

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-123

FINAL DECISION

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This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on May 19, 2004, upon receipt of the applicant's completed application and military records.

This final decision, dated March 17, 2005, 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 correct his military record to show that he was commissioned as a Lieutenant (LT; 03) rather than as a Lieutenant junior grade (LTJG; 02) on July 1, 2002, with back pay and allowances.

APPLICANT'S ALLEGATIONS AND SUBMISSIONS

The applicant alleged that although he had applied for a direct commission as a LT under the Licensed Officer Merchant Marine (LOMM) program in July 2001, his application was erroneously considered under the Maritime Academy Graduate (MARGRAD) Direct Commissioned Officer (DCO) program. He stated that his application was placed before the DCO board that convened on November 26-27, 2001, to select candidates for direct appointments in the fields of aviation, engineering, law, MARGRAD, naval engineering, and information technology. He stated that his application was incorrectly lumped with the MARGRADs, which selected him for a direct commission in that field at the rank of LTJG.

The applicant alleged that after he was selected under the MARGRAD program, the recruiter told him that the LOMM program no longer existed and that his only option was to accept the commission at a lower rank (LTJG). The applicant stated that he has subsequently learned that the LOMM selection board is not normally held and is opened only on a case-by-case basis. He stated that the MARGRAD program is for recent graduates of maritime academies with little or no sea experience, but he had ten years of sea time with an unlimited chief officer's license that clearly placed him in a different category.

The applicant was granted an age waiver to receive a commission under the MARGRAD program. The age waiver memorandum, which the applicant alleged corroborates his allegation that he should have been considered for the LOMM program, stated that the "applicant is really more a LOMM than a MARGRAD, but he got lumped under MARGRAD. LOMM age maximum for JG is 32". The age waiver memorandum further stated the following:

This one is unique. The MARGRAD selected [the applicant], but he is really a Licensed Officer of the Merchant Marine (LOMM). LOMM age limit for LTJG is 32, which would require a 3 year, 2 month, 14 day waiver. MARGRAD would require a 7 year, 2 month, 14 day age waiver. Even though he's been lumped under MARGRAD Board (he qualified for DCE, DCEM, and LOMM), we should consider him LOMM for age waiver purposes. This guy is very versatile. Recommend positive consideration.

The applicant complained that at no time did anyone contact him to let him know that his application would not be reviewed under the LOMM program. He asserted that had he known that the LOMM program still existed he would not have accepted the commission as a LTJG. He restated that he applied for a commission under the LOMM program, not the MARGRAD program.

The applicant stated that in December 2003 he met a LT who had been a recruiter. According to the applicant, the LT told him that the LOMM program still exists and that it can be opened as needed for a candidate who fits the profile, even if the Coast Guard is not actively recruiting under the LOMM program. He stated that the LT opined that the applicant's package was incorrectly placed with those under consideration for a direct commission under the MARGRAD program.

On April 12, 2004, the applicant's commanding officer (CO) submitted a memorandum to the recruiting command on the applicant's behalf requesting a correction to the applicant's rank. On May 10, 2004, a LTJG responded for the recruiting command. The LTJG stated that the recruiting command could not make corrections to

dates of rank after a contract has been executed. She referred the applicant to the BCMR.

The applicant submitted evidence showing that he was a Licensed Chief Engineer of the Merchant Marine. He submitted a copy of 46 CFR § 10.510 containing the qualifications one must meet to be a Licensed Chief Engineer.

The applicant also submitted a pertinent portion of Article 4.D.7. of the Recruiting Manual entitled "Licensed Officers of the Merchant Marine" (LOMM). Subsection 4.D.7.a. states as follows:

To ensure continued representation of the Merchant Marine industry in the Coast Guard Marine Safety Program, a number of licensed officers of the U.S. Merchant Marine are to be commissioned as lieutenants or lieutenants junior grade in the Coast Guard. The selection board determines the rank of those selected. These personnel serve as inspectors, investigators, and as licensing program personnel. LOMM are offered an indefinite contract, with the first three years as a probationary status.

Subsection 4.D.7.b. states that for the rank of lieutenant an applicant should have a minimum age of 21 and a maximum age of 38. It provides that the applicant should have "3 or more years' service as a licensed officer aboard U.S. commercial vessels, at least 6 months of which should be as Chief Mate, First Assistant Engineer, or higher." It further provides that an applicant applying for the rank of LT should hold at a minimum either a "license as a Chief Mate (unlimited), Oceans or Coastwise" or as a "Master and First Class Pilot (unlimited), Great Lakes, First Assistant Engineer (any horsepower)."

VIEWS OF THE COAST GUARD

On October 14, 2004, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. He stated that the Coast Guard was not accepting LOMM accessions at the time the applicant applied to join the Coast Guard. He stated that the applicant exceeded the requirements for MARGRAD accessions and was offered a commission under that program.

The JAG stated that the applicant has the burden of proving either error or injustice in his record, which he failed to do in this case. He further stated the following:

a. There is no dispute that applicant appears to have sufficient qualifications for him to compete for a commission as a Licensed Officer of the Merchant Marine (LOMM). Unfortunately for applicant, that program wasn't an available option. . . .

b. The Coast Guard is under no obligation to offer particular accessions programs every time an Applicant happens to be qualified for one. Applicant was considered under another program for which he was qualified, MARGRAD, and voluntarily chose to accept a commission under the MARGRAD program. If the Recruiter did in fact tell Applicant that the LOMM program "no longer existed," a fact posited by Applicant but not supported by any evidence, that statement, while arguably technically incorrect, was in fact a true statement with respect to Applicant's attempt to enter active duty with a Coast Guard commission. The LOMM program was not offered at the time applicant sought his commission. It "no longer existed" as an option for him if he wanted to be commissioned as an officer at the time he sought to be commissioned.

c. Absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith. Arens v. United States, 969 F.2d 1034, 1037 (1992) . . . Moreover, applicant bears the burden of proving error. 33 CFR § 52.24. Here, applicant offers no evidence that the Coast Guard committed an error or injustice. To the contrary, the record shows that Applicant was correctly informed that a commission as a LOMM was not an available option.

The Coast Guard attached a statement from the Assistant Chief, G-MRP-3 (Human Resources Division), Coast Guard Headquarters. He wrote the following under penalty of perjury.

My division . . . is the Program Policy Manager for the LOMM, MARGRAD, and MARTP programs. As Program Policy Manager, this office advises the Coast Guard Recruiting Command (CGRC) on whether any accessions for a particular program are sought or will be accepted. When seeking or accepting applications we say the program is "open," when not seeking or accepting applications the program is referred to as "closed."

LOMM is not currently an open officer accessions program; nor was it open in years 2001 through 2004. When a particular accession program is closed, CGRC is precluded from evaluating candidates under that program.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 18, 2004, the Board received the applicant's response to the views of the Coast Guard. He disagreed with the Coast Guard's recommendation.

The applicant stated that the critical question is how the LOMM program is opened for the consideration of applicants. In response to the Coast Guard's position that it is opened based on the needs of the service, the applicant questioned what that means. "Does it mean that when a highly qualified applicant applies, the board is opened to commission the individual since his/her Merchant Marine Officer experience is wanted? Or, does it mean that the CG decides that it needs highly experienced Merchant Marine Officers for commission in the CG and then opens the board and candidates are sought out"? He complained that the Coast Guard would not answer these questions for him. He further stated as follows:

My position is that the Coast Guard desired my skills as an experienced Merchant Marine Officer and recruited me under a pretense to provide a position commensurate with my skill set but then shifted to a less costly rank after I entered the process. This change happened after I had already made the personal and family sacrifices of ending employment with my civilian employer and committed myself to the service. The Coast Guard used the LOMM program to entice me and then told me that the LOMM program no longer existed in order to bring me in at a lower pay grade. I have been filling a billet for a 0-3 since my commission . . . My OERs clearly show that I have been performing at an exceptional level. The Coast Guard has clearly demonstrated a need for my service and experience, yet they do not want to pay for it.

The applicant stated that he has provided sufficient evidence to substantiate his allegation that he applied under the LOMM program, that he exceeded the requirements to be commissioned as an 0-3, and that his application was mishandled. He repeated that the age waiver board stated that he was a LOMM candidate that was lumped into the MARGRAD program. He stated that the age waiver considered him as a LOMM when considering his request for an age waiver.

The applicant submitted a copy of an email he sent to the Assistant Chief, G-MRP-3 asking for a written policy on the opening and closing of the LOMM program. The applicant stated that he did not receive a reply to the email.

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 section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant has submitted insufficient evidence to establish that the Coast Guard committed an error by not considering his application for a direct commissioned officer appointment as a LT under the LOMM program. The Coast Guard has stated that based on service need, the LOMM program is closed and was closed at the time the applicant submitted his application for an appointment under the program. The applicant has not presented any evidence, and the Board is aware of none, requiring the Coast Guard to offer appointments under a program that it has closed because of Service need. The Board finds no error in the Coast Guard's refusal to open the LOMM program to consider the applicant's application.

3. In the absence of error, the Board must consider whether the applicant's treatment by the Coast Guard constitutes an injustice that "shocks the sense of justice." *See Reale v. United States*, 208 Ct. Cl. 949 (1976). Apparently the Recruiting Manual listed the LOMM program as one under which a potential applicant could apply for a direct commission. However, the Board is not persuaded that this fact alone created an injustice under the circumstances presented here. While the recruiter accepted the applicant's application for the LOMM program, there is no evidence that the mere acceptance of the application by the recruiter would lead to an appointment under the program. In this regard, Article 4.d.7. of the Recruiting Manual states that any decision with respect to selection and rank under the LOMM is left to a selection board.

4. The applicant suggested that the Coast Guard enticed him to apply for an appointment under the LOMM program and later offered him an appointment under another program at the lower rank of LTJG. However, nowhere does the applicant state, or provide proof, that any Coast Guard personnel with authority to do so promised him an appointment under the LOMM program, much less at the rank of LT. Nor is there evidence that the Coast Guard advertised or actively sought applicants for this closed program. The evidence suggests that the applicant wanted to apply under the LOMM program, hoping to receive an appointment at the higher rank of LT. It is up to the Commandant to determine service need and the Board finds no injustice in the fact that the Coast Guard refused to open a closed program just because the applicant requested it.

5. The applicant was offered an appointment as a LTJG under another program, which he accepted. The applicant asserted that he had to accept the offer of an appointment under the other program at a lower rank because he had already terminated his civilian appointment. It appears to the Board that the applicant had the

option not to terminate his civilian employment before receiving an offer for a direct commission from the Coast Guard under the LOMM program. Even if the applicant had terminated his civilian employment, he still had the choice of refusing the offer of an appointment under the MARGRAD program at the rank of LTJG.

6. The applicant's argument that the age waiver board's comment that he was a LOMM candidate that was lumped under the MARGRAD program proves that the Coast Guard erred by not placing his application before a LOMM board is without merit. The age waiver board stated that the applicant was more a LOMM than a MARGRAD and it also stated that he qualified for consideration for a commission in two other programs. Apparently, the Coast Guard offered him an appointment in the area that best fit its needs. The age waiver board is just that; it determines whether individuals who exceed the maximum age for an appointment in the Coast Guard should still be considered. There is no evidence that the age waiver board had any authority to determine which programs were open and which were closed. The Commandant determines service need and that does not change because of comments made by an age waiver board. The applicant certainly could not have relied on these comments since there is no indication that he discovered them before the DCO process began.

7. Accordingly, the Board finds neither error nor injustice in this case, and the applicant's request should be denied.

8. The Board notes that if the Coast Guard had taken the time to answer the applicant's questions, this application may not have been before the Board.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of _____ USCG, for correction of his military record is hereby denied.

Quang D. Nguyen

Kathryn Sinniger

Molly McConville Weber