

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:



BCMR Docket
No. 1998-016

DECISION OF THE DEPUTY GENERAL COUNSEL

I approve the recommended Order of the Board.

I disapprove the recommended Order of the Board.

I concur in the relief recommended by the Board.

DATE:

Apr 27, 1999



Rosalind A. Knapp
Deputy General Counsel
Delegate of the Secretary
Department of Transportation

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FINAL DECISION

[REDACTED]

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced October 29, 1997, upon the Board's receipt of the applicant's application for correction.

This final decision, dated October 22, 1998, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a retired commander (CDR), asked the Board to correct his record by removing an administrative remarks entry (disputed page 7 entry) dated July 3, 1997, and by removing his 1997 failure of selection for promotion to captain.

The 1997 captain selection board convened on July 14, 1997, and adjourned on July 18, 1997. The applicant voluntarily retired from the Coast Guard on November 1, 1997.

EXCERPTS FROM RECORD AND SUBMISSIONS

The applicant contended that the disputed page 7 entry contained incorrect information and was not prepared in accordance with COMDTINST M1020.8C (Allowable Weight Standards for the Health and Well-being of Coast Guard Military Personnel). The applicant stated that the disputed page 7 entry was prepared and submitted while he was away from the unit on leave. He alleged that his opportunity for selection to captain was unfairly influenced by a "capricious, malicious supervisor who distorted the facts."

The disputed page 7 entry stated as follows:

You have this date been determined to be 53 pounds overweight. Your measurements are: Height: 74 (inches) . . . and weight 279 pounds. In accordance with CONDTINST 1020.8 (series), you are hereby notified that you are required to lose 53 pounds by 27 July 98. If you fail to reach

compliance by the end of this probationary period, you will be recommended for separation. . . .

The applicant stated that upon his return from vacation he confronted his supervisor about the page 7 entry. The applicant stated that his supervisor admitted that he had made a mistake in submitting an inaccurate page 7. On July 21, 1997, after the adjournment of the captain's selection board, the applicant's supervisor sent a message to Headquarters acknowledging that the disputed page 7 entry was improperly prepared and requesting that it be withdrawn.

On July 23, 1997, after the captain selection board adjourned, a new page 7 entry was prepared and entered into the applicant's record. It stated that the applicant was overweight by 39 rather than by 53 pounds as indicated in the erroneous entry. While the applicant complained that the July 23, 1997 entry did not take into consideration his medical problems (diabetes and diverticulitis), he did not ask for its removal.

Selected Review of Applicant's Performance

The applicant's last two OERs as a lieutenant commander (LCDR) contained marks of 5s and 6s except for one mark of 4 in military bearing. The applicant was given a mark of 5 in block 12 (comparison scale and distribution) of each of these OERs.

The applicant had five OERs as a CDR in his record when that record was considered by the 1997 captain selection board. In the performance dimensions, the applicant received mostly marks of 5 and 6, with an occasional 4 in health and well being and military bearing. On all of the OERs as a CDR except for the last one, the applicant was evaluated as a 4 in block 12. On the last OER he received a mark of 5 in that category.

Views of the Coast Guard

On September 16, 1998, the Board received the views of the Chief Counsel of the Coast Guard. He recommended that the disputed page 7 entry, dated July 3, 1997, be removed from the applicant's record, but that all other requested relief be denied.

The Chief Counsel stated that the disputed page 7 entry was not prepared in accordance with COMDTINST M1020.8C. The Chief Counsel further stated as follows:

The initial date that Applicant was reportedly weighed (97Jul03) has not been established. In addition, even if Applicant was weighed on that date, Applicant was not referred to appropriate medical authority, nor given the opportunity to acknowledge this service record entry prior to the execution of the entry establishing the probationary period as required. While it is likely that Applicant exceeded maximum weight and body fat

standards before the convening of the captain selection board, procedural errors exist in preparation of the [disputed page 7] entry.

The Chief Counsel did not recommend removing the applicant's failure of selection for promotion. The Chief Counsel recognized that the applicant had been selected on time for promotion to each grade below commander. He stated that with a 63% selection opportunity for promotion to captain in 1997, members of the selection board would closely review any material that would assist them in deciding who should be selected for promotion. He stated that the disputed page 7 entry would undoubtedly have received scrutiny from members reviewing this record in comparison to others and would likely have constituted a nexus to non-selection. If the disputed page 7 entry were removed from the applicant's record, it would appear stronger.

The Chief Counsel argued that even if there was some prejudice, it is unlikely that the applicant would have been promoted in any event. In this regard, the Chief Counsel noted an earlier page 7 entry dated May 12, 1992 that reported that the applicant was overweight (by 13 pounds). The Chief Counsel stated that this 1992 page 7 entry would have been closely reviewed by the captain selection board. (Another page 7 entry dated July 15, 1992, showed that the applicant managed to bring his weight into compliance with the applicable weight standards.)

The Chief Counsel also offered the following:

[The] Applicant's record contains no evidence of personal awards since selection to commander in 1991. While awards and end of tour awards are not required, a lack of personal awards at the grade of commander in such positions of responsibility as those held by Applicant would not escape notice by those considering him for promotion. . . . Furthermore, every OER since selection to commander (except the OER ending 970331) contained a mark of 4 (out of 7) in the comparison scale in section 12. . . . While it is possible for officers with marks of 4 out of 7 in the comparison scale to be selected for promotion to captain, it would be highly unlikely given the high number of OERs (4 of 5 as a commander) with this relative ranking and the other two issues (CG-3307 regarding weight, and no awards) in the record.

The Chief Counsel argued that the subsequent page 7 entry dated July 23, 1997 was valid and proper.

Applicant's Response to the Views of the Coast Guard

On September 18, 1998, the Board sent a copy of the views of the Coast Guard to the applicant with an invitation for him to submit a response. He did not submit a response.

APPLICABLE REGULATIONS

Promotion to captain on active duty is made by a best qualified selection. Article 14-A-1c. of the Personnel Manual states the following: "In a best-qualified system, the [selection] board is limited to a specific number it may select. Accordingly, in addition to the fully-qualified standard, the board also must select by comparing each officer to all others considered. This procedure enables the board to select from the entire group the limited number whom it believes are the best-qualified." Id.

Article 14-A-3 speaks to selection criteria. Specifically it states the following:

a. General. Personnel boards recommend on either a best-qualified or fully-qualified basis as set forth in law and directed in the precept. The type of information all personnel boards consider is fundamentally the same. However, each board develops its own overall standards and selection criteria. The degree of significance a board assigns to each of the many factors it considers may vary according to the grade level and type of selection the board is making. A board selecting officers for lieutenant may emphasize different factors than would a Captain Continuation Board.

Subsection b. of this provision list the following basic criteria to be applied by selection boards: performance evaluations, professionalism, leadership, and education.

Article 14-A-4d. of the Personnel Manual states the following:

"The Performance file contains all performance evaluations, education information, awards and discipline documentation. A board must consider an officer's entire record; however, the following portion of the record to be evaluated is considered most significant:

"For promotion to

Service Period

"... Captain ...

7 years of immediate previous service or all service in present grade, whichever is greater."

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 the case pursuant to section 1552 of title 10, United States Code. The application was timely.

2. The Board finds, and the Coast Guard admits, that the disputed page 7 entry is inaccurate and was not prepared in accordance with the pertinent weight instruction. Thus, the applicant's record contained an error when it was placed before the 1997 captain selection board. Establishing an error is not enough to cause the applicant's failure of selection to be removed. The applicant must establish a nexus between the error and his failure of selection for promotion to captain.

3. In resolving the nexus issue, the Board applies the test in Engels v. United States, 230 Ct. Cl. 465 (1982). In Engels, the United States Court of Claims established two "separate but interrelated standards" to determine the issue of nexus. The standards are as follows: "First, was the claimant's record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that he would have been promoted in any event?" Engels at 470.

4. The Board finds that the applicant was prejudiced by the erroneous page 7 entry before the 1997 captain selection board. The contents of the disputed page 7 entry placed the applicant in a very unfavorable light. The Board finds that the disputed page 7 entry, which was submitted within 11 days of the convening of the selection board and which reported that the applicant was 53 pounds overweight, would have been very difficult to overcome no matter what the quality of the applicant's performance had been.

5. Without this erroneous disputed page 7 entry, the applicant's average to above average performance would have been the focus before the selection board. The applicant's record would have certainly looked better without this erroneous entry.

6. As to the second standard, when the applicant has made a prima facie showing of nexus, the burden of persuasion shifts to the Coast Guard to show that it is unlikely that the applicant would have been promoted in any event. The Board finds that the Coast Guard has failed to carry its burden. First, the Coast Guard argued that the selection board would have closely scrutinized a similar page 7 entry, dated May 12, 1992, which reported that the applicant was 13 pounds overweight at that time. However, during that scrutiny the selection board would have also discovered that there was a subsequent page 7 entry, dated July 15, 1992, which showed that the applicant had lost the 13 pounds. The Board notes that at the time the 1997 captain selection board convened, this May 12, 1992 page 7 entry was approximately 5 years old. The Board finds that the May 12, 1992 page 7 entry would have had little or no impact on the 1997 captain selection board because of its age and because of a subsequent page 7 entry, dated approximately two months later, that showed that the applicant had lost those 13 pounds.

7. The Coast Guard also argues that it is unlikely that the applicant would have been promoted in any event based on his marks of 4 in block 12 on five of his six OERs as a CDR and his lack of any personal awards while holding that rank. As the Court made clear in Frizelle v. U.S., 111 F.3d 172 (D.C. Cir. 1997), the focus should be on more than just the block 12 marks. All of the applicant's performance should be reviewed in making a determination of whether it is unlikely that the applicant would have been promoted in any event. The applicant's grades in the other dimensions, on the most pertinent OERs in considering him for promotion to captain, as outlined in the Personnel Manual, were above average, consisting mainly of 5s and 6s. The comments on these OERs were flattering and the applicant was highly recommended for promotion and for command.

8. In addition, although the applicant may not have received any personal awards while serving in the grade of CDR, he did receive two thank you letters for certain accomplishments and a Coast Guard Meritorious Team Commendation for his service on the Eighth District Field Commanders Strategic Planning Team. Thus, the Board is not persuaded that the lack of any personal awards while in the grade of CDR would have made the applicant's selection for promotion unlikely.

9. The Coast Guard pointed out that there was a 63% selection rate for promotion. This figure means very little in this instance because the Board is not told the number of personnel in the zone for captain or the quality of the records of those selected. Based on the evidence presented, the Board cannot say that it is unlikely that the applicant would have been promoted in any event with a corrected record.

10. The Coast Guard erred by including the inaccurate page 7 entry in the applicant's record. The applicant has established a nexus between the erroneous page 7 entry and his failure of selection for promotion to captain in 1997.

11. Accordingly, the applicant's request for relief should be granted.

ORDER

The application of [REDACTED] for correction of his military record is granted. His record shall be corrected by removing the page 7 entry dated July 3, 1997. His 1997 failure of selection before the captain selection board shall also be removed.

