

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-001

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXX, LT

FINAL DECISION

AUTHOR: Ulmer, D.

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 on October 7, 2005, upon receipt of the applicant's completed application and military records.

This final decision, dated July 13, 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, a member of the Coast Guard Reserve, requested that a special selection board consider her for promotion to lieutenant commander (LCDR). She further requested that if selected by the special selection board that her LCDR date of rank be adjusted to the date she would have received if she had been selected by the calendar year 2005 inactive duty promotion list (IDPL) LCDR selection board, with back pay and allowances.

The Coast Guard has no statutory authority to hold special selection boards.¹ Therefore, the BCMR will treat the applicant's request as one for the removal of her failure of selection, if any is denoted in her record, and the placement of her corrected record before the next IDPL LCDR selection board as an officer who has not failed of selection for promotion to that grade. The BCMR will further consider that if the

¹ See advisory opinion *infra*.

applicant is selected for promotion to LCDR by the next IDPL selection board, that her date of rank be adjusted retroactively to the date she would have had, if she had been selected by the 2005 promotion board, with back pay and allowances.

APPLICANT'S ALLEGATIONS

The applicant alleged that the Coast Guard committed an error by not adding her name to the list of candidates that were considered for promotion to LCDR by the calendar year 2005 IDPL promotion board, although CGPC had informed her that her name would be added to that list. She asserted that due to this error, she did not have an opportunity to be selected and promoted to LCDR in 2005. The applicant had been on an extended active duty (EAD) contract, which ended on July 31, 2005. The selection board met on August 15, 2005.

VIEWS OF THE COAST GUARD

On February 21, 2006, the Judge Advocate General (JAG) submitted an advisory opinion recommending that the Board grant alternative relief to the applicant. The JAG admitted that the Coast Guard committed an error by not submitting the applicant's record to the 2005 IDPL selection board. The JAG stated the following:

Applicant's record should have been considered by the [2005] IDPL LCDR Promotion Board. Applicant was eligible for selection based upon the following facts: (1) she was released from active duty into a reserve status on 31 July 2005; (2) the board convened on 15 August 2005; (3) her date of rank was 22 March 2000; and (4) the date of rank of the most junior officer considered for promotion was 20 April 2001 . . . this error occurred despite Applicant's efforts to ensure that her record was screened. Therefore it is reasonable to conclude that Applicant has presented sufficient evidence of an administrative error by the Coast Guard to rebut the presumption of regularity afforded government officials.

The JAG stated that Coast Guard policy does not provide for convening special selection boards or back pay and allowances for a Reserve officer not considered by a IDPL selection board due to administrative error. The JAG stated that the proper remedy for such cases as applicant's is found under Article 7.A.7.b. of the Reserve Policy Manual, which states, as follows:

A Reserve officer is not considered to have failed selection if the officer was not considered by a selection board due to administrative error.

(1) If the officer is selected by the next appropriate selection board after the error is discovered, and is promoted, then the date of rank and precedence on the IDPL shall be assigned that would have been assigned if the officer had been recommended for promotion by the selection board that originally would have considered the officer but for the error (14 U.S.C. 739(b)).

(2) However, such officer's *date of appointment, which is the effective date that pay and allowances in the higher grade begins, cannot be backdated*. The date of appointment is that date the Secretary exercises promotion authority regardless of how much later that date may be than the date of rank.

The Coast Guard recommended that the applicant's record be corrected to delete any references to the non-selection by the 2005 IDPL LCDR Promotion Board; that her record should go before the 2006 IDPL LCDR Promotion Board; that if she is selected for LCDR she be assigned the same date of rank and precedence on the IDPL that she would have had if she had been selected for promotion by the 2005 IDPL LCDR Promotion Board; and that she not receive a backdated date of appointment or back pay and allowances.

However in a supplemental advisory opinion, the JAG offered a point of clarification on its comment: "Applicant may not receive a backdated date of appointment or back pay and allowances. Her date of appointment and effective date of any increased pay and allowances should be determined by the date on which the Secretary exercises promotion authority." In this regard, the JAG offered the following:

[T]he Coast Guard policy contained in the Reserve Policy Manual does not prevent the Board for Correction of Military Records or the Secretary from providing the remedy of back pay and allowances to the applicant if she is entitled to it. The Secretary, acting through the Board, has the statutory authority under 10 U.S.C. § 1552(c) to pay a claim for loss of pay or allowances if it is found to be due the claimant when correcting a military record. As another option, the Secretary may adjust the date of appointment, which is the effective date of pay and allowances in the higher grade, when he exercises promotion authority in Applicant's case, if she is selected for promotion by the [calendar year 2006] IDPL LCDR promotion board. [See 14 U.S.C. § 736(c)].

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 22, 2006, the original advisory opinion was sent to the applicant and on March 15, 2005, the supplemental advisory opinion was sent to the applicant. The BCMR did not receive a reply from the applicant to either mailing.

FINDINGS AND CONCLUSIONS

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

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code. The application was timely.

2. The calendar year 2005 IDPL LCDR selection board did not consider the applicant's record due to an administrative error, i.e. the Coast Guard failed to place her name on the list of candidates being considered for promotion to LCDR by the 2005 IDPL promotion board. The Coast Guard concedes the error.

3. The applicant's request for a special selection board cannot be granted since the Coast Guard does not have the statutory authority to convene such boards.² However, the applicant is entitled to the relief normally granted in these situations, which is the removal of the 2005 failure of selection for promotion, if any, from her record, and if selected for promotion by the calendar year 2006 IDPL LDCR selection board, her date of rank, once promoted, will be adjusted retroactively to the date she would have received if selected by the 2005 selection board, with back pay and allowances.³ The Coast Guard agreed that the applicant should have relief, but did not initially recommend back pay and allowances for the applicant under the mistaken belief that Article 7.A.7b. of the Reserve Policy Manual⁴ prevented the Board from awarding the back pay owed to the applicant as a result of correcting her record. However, the JAG subsequently issued a point of clarification on the back pay issue. In the clarification, the JAG stated that under 10 U.S.C. § 1552(c)⁵ the Secretary acting through the Board has the authority to award back pay that is owed as a result of a record correction.⁶

² In BCMR No. 2001-016, the Board also noted, based on advice from the Judge Advocate General, that the Coast Guard did not have statutory authority to hold special selection boards

³ Section 739(b) of title 14 of the United States Code states that a Reserve officer whose record was not considered by a selection board due to administrative error but who is selected by the next selection board, once promoted, shall have the same date of rank and precedence that would have been assigned if selected by the that Board that would have considered the officer but for the error.

⁴ Article 7.A.7(b)(2) of the Reserve Policy Manual states that an officer's date of appointment (under the provision of 14 U.S.C. 739(b)), which is the effective date that pay and allowances in the higher grade can begin, cannot be backdated. This provision of the Manual further states that the date of appointment is that date the Secretary exercises promotion authority regardless of how much later that date may be than the date of rank.

⁵ Section 1552(c) of title 10 of the United States Code authorizes the Secretary to pay money owed as a result of a record correction from current appropriations.

⁶ The JAG also recognized that under 14 U.S.C. 736(c), the Secretary may adjust a date of appointment as a matter of equity. This provision of the law states in pertinent part: ". . . the date of appointment shall

4. By way of information, the Board has directed back pay and allowances in similar cases, often with the agreement of the Coast Guard. For instance in BCMR No. 2001-040, the applicant's record was not considered by the 1999 lieutenant selection board due to administrative error. He was selected the next year. The Coast Guard itself adjusted that applicant's date of rank retroactive to the date he would have had if he had been selected by the earlier board and directed the applicant to apply to the BCMR for back pay and allowances with a favorable recommendation for relief.

5. Accordingly, the applicant is entitled to the partial relief directed below.

[ORDER AND SIGNATURES ON NEXT PAGE]

be that date when promotion authority is exercised by the Secretary. However, the Secretary may adjust the date of appointment . . . for any . . . reason that equity requires."

ORDER

The application of LT xxxxxxxxxxxxxxxxx, USCGR, for correction of her military record is granted in part, as follows:

(1) The Coast Guard shall ensure that all references, if any, to a failure of selection before the calendar year 2005 IDPL LCDR promotion board are removed from the applicant's record.

(2) The applicant's record shall be placed before the calendar year 2006 IDPL LCDR promotion board. If she is selected for promotion by that selection board, her LCDR date of rank, once promoted, shall be adjusted retroactively to the date she would have been assigned if she had been selected by the 2005 selection board, with back pay and allowances.

All other relief is denied.

Philip B. Busch

Dorothy J. Ulmer

Richard Walter

