

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-070

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXX, LCDR

FINAL DECISION

Author: Ulmer, D.

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on February 25, 2005, upon receipt of the applicant's completed application and military records.

This final decision, dated January 5, 2006, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to remove or mask all of his officer performance reports (OPRs) and officer evaluation reports (OERs) from a prior period of Coast Guard service.¹ He also asked the Board to remove his failures of selection for promotion to commander (CDR) from his record, to back date his date of rank if he is selected for promotion by the first CDR selection board to consider him based on a corrected record, and to award him back pay and allowances.²

APPLICANT'S ALLEGATIONS

The applicant alleged that he was prejudiced before the CDR selection boards because his record contained OERs from a prior period of active duty in the regular Coast Guard, while the records of the other members of his 1990 direct commission aviator (DCA) class did not contain any prior service OERs.

¹ In this decision, the term OERs also refers to OPRs.

² The applicant stated that he has been passed over for promotion to CDR four times.

SUMMARY OF RECORD

The applicant served in the regular Coast Guard from 1982 to 1988. On June 30, 1988, he was discharged from the Coast Guard in the grade of lieutenant junior grade (LTJG) because he twice failed to be selected for promotion to lieutenant (LT).

On April 21, 1990, the applicant signed an oath of office in which he accepted a commission in the Coast Guard Reserve through the DCA program in the grade of LTJG. In due course, the applicant was selected for promotion to lieutenant and to lieutenant commander.

On August 4, 2003, the promotion year 2004 [PY04] CDR selection board considered the applicant's record but did not select him for promotion to that grade.

On July 26, 2004, the PY05 CDR selection board considered the applicant's record but did not select him for promotion to that grade.

VIEWS OF THE COAST GUARD

On July 11, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. The JAG stated that the applicant does not challenge the accuracy of the OERs but instead challenges the Coast Guard's policy of implementing 14 USC § 258 that requires selection boards to receive the "name and record of all officers who are eligible for consideration for promotion." See Coast Guard Active Duty Officer Promotion Boards, COMDTINST 1410.1, para 7 and Encl (1). In support of this argument, the JAG quoted the following from the Commander, Coast Guard Personnel Command (CGPC) memorandum that is attached as Enclosure (1) to the advisory opinion.

In limiting the evaluations to those earned as a Coast Guard officer, Commandant Instruction 1410.1 serves to prevent a candidate from unfairly being advantaged or disadvantaged during the Selection Board process. Since all officers don't have enlisted service, enlisted records could provide additional positive or negative information that one without enlisted service had no chance to earn. Additionally, all Coast Guard officers do not have service in another Armed Force prior to entry in the Coast Guard. Other Services have different standards, expectations and core values, so it is difficult to fairly evaluate the strengths and weaknesses of an individual based on those evaluations. Any strengths or

weaknesses developed in one's background will manifest itself in the officer's Coast Guard performance that will be documented with a Coast Guard standard OER. Not displaying prior Coast Guard officer evaluations following a break in service could be particularly damaging to an officer that departed under the temporary separation program and expected to have that previous service documented when going before a selection board.

The JAG stated that Coast Guard's interpretation of 14 USC § 258 that a selection board receives all Coast Guard officer evaluations relating to a member is to be given considerable deference. See e.g., Small v. United States, 158 F. 3d 576, 580 - 81 (Fed Cir. 1998) adopting Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

The JAG further commented that "ALCOAST 214/03 Masking Ensign OERs" states that ensign evaluations should not be presented to CDR promotion boards. The JAG also stated that the Coast Guard considers the previous seven years of service or all service in the present grade as the most significant portion of the record for selection to CDR. See Article 14.A.4.d. of the Personnel Manual. The JAG argued that some of the OPRs/OERs the applicant seeks to have excluded either were not before the selection board or were not considered to be significant.

The JAG stated that the documents sent to the selection board for its consideration in the applicant's case were substantially complete and favorably portrayed the applicant's record. The JAG argued that there is a strong presumption that military officials acted correctly, lawfully, and in good faith. Arens v. United States, 969 F.2d 1034, 1037 (Fed. Cir. 1992); Sanders v. United States, 594 F.2d 804, 813 (Ct. Cl. 1979). In this regard, the JAG stated that the applicant did not raise any issues and there was nothing in the record to suggest that the Coast Guard did not carry out its responsibilities in accordance with the applicable law and Coast Guard regulation.

The JAG asked the Board to accept the CGPC memorandum attached as Enclosure (1) to the advisory opinion as part of the opinion. CGPC stated that 14 USC § 258 and COMDTINST 1410.1 require that all Coast Guard OERs be provided to selections boards. CGPC stated that the instruction does not specify specific periods of service or note that a break in service will exclude previous Coast Guard officer evaluations. CGPC stated, "Displaying the record of previous service as a Coast Guard officer following a break in service is a common practice when officers depart through the temporary separation program and return to active service."

CGPC stated that there were 20 graduates of the April 1990 DCA course including the applicant. The other 19 applicants did not have prior Coast Guard officer service, but if they had had such service, it would have been included in their records.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 12, 2005, the BCMR received the applicant's reply to the views of the Coast Guard. He disagreed with the Coast Guard's recommendation that his case should be denied. In regard to the Coast Guard argument that its interpretation of 14 USC § 258 is entitled to deference, he stated that since he did not leave the Service in 1988 under the temporary separation program and since he competed against others for a direct commissioned appointment in 1990, he should stand on equal footing with those peers when going before a promotion board. Therefore, he argued that his prior service OERs should be masked.

The applicant stated that having the prior service OERs in his record did not help him and he believes that he suffered an injustice by having them placed before the selection board. He stated that although he has been passed over for promotion four times, the aviation detailer recently offered to recall him to active duty under a contract.

APPLICABLE LAW

United States Code

Section 258 of title 14 of the United States Code states the following: "The Secretary shall furnish the appropriate selection board convened under section 251 of this title with: . . . (2) the names and records of all officers who are eligible for consideration for promotion to the grade to which the board will recommend officers for promotion, with identification of those who are in the promotion zone."

Coast Guard Personnel Manual

Selection for promotion to CDR on active duty is made on a best-qualified basis. Article 14.A.1c. of the Personnel Manual states in a best-qualified system the selection board is limited to a specific number it may select and makes its selection by comparing each officer to all others considered.

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

1. Personnel boards recommend on either a best-qualified or fully-qualified basis as set forth in law and directed in the precept. . . . [E]ach 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 and type of selection the board is making. A board selecting officers for lieutenant may emphasize different factors than would a Captain Continuation Board.

Section 14.A.3.b. lists 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 that “[a] board must consider an officer’s entire record; however, the following is considered the most significant portion of the record evaluated: . . . Commander . . . seven years of immediate previous service or all service in present grade, whichever is greater.”

COMDTINST 1410.1 (Coast Guard Active Duty Officer Promotion Boards)

Enclosure (1) lists documents to be viewed by the selection board. The list includes "CG-5311-CG-5317 All Officer Evaluations."

ALCOAST 214/03

This ALCOAST states, "active duty and reserve promotion boards will no longer view any ensign OER at LCDR and above promotion boards . . ."

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant has not proven that the Coast Guard committed an error by providing all of his Coast Guard OPRs/OERs to the CDR selection boards. Section 258 of title 14 of the United States Code states that the Secretary shall furnish to the selection boards "the names and records of all officers who are eligible for consideration to the grade to which the board will recommend officers for promotion." The Coast Guard has interpreted this statute to mean that a selection board should receive all of an officer's Coast Guard OERs (except that ensign OERs will not be presented to LCDR and higher selection boards) and it has implemented the policy in COMDTINST 1410.1 and ALCOAST 214/03. The applicant has not presented any evidence that the Coast Guard's regulation is contrary to law. Therefore, the applicant has failed to prove an

error in this regard. Moreover, the Board notes that the applicant does not argue that any one of the earlier OERs is erroneous.

4. Nor has the applicant established that he suffered an injustice by having the earlier OPRs/OERs from his previous Coast Guard service included in his military record. As the Coast Guard stated, the applicant was not treated any differently than other officers who had prior Coast Guard service. The fact that he was the only aviator from the 1990 DCA class to have prior service OERs in his record does not constitute an injustice; it only reflects reality. Moreover, the law and regulation were in effect at the time the applicant received his 1990 Reserve commission in the Coast Guard. The fact that the applicant may have been unaware of the regulation, and that he disagrees with it, does not render it unjust.

5. In addition, the Board notes that the Coast Guard has acted to diminish the impact of junior officer OERs before CDR selection boards through ALCOAST 214/03, which prohibits consideration of ensign OERs, and through Article 14.A.4.d. of the Personnel Manual, which makes the last seven years of an officer's record the most significant. Under the circumstances of this case, the applicant's argument that the earlier OERs were the reason for his non-selections, without more, is insufficient to prove that the Coast Guard committed an injustice. The Court defined injustice in Reale v. United States, 208 Ct. Cl. 1010, 1011 (1976), as treatment by military authorities "that shocks the sense of justice." The Coast Guard's treatment of the applicant in this case was consistent with the law and regulation and does not shock our sense of justice.

6. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of LCDR XXXXXXXXXXXXXXX, USCG, for correction of his military record is denied.

Stephen H. Barber

Harold C. Davis, M.D.

David Morgan Frost