

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-078

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XXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

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 BCMR docketed this case on March 12, 2004, upon receipt of the applicant's completed application.

This final decision, dated January 27, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a lieutenant commander (LCDR; pay grade O-4) in the Coast Guard Reserve, asked the Board to correct his date of rank (DOR) as a lieutenant (LT; O-3) from September 30, 1998, to March 27, 1997, which, he alleged, was the date he received his commission as a law specialist with the rank of lieutenant (junior grade) (LTJG; O-2). He also asked that his DOR as a LCDR be backdated accordingly and that he be awarded all backpay and allowances he would be due as a result of such corrections.

APPLICANT'S ALLEGATIONS

The applicant alleged that on March 27, 1997, he received a direct commission as a LTJG law specialist. He alleged that according to 14 U.S.C. § 727, which grants newly appointed attorneys three years of constructive service, he should have been commissioned as a LT. He alleged that the Coast Guard acknowledged this fact in April 2001 and "attempted to rectify its mistake by adjusting [his] then DOR to Sep[tember] 1998; however, the proper remedy would have been to adjust [his] DOR to [his] initial date of

commission.” He pointed out that the Coast Guard has renewed its practice of commissioning law specialists as lieutenants with concurrent DORs.

In support of his allegations, the applicant submitted a copy of a letter from the Coast Guard Personnel Command (CGPC) dated April 27 2001, to another Reserve direct commission law specialist. The letter states the following:

1. In accordance with [14 U.S.C. § 727] a Reserve officer appointed for the purpose of assignment or designation as a law specialist shall be credited with a minimum of three years service in an active status. As explained in [a letter from the Chief Counsel dated April 23, 2001], upon appointment in the Coast Guard as a lieutenant (junior grade) you were inadvertently credited with only 18 months in an active status as a result of an administrative error. Your date of rank is being adjusted to reflect a total of three years service in an active status upon commissioning. The correction will be made prior to the promotion year 2002 board season, which starts 1 July 2001. You are authorized any back pay and allowances due as a result of this correction.

2. Although the correction will be applied uniformly, it will affect officers in different ways, depending on their status. Some officers will be in zone for the next scheduled selection board sooner than anticipated. Those officers must go before the board. Some officers will have missed the selection board for which they should have been eligible. Those officers will compete in the next scheduled board and if selected, will receive back DOR's as if they had been selected the year they should have been eligible. Some officers have been selected for lieutenant but not yet promoted. Those officers will be given new back DOR's for lieutenant (junior grade) and subsequently, will also receive back DOR's for lieutenant. Some officers will merely be 18 months closer to their next selection board and the correction will have little impact.

3. You were commissioned in the Coast Guard Reserve as a lieutenant (junior grade) with a DOR of [April 26, 1999]. In order to reflect a total of three years service in an active status, your DOR will be adjusted to [October 26, 1997]. This adjustment would have placed you in zone for promotion to lieutenant in September 1999. Your record will appear before the lieutenant selection board in September 2001. If selected, your LT DOR will be [October 26, 2000] which it would have been had you been selected by the lieutenant selection board held in September 1999.

4. The correction of this administrative error is an entitlement, which cannot be refused or delayed. ...

SUMMARY OF THE RECORD

On March 31, 1997, the applicant accepted a commission and signed an oath of office to become a LTJG (O-2) in the Reserve. On the same day, he signed a four-year extended active duty contract. He had prior military service in several branches of the Armed Forces and had been discharged from the Army Reserve as a First Lieutenant (O-2) the day before, March 30, 1997. From March 31, 1997, to June 12, 1998, he served as a “staff attorney” in the xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

enable[d] the service to assign the member to a precedence on the promotion list three years ahead of where that officer would have otherwise stood had they [sic] not been recruited specifically to serve as law specialists.”

CGPC stated that the applicant was initially credited with 18 months of constructive service when he received his commission on March 31, 1997. The administrative error acknowledged by the Chief Counsel in April 2001 meant that the applicant’s DOR “upon initial appointment should have been equivalent to the precedence of a LTJG with 18 months of service.” Therefore, the applicant’s DOR as a LTJG was backdated by 18 months to September 30, 1995. CGPC stated that, had the applicant originally received this DOR, “he would have been placed in zone for consideration for promotion to LT in September 1997.” Backdating his DOR as a LT to September 30, 1998, “not only awarded the additional 18 months constructive active service credit required, but also reflected the appropriate date of rank had Applicant competed on the LT selection board in September 1997.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 20, 2004, the BCMR sent the applicant a copy of the Chief Counsel’s advisory opinion and invited him to respond within 30 days. The applicant requested an extension of 22 days and responded on September 9, 2004.

The applicant argued that although 14 U.S.C. § 727 (1997) “[did] not specifically indicate the rank of accession, the Coast Guard has resumed the correct interpretation of this statute to mean that ... one who is accessed thru the Direct Commission Lawyer (DCL) program be commissioned in the rank of lieutenant. There is no other practical means to apply the statute.” The applicant pointed out that in BCMR Docket No. 2002-012, the Board acknowledged that “the constructive credit provision of 14 USC 727 comported with DCLs being appointed as lieutenants.”¹

¹ In BCMR Docket No. 2002-012, the applicant was already a Reserve officer with more than three years of service when he became a law specialist. He argued that under 14 U.S.C. § 727, he was entitled to an additional three years of constructive service credit. The Board denied his request, finding that under 14 U.S.C. § 727, only individuals appointed as law specialists were entitled to the credit, whereas the applicant had been appointed an officer years before and did not resign his commission to be reappointed as a law specialist. In finding 7 of the decision, the Board noted the following:

7. The Commandant, by delegation of the Secretary, issued COMDTINST 1131.23, which addresses credit to be given for those receiving a direct appointment in the Coast Guard. The regulation permitted law graduates to apply for a Reserve appointment at the rank of lieutenant, thereby giving them active service credit for years they would normally have spent in the grades of ensign and lieutenant junior grade. For these officers, the instruction states that the date of rank for appointment under the DCL program shall be the date of appointment. Neither the law nor the regulation requires law specialists to be given credit for time already spent in the Reserve if reappointed under the DCL program, and the applicant has not presented any law or regulation to

The applicant argued that COMDTINST M1100.2D, relied on by the Coast Guard, did not go into effect until March 23, 1999, two years after his appointment. He stated that “[a]rguably, COMDTINST 1131.23 with an effective date of January 6, 1993 was controlling because it was not officially cancelled. That instruction correctly applied 14 USC 727 by appointing DCLs as lieutenants.” He noted that after acknowledging its error in April 2001, the Coast Guard resumed the practice of commissioning DCLs as lieutenants.

Furthermore, the applicant argued that the Coast Guard’s interpretation of the statute is disingenuous and impractical as it “would result in an individual being commissioned a lieutenant junior grade and eligible for promotion review shortly upon accession as a DCL.” The applicant argued that although the Coast Guard adjusted his LT DOR back 18 months to September 30, 1998, the right correction would have been to adjust it back to his date of commissioning, March 31, 1997. “By not doing so, the Coast Guard in effect has allowed DCLs commissioned after [him] to be eligible for promotion on a quicker timeline. The correct remedy would have made me eligible for [promotion to LCDR] in 2002 vice 2003.”

The applicant also argued that the Coast Guard’s assertion that it did not discover the error until 2001 is erroneous because he himself formally communicated with the Chief Counsel about the issue in 1998.

Finally, the applicant noted that he has already been promoted to LCDR. Therefore, he asked only that his DOR as LCDR be backdated by one year to August 1, 2003, to “reflect the fact that had the Coast Guard properly commissioned [him] initially [as a LT], [he] would have been eligible for promotion to [LCDR] in 2003 vice 2004.” The applicant stated that if the Board agrees with this proposition, he would forgo “any claim to additional back pay as a lieutenant.”

APPLICABLE LAW

Title 14 U.S.C. § 727, titled “Constructive credit upon initial appointment,” states that “[u]nder regulations prescribed by the Secretary, a person, appointed as a Reserve officer, may be assigned a date of rank and precedence which reflects that person’s experience, education, or other qualifications. [A] person appointed for the purpose of assignment or designation as a law specialist in the Reserve shall be credited with a minimum of three years service in an active status.”²

the contrary. See *Dock v. United States*, 46 F.3d 1083, 1086 (Fed. Cir. 1995) (stating that the “rights and benefits of a member of the military services, including pay and allowances, are defined by statute”).

² In 2004, the credit was reduced to one year. Pub. L. 108-293, Title II, § 208, 118 Stat. 1035 (Aug. 9, 2004).

Commandant Instruction 1131.23, which went into effect on January 6, 1993, contained the regulations for the Coast Guard's direct commission programs. Paragraph 10.a. of the instruction concerns the direct commissioning of law school graduates as lawyers in the Coast Guard Reserve and provides that “[u]nder this program, graduates of accredited law schools may apply for appointment in the Coast Guard Reserve at the rank of lieutenant. The date of rank shall be the date of appointment to commissioned status in the Coast Guard Reserve.”

Paragraph 5.M.1.a. of Commandant Instruction M1100.2C, the Recruiting Manual in effect in 1997,³ stated that “[q]ualified law school graduates are commissioned in the Coast Guard Reserve as lieutenants to serve as lawyers.”

In 1994, COMDTINST 1131.23 was amended by a memorandum dated September 14, 1994, from the Chief of the Military Personnel Division to the Chief of the Office of Personnel and Training, who approved a proposal to require DCLs to be commissioned as LTJGs rather than LTs. This amendment was incorporated in the new Recruiting Manual issued in 1999. The rationale for the amendment was attached in a memorandum by the Chief Counsel dated August 18, 1994, who stated the following in pertinent part:

1. Acting upon the recommendation of my Quality Management Board, I have concurred in a proposal to commission Direct Commission Lawyers (DCLs) as lieutenants (junior grade) (OD) rather than full lieutenants (O3). This change in policy, should you approve, would improve the DCL's ability to compete with Academy and OCS officers for promotion and operational assignments, the benefits of which will flow not only to the DCLs, but to the Coast Guard as a whole.
2. Currently, DCLs first compete for promotion on a best-qualified basis (to O4) after approximately 5 years [of] commissioned service. They compete primarily against officers with 9 years [of] commissioned service—a 4 year (8 OER) differential. In a few cases, this has disadvantaged the DCL; more often it has created the perception of disadvantage. Shifting the DCL accession grade to O2 would reduce the experience differential at the first best-qualified promotion board (to O3) to only 18 months (3 OERs), thus minimizing the DCLs' disadvantage of not entering the service as Ensigns. DCLs also would benefit from the higher stated opportunity for selection to O3 than O4.
3. Because DCLs now enter as O3's, they compete for their second assignments after 4 years in service as senior O3's likely to be promoted to O4 midway through that tour. Consequently, they have seniority without experience, which disadvantages them in seeking out of specialty operational assignments. And if, for whatever reason, they do not obtain out of specialty second tour assignments, at the third tour point (mid-grade O4) their seniority very nearly forecloses them from obtaining career-enhancing out of specialty assignments. This situation would be alleviated by shifting the DCL accession

³ As alleged by the applicant, the version of the Recruiting Manual relied on by the Coast Guard, COMDTINST M1100.2D, did not go into effect until 1999.

grade to O2. ... DCLs would be starting their second assignments as brand new O3's—four years more junior than at present. Officers this junior should have no difficulty obtaining assignment to O2 or O3 operational tours

Under Article 5.A.5. of the Personnel Manual, an ensign becomes eligible for promotion to the grade of LTJG after completing 1 year of active duty as an ensign. The ensign must be selected by a “fully qualified” selection board and the selection must be approved by the Commandant. Article 5.A.5.f.1. provides that following selection by the first board to review his record “an ensign eligible for promotion may be promoted to lieutenant (junior grade) without regard to vacancies on the day after he or she completes 18 months of active service.”

Under Article 5.A.4.a. of the Personnel Manual, an officer “becomes eligible for consideration for promotion to the next higher grade at the beginning of the promotion year in which he or she completes the following amount of service computed from date of rank in the grade in which serving:

Grade In Which Serving	Length of Service [in Grade]
Lieutenant (junior grade)	2 years [for eligibility for promotion to LT]
Lieutenant	3 years [for eligibility for promotion to LCDR]

Under Article 5.A.4.g.4. of the Personnel Manual, promotions for LTJGs selected for LT are effected as follows:

a. After Selection by First Board. A lieutenant (junior grade) eligible for promotion may be promoted to the grade of lieutenant without regard to vacancies on the day after completing 36 months of service in grade.

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 requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. Title 14 U.S.C. § 727 provides that “a person appointed for the purpose of assignment or designation as a law specialist in the Reserve shall be credited with a minimum of three years service in an active status.” The applicant and the Coast Guard have indicated that he was appointed for the purpose of assignment or designation as a law specialist, and the record indicates that he was in fact designated a law specialist.

Therefore, under the statute, upon his commissioning in 1997, he should have been credited with three years of active service. The record indicates that in 2001, the Chief Counsel of the Coast Guard determined that the applicant and certain colleagues had only been credited with 18 months of active service upon commissioning. Therefore, they were credited with an additional 18 months of active service. The applicant, who had been commissioned on March 31, 1997, had his DOR as a LTJG backdated to September 30, 1995, and his DOR as a LT backdated to September 30, 1998. In addition, the Coast Guard has apparently resumed the practice of commissioning law specialists in the rank of LT.

4. The applicant alleged that according to regulation, he should have been commissioned as a LT. However, the record indicates that in 1994, with the Chief Counsel's approval, the Chief of the Office of Personnel and Training amended COMDTINST 1131.23 to have new law specialists commissioned as LTJGs in order to enhance their competitiveness for out-of-specialty assignments and subsequent "best qualified" promotions. Therefore, the applicant's appointment as a LT did not violate the regulation.

5. The applicant alleged that under 14 U.S.C. § 727, he was entitled to be commissioned as a LT. However, as the Coast Guard argued, the statute only requires an award of three years of constructive active service credit. Under Article 5.A.5.f.1. of the Personnel Manual, an officer must have served as an ensign for at least 18 months before he can be promoted to LTJG. Under Article 5.A.4.g.4. an officer must serve as a LTJG for at least 36 months before being promoted to LT. Therefore, officers who have exactly three years (36 months) of active service are normally officers who (a) have been LTJGs for 18 months; (b) under Article 5.A.4.a., will soon be considered for promotion by a LT selection board; and (c) even if selected, must remain LTJGs for another 18 months. The Board finds that the applicant has not proved by a preponderance of the evidence that the language in 14 U.S.C. § 727 entitled him in 1997 to be commissioned as a LT.

6. The applicant has not proved that the Coast Guard violated 14 U.S.C. § 727 or its own regulations in commissioning him as a LTJG in 1997. The Board, however, is not limited to correcting legal errors in members' records, but may also remove injustices. "Injustice" is "treatment by the military authorities that shocks the sense of justice, but is not technically illegal."⁴ The applicant complained that the Coast Guard has committed an injustice in refusing to backdate his DOR as a LT to his date of commissioning because law specialists commissioned before 1994 and after April 2001 have been commissioned as LTs. He argued that "the Coast Guard in effect has allowed DCLs commissioned after [him] to be eligible for promotion on a quicker timeline."

⁴ See *Reale v. United States*, 208 Ct. Cl. 1010,1011 (1976); Decision of the Deputy General Counsel, BCMR Docket No. 2001-043.

7. It is true that, under Article 5.A.4.a. of the Personnel Manual, DCLs commissioned as LTs become eligible⁵ for selection for promotion to LCDR within three years of commissioning—much sooner than the applicant and his colleagues who were commissioned as LTJGs. However, as shown in the Chief Counsel’s memorandum of August 18, 1994, being commissioned as a LT may have significant drawbacks and negative consequences for an officer’s career. DCLs who, like the applicant, were commissioned as LTJGs between 1994 and 2001 may well have reaped the potential benefits outlined in that memorandum. Although the Chief Counsel apparently concluded in 2001 that the needs of the Service were best served by commissioning DCLs as LTs, this does not prove that the Coast Guard committed an injustice by correcting its 1997 error (in awarding him only 18 months of constructive service upon commissioning) by awarding him another 18 months so that he would have a total of 36 months of constructive service, as required by 14 U.S.C. § 727, instead of by adjusting his DOR as a LT to his date of commissioning. The Board finds that the applicant’s commissioning as a LTJG and his dates of rank, as corrected in 2001, do not constitute “treatment by the military authorities that shocks the sense of justice.”⁶

8. Accordingly, the applicant’s request should be denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

⁵ Although LTs may technically be eligible for promotion to LCDR within 3 years under Article 5.A.4.a. of the Personnel Manual, the Board notes that they may not be considered “in zone” for promotion for a few more years. See Coast Guard Personnel Manual, Article 5.A.4.c.

⁶ *Reale*, at 1011.

ORDER

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

(recused)*

Stephen H. Barber

Adrian Sevier

Thomas H. Van Horn

*This Board member recused himself from deliberating and deciding this case because he has worked with the applicant. Under 33 C.F.R. 52.11(b), the two remaining members constitute a quorum of the Board.