guard on October 30, 1997. On November 26, 1997, the Board sent a copy of those views to the applicant. On December 12, 1997, the applicant's attorney asked the Board to grant him additional time to respond to the advisory opinion of the Coast Guard, which tolled the 10-month rule until January 5, 1998, when the applicant's views were received.

retirement authority) as an active duty lieutenant, with back retired pay from June 30, 1996; or that he be restored to the ADPL (active duty retired promotion list) as an ADPL lieutenant and considered two additional times for promotion to LCDR, on the basis of a corrected record with provision for retroactive date of rank and back pay.

In January 1996, at a time when the applicant had 16 years of active duty service in the Army and in the Coast Guard, he applied for early retirement under TERA. He alleged that he met all the requirements for TERA retirement. He says he was denied early retirement because he had been passed over for promotion to LCDR. Following his involuntary release from active duty on June 30, 1996, he was commissioned as a LTJG in the Coast Guard Reserve.

The applicant's attorney stated that "the Coast Guard's claim (§3) that a TERA retirement at the Applicant's option would be absolutely inappropriate is absolutely wrong. . . . The Coast Guard does not deny that it was granting TERA retirements during the time [the applicant's] record should have been corrected. TERA remains in the United States Code."

Order Regarding Implementation of Prior Board Decision

On July 15, 1994, the Board issued the following order to the Coast Guard in BCMR Docket No. 263-92: "The military record . . . shall be corrected by modifying the reporting period of the special OER . . . to include only the period time the applicant was actually deployed. The Coast Guard shall determine the dates of actual deployment and correct the special OER accordingly. . . ." The Coast Guard did not object to shortening the reporting period."

The applicant and the Coast Guard agreed that this order was never implemented by the Coast Guard. The applicant alleged that "[t]he Coast Guard's failure to implement the relief ordered by the BCMR was highly prejudicial to the [applicant]." The Coast Guard, on the other hand, alleged that "[t]he error was harmless . . . and thus does not merit further relief. "

The applicant noted, in a 1992 memorandum, that the disputed special OER "purports to cover several months [out of the 3 1/2 month period of the special OER] during which he was no longer on the ship, thus materially exaggerating the matter." Because the duration of the period was so limited, "a mistake of several months in the ostensible reporting period is an error of significant proportions . . . Overstating the duration of the reporting period for a critical OER such as this, which casts doubt on the officer's skills and mental health, is highly prejudicial."

Views of the Coast Guard

On November 26, 1997, the Board received an advisory opinion from the Chief Counsel of the Coast Guard recommending that it deny the relief requested by the applicant. The Chief Counsel admitted that the Coast Guard did not execute a part of the order that the Board issued in BCMR No. 263-92, an earlier decision involving this applicant. The Chief Counsel said that the failure to make the change was "an administrative oversight" that it regrets, and it said that it has since made the change. Despite the administrative oversight, however, the service said the applicant's failures of selection should not be removed under the tests set forth in Engels v. United States, 230 Ct. Cl. 464, 468-70 (1988).

The Chief Counsel reiterated that it did not execute the BCMR order, but it said that "it does not appear that Applicant's record was actually incorrect in any respect before the 1994 or 1995 selection boards." If the time actually desbirewas less than 104 days, the error was partly the fault of the applicant. Article 10-A-4d. of the Personnel Manual, according to the Chief Counsel, makes the reported-on officer responsible for the accuracy of the information in the administrative data in block 1.

The Chief Counsel stated that if the BCMR granted relief to the applicant, it would be "absolutely inappropriate" to award him a TERA [temporary early retirement authority]. The applicant has not proven that he would have received a TERA retirement had the error not occurred.

Applicant's Response to Coast Guard Views

On January 5, 1998, the Board received a response from the applicant's attorney. The attorney noted that the Coast Guard admitted that it failed to implement the Board's decision in No, 263-92, but that the error was harmless. He also noted that the Coast Guard claimed that the relief requested by the applicant, a TERA retirement, "is absolutely wrong" He noted that the Coast Guard was granting TERA retirements at the time the applicant's record should have been corrected. TERA, he said, remains in the United States Code.

Excerpts from Record

Following are some excerpts from the disputed special OER:

According to block 3.f. of the disputed special OER, the applicant "flew only 3.1 hours during this shortened period before being grounded pending medical evaluation stateside. . . . To this point in deployment [the applicant's] performance was marginal at best and marked by apparent momentary periods of inattention." The failure to reduce the period covered by the special OER did not make his record

as a whole appear substantially worse, and it did not show that the Coast Guard's error prejudiced his opportunity for selection."

According to block 4.c., he "[b]ecame increasingly depressed and withdrawn this period. His hours became very irregular and his moodiness greatly affected his ability to work with other members of the AVDET and ship's company."

According to block 9.f., "he has displayed poor judgment both in and out of the cockpit. Based on this most recent incident he has had his Aircraft Commander designation removed"

On block 11, the Reporting Officer said he "would consider his overall potential for leadership positions or any assignment requiring increased responsibility to be extremely limited." On block 12, the comparison scale, he was rated as a "2" out of a possible "7."

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.

2. In BCMR Docket No. 263-92, the Board concluded that the "period covered by the disputed special OER should be modified to cover only that period of time that applicant was actually deployed." An order to that effect was issued to the Coast Guard on July 15, 1994, but it was not complied with until the end of 1997. On or about November 21, 1997, more than three years later, the Coast Guard changed the period of the special OER from 104 days to 45 days (December 1, 1988 to January 14, 1989) and inserted an OER for continuity purposes only from January 15, 1989 to March 14, 1989.

3. The special OER gave the applicant a mark of "2" on a scale of "1" to "7" on block 12. There was only one mark lower ("unsatisfactory"). A mark of "2" on the comparative scale would reduce the applicant's chances before a lieutenant commander's (LCDR) selection board, whether the poor evaluation took place over the course of 104 days or over the course of 45 days followed by "not observed" for 59 days.

4. According to the special OER, the applicant, who was a helicopter pilot, was grounded, made procedural errors, performed marginally, displayed recklessly poor

judgment, had periods of inattention, did not accept criticism well, and reacted inappropriately to confrontation. His moodiness affected his ability to work with other members, messages were drafted awkwardly with numerous spelling errors, his aircraft commander designation was removed for poor judgment, and his potential for assignment requiring increased responsibility was limited.

5. These comments make it unlikely that the applicant would have been selected for promotion if the Coast Guard had reduced the period covered by the special OER.

6. The Coast Guard committed an error in not implementing the relief ordered by the BCMR in Docket No. 263-42. The correction of this error (shortening the period of the special OER) would not, however, have made the record appear any stronger. The performance recorded therein casts serious doubt on the applicant's prospects for promotion regardless of the duration of the special OER.

7. The applicant asked the Board to void his 1994 and 1995 passovers for promotion to the grade of LCDR. He also asked to be retired as an ADPL lieutenant under the TERA program or restored to active duty as an ADPL lieutenant with back pay and allowances. This requested relief is not merited because the applicant did not show that the error made his record appear worse nor did he make a prima facie showing that it is not unlikely that he would have been selected if the error had not occurred. Engels v. United States, 230 Ct. Cl. 464, 460-70 (1982).

8. Accordingly, the application should be denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application to correct the military record of
SCGR, is denied.

