

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-057

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

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 upon receipt of the applicant's completed application on December 16, 2010, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated August 18, 2011, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, a lieutenant (LT) in the Reserve, asked the Board to adjust her date of rank as a LT to the date she left active duty and to remove from her record her non-selections for promotion to lieutenant commander (LCDR) in the Reserve.

BACKGROUND

On July 1, 2007, the applicant was promoted to LCDR in the Regular Coast Guard. On February 23, 2008, she was punished at mast and received a Punitive Letter of Reprimand for having a romantic relationship with an enlisted man whom she supervised. On a special, poor performance evaluation, her commanding officer wrote that she was "[n]ot recommended for promotion. Recent conduct indicates officer does not possess the judgment and responsibility to assume duties of greater leadership or increased responsibilities."

As a result of these events, the applicant resigned her commission and was discharged on July 1, 2008. Before her discharge, she requested an officer's commission in the Reserve, but the Regular to Reserve Officer Commission Panel (RROCP) that convened in June 2008 did not select her. However, the RROCP that convened in September 2008 selected her to receive a commission as a LT. She was offered the LT commission with a date of rank of May 12, 2004, in a letter dated November 5, 2008. The letter stated that her date of rank was based on that of "the senior most officer on the Inactive Duty Promotion List in the Lieutenant grade who has not

been considered for promotion to the next higher grade” in accordance with Article 1.H.2.d. of the Personnel Manual. The applicant accepted the LT commission with a May 12, 2004, date of rank on November 12, 2008, by signing an Acceptance and Oath of Office. Her commission was made effective retroactive to July 2, 2008.

Following her discharge from active duty, the applicant found civilian employment for which she moved overseas until the spring of 2010. While working overseas she could not drill with a Reserve unit, and so she was assigned to the Individual Ready Reserve and received no substantive performance evaluations. With a LT date of rank of May 12, 2004, the applicant was eligible for promotion to LCDR in the Reserve in the fall of 2009 and again in the fall of 2010. However, the Reserve LCDR selection board did not select her for promotion in either 2009 or 2010. Therefore, she was honorably discharged from the Reserve on June 30, 2011.

APPLICANT’S ALLEGATIONS AND EVIDENCE

The applicant stated that when she transferred to the Reserve in 2008, she was demoted from LCDR to LT with no explanation from the RROCP. She alleged that her demotion was erroneous and unjust because all of the other eight LCDRs who received Reserve commissions through the RROCP in 2008 retained their LCDR rank. In addition, she alleged that six of the LTs who began their commissioned service in 1997, as she did, and who were released from active duty in 2008 had their date of rank adjusted to the date they received their Reserve commission. However, the RROCP erroneously adjusted her date of rank to May 12, 2004, instead of July 2, 2008. This error caused her to be eligible for promotion to LCDR very quickly and so she had inadequate time to show improved performance before the Reserve LCDR selection board reviewed her record. The applicant alleged that she did not discover the alleged error in her record until July 1, 2010. In support of her allegations, the applicant submitted the following documents:

- ALCGRSV 013/08 stated that a RROCP would convene on June 3, 2008, to consider whether to award a Reserve commission to certain Regular officers who were leaving active duty. The applicant’s name and the names of two other LCDRs are on the list of those under consideration. (The applicant was not offered a commission by this panel.)
- ALCGRSV 030/08 announced that another RROCP would convene on September 10, 2008. The applicant’s name and the names of three other LCDRS are on the list of those under consideration. (The applicant was offered a commission as a LT by this panel.)
- ALCGRSV 043/08 announced that a third RROCP would convene on November 12, 2008. The names of two more LCDRS are on the list.
- The applicant submitted an undated copy of the register of Reserve lieutenants listed in order of their LT dates of rank. None of the LCDRs listed in the three ALCGRSVs appear on the list of Reserve LTs, except the applicant, which presumably means they received commissions as LCDRs. The register also shows that of the LTs who, like the applicant, began their commissioned service in 1997, two have dates of rank in 2001, one has date of rank in 2002, the applicant and one other have dates of rank in 2004, two have

dates of rank in 2005, and eight have dates of rank in 2008. The names of seven of the LTs listed as seeking Reserve commissions in ALCGRSVs appear on this register of Reserve LTs, but only one of the seven has a date of rank in 2008.

- On August 8, 2010, the applicant submitted a Letter of Communication to the Reserve LCDR selection board. She explained why she had no recent substantive performance evaluations in her record. However, she noted that upon returning to the United States in 2010, she was assigned to a Reserve unit and immediately began using her skills and qualifications as a Senior Marine Inspector, Marine Casualty Investigator, Suspension and Revocation Investigator, and Certified Defense Financial Manager. The applicant described her civilian job and the significant work she had been assigned by the Coast Guard since returning home. The applicant further stated that “[i]n 2008, I received a punitive letter of reprimand for falling in love and marrying another member of the command. That period of time was difficult for me, but I feel that in the end, I made the right choices for my personal life. I take full responsibility for my actions and have found that the experience has helped me grow significantly, as an officer and a person.”

VIEWS OF THE COAST GUARD

On March 30, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant’s requests.

The JAG stated that RROCP deliberations about whether to offer commissions and at what rank are confidential, and the JAG will not speculate on why the RROCP decided to offer the applicant a commission as a LT. The JAG noted that the applicant could have appealed the RROCP’s decision in accordance with Article 1.H.3. of the Personnel Manual, but did not. The JAG stated that the applicant voluntarily accepted the commission she was offered, and her allegations are without merit.

The JAG stated that the applicant’s LT date of rank was adjusted to May 12, 2004, in accordance with the policy in Article 1.H.2.d. of the Personnel Manual and that her desire or ability to show improved performance “is not dispositive nor a factor for consideration [with regard to] her date of rank determination.”

The JAG noted the applicant’s then-pending discharge from the Reserve and stated that “[a]lthough extremely unfortunate for this applicant, the applicant’s choice of violating clearly established 8H policy was the catalyst for her career destruction. If [she] was not satisfied with [the PSC’s] appointment [as a LT with a date of rank of May 12, 2004], she could have rejected the offer in its entirety” or appealed the decision. The JAG noted that because the applicant is challenging significant issues of Coast Guard policy, any decision to the contrary by the Board should be reviewed by the delegate of the Secretary.

The JAG also adopted the findings and analysis of the case provided in a memorandum prepared by the Personnel Service Center (PSC). The PSC stated that the applicant was offered and voluntarily accepted a commission as a LT with a date of rank of May 12, 2004. The PSC stated that because she received notice that her proposed commission in the Reserve would be as

a lieutenant with a May 12, 2004, date of rank, no error was committed. The PSC also stated that under Article 1.H.2.d. of the Personnel Manual, the applicant's LT date of rank, May 12, 2004, is correct.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 6, 2011, the Chair mailed the applicant a copy of the views of the Coast Guard and invited her to respond within 30 days. No response was received.

APPLICABLE REGULATIONS

The Coast Guard's regulations for Regular to Reserve commissions of former active duty Coast Guard and Navy officers appear in Article 1.H. of the Personnel Manual 1.H.1. Any Coast Guard officer who resigns his Regular commission or who has twice been non-selected for promotion but is not eligible for retirement may apply for a Reserve commission. PERSMAN, Article 1.H.2.a. Under Article 1.H.2.c., after reviewing the applicants' military records, the RROCPs may

- (a) approve the request;
- (b) conditionally approve the request, offering a Reserve commission at the same grade held while a member of the Regular Coast Guard or Navy, but assigned a different date of rank;
- (c) conditionally approve the request, offering a Reserve commission, but at a lower grade than previously held, or;
- (d) disapprove the request.

Under Article 1.H.2.d. of the Personnel Manual, entitled "Date of Rank Determination,"

1. If applicant is approved with an appointment to the same grade, the date of rank shall remain the same if the applicant resigned their commission from active duty.
2. If applicant, who has multiple non-selections on the ADPL and is discharged from active duty, is approved with an appointment to the same grade, the date of rank shall be the date the applicant signs their oath for a Reserve commission.
3. If applicant is approved with appointment to a lower grade, the date of rank will normally be equal to that of the senior most officer on the Inactive Duty Promotion List in that grade who has not yet been considered for promotion to the next higher grade.

Under Article 1.H.3. of the Personnel Manual, an applicant for a Regular to Reserve commission may appeal a decision of the RROCP to offer a commission at a lower grade than that previously held by the officer. The appeal must be made within 15 days of receipt of the letter offering the commission and must include "additional information that is a matter of record but was not available to the panel making the original determination. Mere disagreement is not sufficient justification for appeal."

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. Although the applicant alleged that she discovered the errors in her record on July 1, 2010, the Board finds that the preponderance of the evidence shows that she knew about the alleged errors—her commissioning as a LT with a date of rank of May 12, 2004—on or about November 5, 2008, when she received the written offer of the commission. Since her application was received within three years of that date, it was timely filed.

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.¹

3. The applicant alleged that her Reserve rank, date of rank, and non-selections for promotion resulting in her discharge from the Reserve are erroneous and/or unjust. The Board begins its analysis in every case by “presuming administratively regularity on the part of Coast Guard and other Government officials.”² The applicant bears the burden of proving the existence of an error or injustice by a preponderance of the evidence.³ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁴

4. The Board finds that the applicant has not proved by a preponderance of the evidence that her Reserve commission as a LT, instead of a LCDR, is erroneous or unjust. The record shows that she was offered a commission as a LT and voluntarily accepted it. The RROCP has authority to approve or disapprove a Regular officer's request for a Reserve commission and is also expressly authorized, under Article 1.H.2.c.2.(c) of the Personnel Manual, to offer only a commission at a lower rank. The applicant complained that she received no explanation of the RROCP's decision in this regard, but she is not entitled to one under the regulations. The Board notes, however, that Regular officers may be offered Reserve commissions at a

¹ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that “whether to grant such a hearing is a decision entirely within the discretion of the Board”); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) (“The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process.”); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

² 33 C.F.R. § 52.24(b).

³ *Id.*

⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

lower rank based on their past performance or simply because there are insufficient vacancies in the Reserve at their active duty rank.⁵

5. The Board finds that the applicant has not proved by a preponderance of the evidence that her LT date of rank in the Reserve is erroneous or unjust. The Coast Guard has stated that her May 12, 2004, date of rank accords with the requirement of Article 1.H.2.d.3. of the Personnel Manual that an officer approved for appointment to a lower grade in the Reserve receive the same date of rank as “the senior most officer on the Inactive Duty Promotion List in that grade who has not yet been considered for promotion to the next higher grade.” The applicant has not proved that her date of rank does not conform to this policy. Although she complained that her date of rank did not give her sufficient time in the Reserve to improve her performance record and chance of promotion, no provision of the Personnel Manual allows an officer to select a date of rank simply to enhance their opportunity for promotion. The rule in Article 1.H.2.d.3. appears reasonably designed to help former active duty officers with strong performance records regain their prior, higher rank after they accept Reserve commissions at a lower rank. The applicant’s performance record, however, was not strong because of the mast and special OER. She might have had a better chance for promotion if the rule in Article 1.H.2.d.3. were different or if she had been able to drill with a Reserve unit throughout her first two years in the Reserve, but these possibilities do not prove that either the rule in Article 1.H.2.d.3. or her date of rank is erroneous or unjust.

6. The applicant asked the Board to remove her non-selections for promotion in 2009 and 2010 from her record so that she could remain in the Reserve. Because the applicant has not proved that her military record contained any prejudicial error when it was reviewed by the LCDR selection boards in 2009 and 2010, there are no grounds for removing her two non-selections for promotion.⁶

7. Accordingly, the applicant’s requests should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁵ See Article 7.A.4. of the Reserve Policy Manual (showing that the total number of commissioned officers and the percentage of commissioned officers at each rank is prescribed by statute).

⁶ *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003), citing *Engels v. United States*, 678 F.2d 173, 175-76 (Ct. Cl. 1982); *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005).

ORDER

The application of former xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of her military record is denied.

Donna A. Lewis

Paul B. Oman

Darren S. Wall