

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-036

**XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX**

FINAL DECISION

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 Chair docketed the application upon receipt of the applicant's completed application on December 6, 2011, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated October 25, 2012, 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 asked the Board to promote her to lieutenant commander (LCDR) on the inactive duty promotion list (IDPL) retroactive to November 23, 2010, the date on which she complied with the Coast Guard's weight and body fat requirements, and to award her back pay and allowances.

The applicant was in the Selected Reserve (an active status¹ category of the Reserve) and was selected for promotion to LCDR in September 2009. She was authorized promotion on July 1, 2010, but the promotion was delayed because she was over her allowable weight and body fat limits and she was on weight probation. The applicant was never promoted to LCDR as a result of her September 2009 selection because she was transferred from an active status to the inactive status list (ISL)² immediately prior to the convening of the LCDR selection board in August

¹ Active status is the status of all reservists, except those on an inactive status list or in the Retired Reserve, including reservists performing extended active duty and long-term ADSW. Article 7.A.2.a. of the Reserve Policy Manual.

² The inactive status list, Standby Reserve, is a Reserve category consisting of reservists who may be ordered to active duty in time of war or national emergency if it is determined that not enough qualified reservists in an active status are available in the categories required. Members on the inactive status list may not train for pay or retirement points, are not eligible for

2010 because she did not meet the eligibility requirements for promotion (she was non-compliant with the Coast Guard's Weight and Body Fat Standards program). On August 13, 2010, the applicant acknowledged a page 7 advising her that she had not met the weight standards and body fat standards and would be transferred to the ISL.

ALLEGATIONS

An administrative remarks page (page 7) was entered into the applicant's military record on April 10, 2010, advising her that she was on weight probation and that she was required to be weight-compliant by December 23, 2010. If she failed to meet the weight requirements by the end of the probationary period, she would be transferred to the Individual Ready Reserve (IRR) or the Inactive Status List (ISL).³ She alleged that she was not told until early July 2010 that if she was not weight-compliant by the convening date of the next LCDR selection board, August 16, 2010, she would be transferred to the ISL at that time. She did not meet the weight requirement on August 13, 2010, and was removed from an active status and transferred to the ISL.

Subsequent to her transfer to the ISL, the applicant met her weight requirement on November 23, 2010. On December 13, 2010, she requested to be transferred back into the Selective Reserve (an active status), but was placed into the IRR (another active status) because the Coast Guard stated that the billet she held in the Selective Reserve no longer existed due to a reorganization.

The applicant stated that under 14 U.S.C. § 734 and Article 7.A.12.b. of the Reserve Policy Manual, her promotion was rightfully delayed in 2010 due to her non-compliance with the weight standards. These provisions state that a reserve officer shall not be promoted to a higher grade unless the officer has been found to be physically qualified. However, she argued that her transfer to the ISL on August 13, 2010 was improper because under Article 3.3.5 of the Weight and Body Fat Standards Program, she had until the end of her probationary period, December 23, 2010, to become weight-compliant.

The applicant argued that she was eligible for promotion on November 23, 2010, the date on which she became weight-compliant because her name was never removed from the promotion list and because the list was not exhausted since the last person was promoted from that list on July 1, 2011. In support of her contention that she was eligible for promotion on November 23, 2010, she cites to 14 USC § 729(h), which states, "The recommendations of a selection board, as approved by the President, constitute a list of selectees from which the promotions of Reserve officers shall be made. An officer on a list of selectees remains thereon until promoted unless removed by the President under section 738 of this title. If an existing list of selectees has not been exhausted by the time a later list has been approved, all officers

promotion, and do not accrue credit for qualifying years of service for retirement. Article 1.C.3.b. of the Reserve Policy Manual.

³ The page 7 states that the applicant was 34 pounds overweight and that she exceeded her allowable body fat by 8%.

remaining on the older list shall be tendered appointments prior to those on the later list.” The applicant summed up her contentions as follows:

I was still eligible for promotion from the PY 2010 LCDR list until it has been exhausted.

The first person on the PY 2010 list was promoted on 1 April 2010 and the last person was promoted on 1 July 2011.

The next convening LCDR board would be August 2011 after the PY 2010 list was exhausted, not August 2010 as I was told.

I came into compliance with the weight standards on 23 November 2010 prior to the PY 2010 list being exhausted and therefore was eligible for promotion as of 23 November 2010.

VIEWS OF THE COAST GUARD

On April 18, 2012 the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case. The JAG stated that the applicant’s promotion was withheld due to her non-compliance with weight requirements, as required by regulation. The JAG stated that weight compliance is an eligibility requirement for promotion. In this regard, the JAG stated that the Reserve Policy Manual states, “if the officer fails to meet promotion requirements prior to the convening date of the next promotion board transfer from an active status will take effect on the day prior to the convening date of the board.”

The JAG stated that based on the time the applicant spent in the ISL (102 Days), she “was assigned a new date of rank (27 August 2004) because service in an inactive status may not be counted in any computation of years in service in accordance with 10 U.S.C. § 12734(a).”

The JAG submitted a memorandum from the Commander, Personnel Service Center, (PSC) and asked that it be accepted as a part of the advisory opinion. PSC recommended that the application be denied and stated the following: Although the applicant was selected during the PY 2010 IDPL LCDR promotion board, the applicant was not entitled to promotion because she did not meet the weight-compliance requirements.” PSC stated that the applicant was required to meet all requirements for promotion by the convening date of the next LCDR selection board or be transferred to the ISL. PSC stated that the Coast Guard is presumptively correct, and the applicant has failed to substantiate any error or injustice in her record.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

In July 2012, the Board received the applicant’s response to the views of the Coast Guard and she disagreed with them. She restated her argument that she should have been promoted effective November 23, 2010 because the PY 2010 promotion list had not been exhausted as of that date. She also restated her argument that the Coast Guard committed an error by transferring her into the ISL before the end of her probationary period.

The applicant stated that the Coast relied on a provision in the Reserve Policy Manual, which states that “If an officer fails to meet promotion requirements prior to the convening date of the next promotion board, transfer from an active status will take effect on the date prior to the convening date of the board” to transfer her to the ISL. She argued that transfer to the active status list (ASL) of the Standby Reserve would have been more appropriate. In this regard, she argued that according to the Reserve Policy Manual, the ASL is also an inactive status category of the Reserve that consists of reservists who have been transferred from the Ready Reserve because of a temporary hardship, disability or other cogent reasons and who intend to return to the Ready Reserve. Members on the ASL may participate in reserve training activities without pay, may earn retirement points, and are eligible for promotion, whereas members on the ISL may not train for pay or retirement points, are not eligible for promotion, and do not accrue credit for qualifying years of service for retirement. Reservists on the ISL include volunteers, with no requirement to remain in an active status and members who were eligible to be placed on the ISL in order to prevent an inequity with regard to their pay and promotion or retirement points.

The applicant argued that the ASL is the more appropriate category for a member who is on weight probation like herself because overweight condition is a temporary situation where the member will either lose the weight by the end of the probationary period and rejoin the Ready Reserve or not lose the weight and be processed for separation. She stated that if she had been transferred to the ASL she would have remained eligible for promotion.

The applicant again argued that since the President never removed her from the list of selectees under 14 U.S.C. § 729(h) she should have been transferred to the ASL and promoted once she became weight-compliant.

APPLICABLE LAW AND REGUALTION

Statutes

14 U.S.C. § 276 states: Officers who are not included on the active duty promotion list may be promoted under the regulations to be prescribed by the Secretary.

14 U.S.C. § 729(h) states: “The recommendation of a selection board, as approved by the President, constitute a list of selectees from which the promotions of Reserve officers shall be made. An officer on a list of selectees remains thereon until promoted unless removed by the President under section 738 of this title. If an existing list of selectees has not been exhausted by the time a later list has been approved, all officers remaining on the older list shall be tendered appointments prior to those on the later list.”

14 U.S.C. § 729(i) states: “A Reserve officer whose name is on a list of selectees for promotion shall, unless that officer’s promotion is lawfully withheld, be tendered an appointment in the next higher pay grade on the date a vacancy occurs, or as soon thereafter as practicable in the grade to which the officer was selected for promotion or, if promotion was determined in accordance with a running mate system, at the same time, or as soon thereafter as practicable, as that officer’s running mate is tendered a similar appointment.”

14 U.S.C. § 732 states, “A Reserve officer is eligible for consideration for promotion and for promotion under this subchapter, if that officer is in an active status.”

14 U.S.C. § 733 states, “A Reserve officer recommended for promotion by a selection board but not promoted because of removal from an active status shall be reconsidered by a selection board after returning to an active status and if selected shall be placed on a recommended list of selectees for promotion. A Reserve officer to whom this section applies is not considered to have failed of selection when eliminated from a list of selectees for promotion solely as a result of being removed from an active status.”

14 USC § 734(a) states: “A Reserve officer shall not be promoted to a higher grade unless the officer has been found to be physical qualified and the character of the officer’s service subsequent to the convening of the selection board which recommended the officer for promotion has been verified as satisfactory.”

Regulations

Reserve Policy Manual

Article 7.A.12 (Delay of Promotion) of the Reserve Policy Manual states the following:

“a. Under no circumstances will an appointment to a higher grade be tendered, including an appointment for an officer assigned to the IRR, until the following conditions have been met:

- (1) The reserve officer is found physically qualified by a current approved and documented physical examination and the officer’s character of service since selection has been verified as satisfactory (14 USC 734).
- (2) The active service running mate has been promoted, all officers of the same grade of higher precedence on any prior promotion list have been tendered an appointment, and the Secretary exercises promotion authority.

“b. If an officer cannot meet the physical requirements or other criteria at the time the officer’s running mates is promoted, promotion will be withheld until he or she meets the requirements; the command shall so notify the Personnel Command (CGPC-rpm) and the Personnel Service Center prior to the authorized promotion date.

- (1) If the officer subsequently meets the requirements prior to the convening date of the next promotion board, CGPC-rpm will authorize promotion with a date of rank at the time the officer would have been promoted had the promotion not been delayed. However, pay and allowances accrue from the effective date of appointment, not the date of rank.
- (2) If the officer fails to meet promotion requirements prior to the convening date of the next promotion board, transfer from an active status will take effect on the day prior to the convening date of the board.

- (3) Once an officer in an inactive status becomes physically qualified or meets the other requirements for promotion, he or she may submit documentation to CGPC-rpm and request to be returned to an active status. The officer shall then be reconsidered by a selection board and if selected shall be placed on the new promotion list. A reserve officer is not considered to have previously failed of selection when eliminated from a list of selectees for promotion solely as a result of being removed from an active status.”

Weight and Body Fat Standards Program

Article 3.2.1 states that members who exceed their maximum allowable body weight and body fat percentage will be placed on probation, during which time they are required to lose the necessary amount of weight and/or body fat to come into compliance.

Article 3.2.2 states that the probationary period cannot be greater than 35 weeks or more than eight months.

Article 3.2.7 states that members are required to demonstrate reasonable and consistent progress throughout their probationary period. Progress should be gauged by losing weight and/or body fat at a rate of:

- one pound per week, and
- one percent body fat per month

Article 3.2.10 states that at the end of the probationary period the command must evaluate the member for compliance with the maximum allowable weight and allowable body fat standards. This provision also requires the command to prepare the necessary administrative remarks page documenting the non-compliance and to process the member for separation, if the member is non-compliant with the regulation at the end of the probationary period,

Article 3.3.5 states that the separation procedure for a non-compliant reservist is to transfer the member to the Standby Reserve, Inactive Status List (ISL) for up to one year. If the reservist officer fails to meet the weight and body fat requirements, a mobilization and disposition board must screen the officer to recommend separation or retirement in accordance with section 8.A.7 of the Reserve Policy Manual.

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 submission 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 argued that under Article 3.3.5. of the Weight and Body Fat Program regulation, she had until December 23, 2010, the termination date of her weight probationary period to lose the excess weight and body fat, and therefore, her transfer to the ISL on August 13, 2010 was improper. She further argued that even though she was in the ISL when she became weight-compliant on November 23, 2010, she was still eligible for promotion on that date because the President never removed her name from the promotion list under 14 USC 729(h).

3. There are two regulations that touch upon this case. 1. The Weight and Body Fat Program regulation that dictates standards for all Coast Guard members (active and Reserve) and the consequences for non-compliance with the regulation. 2. The Reserve Policy Manual that dictates policy for Reservists, including the procedures for officer promotion.

4. Article 3.3.5 of the Weight and Body Fat Standards governs the separation of members from the service who fail to meet the weight and body fat standards. The applicant is correct that under the Weight and Body Fat regulation, she would have been transferred to the ISL (removed from an active status) if she was not weight-compliant by December 23, 2010, the termination date of her probationary period. She signed an administrative remarks page acknowledging that she was on weight probation and was required to lose the weight and body fat by December 23, 2010 or she would be transferred to the ISL or the IRR. However, the applicant had been selected for promotion to LCDR by the PY 2010 selection board in 2009 and was on a promotion list awaiting promotion when she became weight non-compliant. If the applicant had not been on the promotion list for LCDR, the only date she would have been concerned with would have been the end date of her probationary period, December 23, 2010.

5. Since the applicant was on the promotion list, the procedure that governed her promotion to LCDR was Article 7 of the Reserve Policy Manual and not the Weight and Body Fat regulation. To be promoted (different from separation) the applicant was required to comply with the Reserve Policy Manual. The applicant was authorized promotion on July 1, 2010. Her promotion was properly withheld because she did not meet the eligibility requirements for promotion due to non-compliance with the Coast Guard's weight and body fat requirements. Article 7.A.12.a. of the Reserve Policy Manual, requires that an officer be physically qualified for promotion or the promotion will be withheld until the requirement is met. Article 7.A.12.b requires that the officer whose promotion is withheld meet the requirements for promotion prior to the convening date of the next selection board and if the officer does not meet the requirements for promotion by the convening date of the next board, the officer is transferred from an active status the day prior to the convening date of the selection board.

6. The applicant was not qualified for promotion on July 1, 2010, the date authorized for her promotion, because of her non-compliance with the Coast Guard's weight requirement. Nor was she qualified on August 13, 2010, prior to the convening of the next LCDR promotion board on August 16, 2010. Therefore, as required by Reserve Policy Manual she was removed from an active status and transferred to the ISL. Once she was removed from an active status, she was no longer eligible for promotion from the PY 2010 promotion list. Section 732 of title 14 of the United States Code states that "A Reserve officer is eligible for consideration for promotion and for promotion . . . if that officer is in an active status." Section 733 of title 14 of the United States Code states that "A Reserve officer recommended for promotion by a selection board but

not promoted because of removal from an active status shall be reconsidered by a selection board after returning to an active status and if selected shall be placed on a recommended list of selectees for promotion.” The last sentence of this provision makes it clear that a Reserve officer on a promotion list who is removed from active status loses the opportunity for promotion from that list. The pertinent portion reads, “A reserve officer to whom this section applies is not considered to have failed of selection *when eliminated from a list of selectees for promotion solely as a result of being removed from an active status.* [Emphasis added.] See also Article 7.A.12.b.(3) of the Reserve Policy Manual. So, even though the applicant became weight-compliant while in the ISL and prior to the end of her probationary period under the Weight and Body Fat Standards regulation, she could not be promoted from the PY 2010 list because under 14 U.S.C. § 733 she lost the promotion when she was removed from an active status. In order for the applicant to be promoted to LCDR, the statute requires that she be selected again for promotion to LCDR by a subsequent board. (There is no indication in the record whether she has been considered by a subsequent selection board.)

7. The applicant is correct that the President never removed her name from the Promotion list under 14 U.S.C. § 738. The law allows the President to remove an officer from the promotion list for cause. Since there is no misconduct involved in the situation at hand this provision is inapplicable. However, it is clear that Congress intended for Reserve officers to be in an active status for promotion. See 14 U.S.C. § 733. Congress also gave the Secretary the authority to implement regulations for the promotion of Reserve officers. Under those regulations, the Secretary (Commandant) determined that officers would be removed from an active status if they do not meet the requirements for promotion by the convening date of the next selection board. The applicant did not meet this requirement.

8. The Coast Guard did not commit an error when it removed the applicant from an active status and transferred her to the ISL on August 13, 2010, because it was permitted to do so under Article 7.A.12.b. of the Reserve Policy Manual which specifically governs reservists promotion procedures. The specific regulation with regard to Reserve officer promotions would govern over the more general Weight and Body Fat Standards regulation.

9. The applicant argued that she should have been transferred to the ASL instead of the ISL because her weight condition was temporary and she would have been eligible for promotion if on the ASL. However, the regulation states that members in the applicant’s situation are to be transferred from an active status, and it does not designate where such members should be assigned. The ASL is, by definition, an active status. Therefore, placing the applicant in the ISL was within the discretion of the Commandant. The Coast Guard did not commit an error by not transferring the applicant to the ASL.

10. The harder question is whether the Coast Guard committed an injustice by not explaining to the applicant in April 2010 that if she did not lose the weight prior to the date for the convening of the next LCDR selection board that was scheduled for August 16, 2010, she would be transferred to the ISL regardless of when her probationary was due to terminate under the Weight and Body Fat regulation. Injustice is “treatment by the military authorities that shocks the sense of justice, but is not technically illegal.” *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); see also BCMR No. 2001-043 (2001), Decision of Deputy General Counsel

(applying the error and injustice standards in *Reale* to the BCMR). The page 7 only advised the applicant about the risk of separation from the Service if she were not weight-compliant by the end of her probationary period. It was not the responsibility of personnel responsible for carrying out the Weight and Body Fat regulation to advise the applicant about regulations governing Reserve promotion policy and procedures. Reserve officer promotion regulations are published in the Reserve Policy Manual and the applicant could have reviewed them at any time. The page 7 placing the applicant on weight probation could have possibly led the applicant to believe erroneously that she had until December 23, 2010 to become weight compliant without any consequences to her career. However, for a matter as important as a promotion, the applicant should have consulted the Reserve Policy Manual or senior officers in her chain of command in April 2010 when she was placed on weight probation about the particulars regarding her promotion.

11. While the applicant's situation is unfortunate, it does not shock our sense of justice, because the regulations were available to her for review.

12. Accordingly, the applicant has failed to prove that the Coast Guard committed an error or injustice in this case.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXXXXXXXXXX, for correction of her military record is denied.

H. Quinton Lucie

James H. Martin

Paul B. Oman