

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-030

XXXXXXXXXXXXXXXXXX
XXXXXXXXXX, 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 case on December 16, 2005, upon receipt of the completed application and military records.

This final decision, dated August 31, 2006, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to place her military record before a special Reserve Program Administrator (RPA)¹ lieutenant commander (LCDR) selection board. She alleged that the calendar year 2005 LCDR RPA selection board² that considered her record was not constituted as required by law or Coast Guard policy. The RPA selection board convened on September 6, 2005.

The applicant alleged that the 2005 RPA LCDR selection board was illegal because only two of the five members were RPAs. She stated that three of five should

¹ RPAs are Coast Guard Reserve officers who are assigned to extended active duty to organize, administer, recruit, instruct, or train Coast Guard Reserve components. See Article 1.B.3.a. of the Personnel Manual.

² Also referred to as the promotion year 2006 [PY2006] selection board.

have been RPAs, as required by Article 14.A.12.b. of the Personnel Manual. This provision states as follows:

A board convened to consider RPAs for promotion to the next higher grade shall consist of five or more officers serving in or above the highest grade to which the board may recommend officers for promotion. Three members shall be RPAs. If enough are not available to satisfy this requirement, Commander (CGPC-opm) may reduce the number of RPA members, but the board must have at least one RPA. If no Reserve officer serving on active duty is senior to all officers under consideration, Commander (CGPC-opm) may recall to active duty a retired Reserve officer or one serving on inactive duty senior to all officers the board will consider to serve on the board.

The applicant argued that there were more than enough available RPAs to satisfy the requirement that three of the five members on the selection board be RPAs. In this regard, she alleged that there were a total of twelve RPA captains eligible to serve on the RPA selection board. Six were RPA active duty captains that she referenced by name, including one of two who actually served on the RPA selection board. (The other RPA who actually served on the selection board is not included in the applicant's total of those eligible for the 2005 board. She alleged that this officer was ineligible for the 2005 board because he served on the 2003 board that considered the record of an officer who was also before the 2005 selection board for promotion to the same grade.) The other six officers that she stated were eligible to serve on the selection board were retired RPA captains that the Coast Guard could have recalled to active duty for service on the selection board, rather than calling a drilling reservist to active duty. She referenced each of the retired RPAs by name. The applicant argued that the Coast Guard's decision not to appoint any of the eleven RPAs that she claimed were eligible to serve on the selection board was arbitrary, capricious, or contrary to law. In this regard, she argued that the Court of Appeals for the Federal Circuit held in *Godwin v. United States*, 33 F.3d 1374 (Fed. Cir. 2003) that the Correction Board's decision upholding the Coast Guard's determination that a soon-to-retire RPA officer was "not available" to serve on the RPA selection board was arbitrary, capricious, or contrary to law.

The applicant compared the RPA selection board to the admiral selection in that there are a limited number of senior admirals available for service on admiral selection boards. She stated that admirals are ordered to serve on selection boards without regard to their availability due to their limited numbers. She argued that the Coast Guard should order RPAs to serve on selection boards in the same manner that it directs admirals to serve on admiral selection boards.

As mentioned above, the applicant alleged that the calendar year 2005 RPA selection board also violated 14 U.S.C. § 252 and Article 14.A.10.b. because one member

of the selection board had served on a previous board (the calendar year 2003 selection board) and had reviewed the record of an officer who was before the 2005 captain selection board. She stated that Article 14.A.10.b. of the Personnel Manual states in pertinent part: "... No officer may be a member of two successive boards convened to consider officers of the same grade for promotion." She named the candidate (a CDR, not the applicant) whose record was reviewed by the member who sat on both the 2003 and 2005 selection boards. The applicant acknowledged that the selection board member did not serve on two successive boards, but she argued the intent of the law was to allow anyone going before the selection board to be on a level playing field. She stated that the CDR was not on a level playing field because one of the members of the 2005 selection board had considered him for promotion to captain in 2003.

The applicant further alleged that the RPA selection board was unfairly constituted because the opportunity of selection for the RPA LCDR selection board was inaccurate and not in accordance with Coast Guard regulation. In this regard, she argued that the selection board used an incorrect opportunity of selection. She quoted the following from Article 5.A.6.e.2. of the Personnel Manual:

The opportunity of selection at each grade will compare to that grade's opportunity during the most recent ADPL selection board. The computed opportunity of selection for each grade, lieutenant and above, shall be determined as follows:

If RPAs going before the selection board include only first-time candidates and those who once failed of selection for promotion to the grade being considered, the percentage is the total number of ADPL officers selected for promotion, divided by the total number of ADPL officers considered for promotion to that grade in the ADPL zone plus the number of officers above the ADPL zone who have been once not selected. Fractions of a percentage shall be rounded to the next higher number.

The applicant argued that for LCDR RPAs the opportunity for selection should have been a minimum of 77% and not 71.4%. The applicant calculated that 77% times 7 RPA LCDRs that were considered by the selection board equaled 5.39, which she rounded to 6. She stated that in accordance with Article 5.A.6.e.2. of the Personnel Manual fractions of a percentage are rounded to the next higher number. She argued, therefore, that based on her calculation, 6 of 7 LCDR RPAs should have been selected rather than 5 of 7. The applicant's figure of 77% opportunity of selection was derived as follows:

The total number of ADPL officers selected for promotion for the [2005] LCDR selection board was 234 (includes in zone an above zone). The total number of ADPL officers considered for promotion to that grade in the

ADPL zone was 267 (in zone only). The number of officers above the ADPL zone who have been once not selected was 37. (Out of the 54 above zone, 37 were not selected only once). Therefore, 234 divided by 267 plus 37 equals 76.9% or 77% ($234 / (267 + 37)$) . . .

The applicant stated that the opportunity of selection for the ADPL LCDRs before the calendar year 2005 selection board was 86% and for RPA LCDRs it was 71.4%, which she suggested denoted the unequal treatment of RPAs. She stated that section 276 of title 14 of the United States Code provides that as nearly as possible, under regulations established by the Secretary, RPAs will be selected and promoted in the same manner and will be afforded equal opportunity for promotion as officers of the corresponding ADPL.

IEWS OF THE COAST GUARD

On May 18, 2006, the Judge Advocate General (JAG) submitted an advisory opinion recommending that the Board deny the applicant's request. In this regard, the JAG stated that the applicant failed to carry the burden of production and persuasion in showing that the Coast Guard committed a legal error by having only two RPA officers on the calendar year 2005 RPA selection board.

The JAG noted that the regulation states that at least three members of the RPA selection board should be RPAs. However, if enough RPAs are not available to satisfy this requirement, CGPC may reduce the number of RPAs to not less than one. The JAG stated that since the Personnel Manual does not define availability, the determination of whether an RPA is available is within the discretion of Coast Guard officials. In this regard, the JAG offered the following:

(3) In the case at hand, CGPC had seven RPAs at the rank of Captain serving on active duty who were eligible to serve on the selection board. CGPC determined that five of them were unavailable for the following reasons: One officer had operational commitments at her command; three officers were involved in response operations following Hurricane Katrina; and one officer had operational commitments in support of Operations Iraqi Freedom; the two remaining RPAs served as members of the selection board.

(4) Applicant claims that the discretionary determination made by CGPC regarding the unavailability of the five eligible RPAs was arbitrary, capricious, or contrary to law. She cites the Court's holding in *Godwin v. United States*, 338 F.3d 1374 (Fed. Cir. 2003) in support of her argument, yet provides no analysis to explain the relevance of that case to her alleged error.

(5) Contrary to Applicants assertion, the *Godwin* case supports the legality of CGPC's decision regarding the availability of RPAs for the [calendar year 2005] selection board. In *Godwin*, the Coast Guard determined that ten of the twelve eligible RPA officers on active duty were not available to serve as members of the Py94 (promotion year 1994) RPA Selection Board for the following reasons: Three officers served on the previous year's board; one officer was being considered for continuation by the same selection board; one officer's record was inadequate; two officers were too junior and classmates of the candidate being considered by the board; *two officers had schedule conflicts*; and one officer was scheduled to retire. *Id.* at 1378. The court found only one of the six reason used by the Coast Guard to determine availability to be arbitrary, capricious, or contrary to law. The court held that the "Coast Guard's determination that a soon to retire RPA officer was "not available" to serve was arbitrary, capricious, or contrary to law[,] because the reason was inconsistent with PERSMAN Art. 14.A.12b. *Id.* at 1379. If allowed to stand, the reason used by the Coast Guard could have resulted in a situation where a retired or inactive RPA officer might be used as a board member instead of a soon-to-retire RPA on active duty. *Id.* at 1379. In the case at hand, CGPC's decision that five officers were unavailable because of operational commitments was not arbitrary, capricious, or contrary to law, because it was consistent with [Article 14.A.12.b. of the Personnel Manual].

The JAG also stated that the applicant failed to prove that the Coast Guard committed an error by having the same officer serve on the calendar year 2003 and the calendar year 2005 selection boards. The JAG argued that none of the authorities cited by the applicant to prove this allegation applies to RPA selection boards.

In this regard, the JAG stated that Article 14.A.10.b. of the Personnel Manual that prohibited officers from serving on two successive selection boards applies only to ADPL boards. He noted that in the *Godwin* case the Coast Guard relied on this provision for finding three RPAs unavailable because they had served on the previous year's board, even though the provision does not apply to RPAs. In the case at hand, the JAG stated that the officer in question served on the 2003 and 2005 RPA boards, rather than on the previous years board. The JAG stated that Article 14.A.12.b. of the Personnel Manual applies to RPAs and it contains no provisions against officers serving on two successive RPA selection boards. Moreover, the JAG noted that Paragraph 4.b. of Commandant Instruction 1401.1, entitled "Coast Guard Active Duty Officer Promotion Boards" clearly states that RPAs "are governed by 14 U.S.C. § 276, and so *are not covered by this instruction* (emphasis added)."

The JAG stated that the applicant failed to prove that the Coast Guard committed legal error with respect to the opportunity of selection to LCDR by the 2005 RPA selection board. The JAG stated that 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 at 1037. The JAG stated that Coast Guard officials calculated the opportunity of selection for the 2005 ADPL board as stated in a memorandum from the Commander, Coast Guard Personnel Command (CGPC), attached as Enclosure (1) to the advisory opinion, which stated in pertinent part as follows:

There were 267 officers in zone on the LCDR ADPL Board. Since the RPA board had one above zone officer who had failed selection only once, all ADPL officers that had failed selection once were included in the calculations. This number was 45. The number set forth by the applicant of 37 is incorrect. {Note: *The number of above zone candidates is not published to the field at large, nor is it published in any ADPL promotion board results message.*} The number to select was 234. Therefore, 234 divided by the sum of 267 plus 45 (312) equals 75 percent computed opportunity of selection.

The JAG stated that the applicant used the wrong authority in determining the number of RPAs who may be selected by the calendar year 2005 selection board. According to the JAG, the correct provision of the Personnel Manual for this determination is Article 5.A.6.f. of the Personnel Manual, which states, "[i]n applying the computed percentage, a fraction of five-tenths or greater shall be counted as a whole number." The JAG stated that the provision of the Personnel Manual, Article 5.A.6.e.2., cited by the applicant is used to determine the opportunity of selection and not the number to of RPAs to be selected.

The JAG concluded the advisory opinion by stating that the applicant had failed to prove that the Coast Guard committed an error or injustice in her case and therefore it was not necessary to reach the issue of whether her failures of selection for promotion to LCDR should be removed.

CGPC's memorandum, which is part of the advisory opinion, offered the following explanation as to the membership of the calendar year 2005 RPA selection board, which met on September 6, 2005:

-Until September 1, 2005, there were three RPAs slated to be members of the board.

-On September 1, 2005, one of the RPAs scheduled to serve on the selection was directed to proceed to in support of Hurricane Katrina response operations and was not available to serve on the selection board.

-There were four other RPAs on active duty at the rank of captain but were unavailable to serve on the selection board for the following reasons: one was unavailability due to operational commitments at her command in Hawaii; one was unavailable due to operational commitments in the Middle East in support of Operation Iraqi Freedom; and two were unavailable due to Hurricane Katrina response efforts.

-Since the RPAs discussed above were unavailable, the Coast Guard sought to use a Reserve officer on active duty. There was only one qualified Reserve captain serving under an extended active duty agreement at the time of the board. He was determined to be unavailable due to operational commitments at his foreign duty assignment in Mexico.

-Therefore, a captain who drilled in the Ready Reserve was brought on active duty to serve on the RPA selection board.

-On September 6, 2005, the RPA selection board membership consisted of two RPAs, two ADPL officers, and one Reservist.

GCPC stated that Coast Guard policy does not specify that a Reserve officer should be recalled from retirement prior to using one on inactive duty. CGPC further stated that there is no prohibition against a member sitting on a board who has previously considered a candidate, but that the member cannot sit on two successive boards. The member of the selection board about which the applicant complains, sat on the 2003 and 2005 boards. CGPC argued these were not successive boards.

With respect to the calculations for the opportunity of selection, again CGPC stated the following:

There were 267 officers in zone on the LCDR ADPL board. Since the RPA board had one above zone officer who had failed selection only once, all ADPL officers that had failed selection once were included in the calculations. This number was 45. The number set forth by the applicant of 37 is incorrect. {Note: the number of above zone candidates is not published to the field at large, not is it published in any ADPL promotion board results message.} The number to select was 234. Therefore 234 divided by the sum 267 plus 45 (312) equals 75 percent computed opportunity of selection.

* * *

Per 5.A.7.f. the calculated percentage of 7 percent is multiplied by the total number of officers that the board may consider in and above zone, which is 7 in the present case. 75 percent of 7 is equal to 5.25. Per the second

sentence of 5.A.7.f., a fraction of .5 or greater shall be counted as a whole number. Since .25 is not greater than .5, the number to select is rounded down from 5.25 to 5.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 7, 2006, the BCMR received the applicant's reply to the advisory opinion. The applicant reasserted that the regulation required that three members of the RPA selection board be RPAs. The applicant recognized that the regulation also allowed for this number to be reduced to at least one if enough RPAs were not available and that the Coast Guard could recall retired Reserve officers to active duty or Reserve officers serving on inactive duty to active duty to serve on the RPA board, as long as they were senior to all officers being considered.

The applicant stated, however, that the intent of the policy is to have a majority of the selection board members be RPAs because of their familiarity with the duties and responsibilities of an RPA, as well the RPA culture. She argued therefore that it would have been more compatible with the intent of the policy to recall to active duty some of the six retired RPAs rather than having ordered a drilling reservist to active duty to serve on the selection board.

The applicant restated her argument that the calendar year 2005 RPA selection board was illegally constituted because one of its members served on the board in 2003 and had considered one of the candidates who was also before the 2005 selection board. She stated that the Coast Guard's argument that 14 U.S.C. § 252 does not apply to RPAs but only to the ADPL is incorrect. This provision of the law states "no officer may be a member of two successive [ADPL] selection boards convened to consider officers of the same grade for promotion." The applicant argued that the provision does apply to RPA selection boards because such officers are on the ADPL list. The applicant further stated that the intent of Coast Guard policy is to ensure that all officers are on a level playing field, as evidenced by the fact that the Coast Guard does not make a distinction between above and in zone officers. However, she argued the playing field was not level in the case of one officer before the calendar year 2005 board because a member of the selection had considered him for promotion to the same grade in 2003.

The applicant stated that she compared the calendar year 2004 ADPL LCDR candidate list with the calendar year 2005 ADPL LCDR candidate list and arrived at 37 officers who had failed once. (In contrast, the Coast Guard stated that there were 45 officers on the ADPL in this category who were considered by the 2005 ADPL board).

The applicant also stated that the officers before the 2005 RPA LCDR selection board were not afforded equal selection opportunity for promotion with the officers on the 2005 ADPL LCDR selection board, as required by 14 U.S.C § 276. The applicant

stated this provision of the law governs RPAs and states as follows: "Officers who are not included on the active duty promotion list may be promoted under regulations to be prescribed by the Secretary. **These regulations shall**, as to officers serving in connection with organizing, administering, recruiting, instructing, or training the reserve components, **provide as early as practicable, that such officers will be selected and promoted in the same manner and will be afforded equal opportunity for promotion as officers of the corresponding grade on the active duty promotion list.**" (Emphasis added by applicant.) In this regard, the applicant stated that based on her calculation, the opportunity of selection for promotion to LCDR for RPAs in 2005 (71%) was not comparable to the opportunity of selection for the ADPL (86%). Therefore, according to the applicant, RPAs were treated differently than ADPL officers.

The applicant further argued that RPAs are treated differently because there is no continuation board for those officers who are twice passed over for promotion to the next higher grade. The applicant submitted an email from the Chief of Reserve Affairs addressing some improvements to the management of the RPA Corps. The email states the following in pertinent part:

Another recommendation is to institute changes to the promotion system to provide a better opportunity for selection to LCDR, CDR, and CAPT level. One of the principle barriers to maximizing the opportunity of selection is to the number of multiple pass-over RPAs whose presence above the promotion zone may negatively impact the opportunity of selection for those PRAs within the zone. As the document was being developed, many suggestions were made including convening an annual continuation board for twice passed over RPAs to evaluate their performance for continued active duty service.

* * *

At this time, I cannot divulge the exact details of the memo because the issues and recommendations are being rewritten . . .

The applicant concluded her reply to the advisory opinion by stating that she believed that she has established a prima facie case of a substantial connection between the existence of an error and the Coast Guard's decision not to promote her. The applicant summarized as follows: "I did show that the [calendar year 2005] RPA selection board membership violated Coast Guard regulation [by not] keeping all the candidates on a level playing field. I also showed that the [calendar year 2005] selection board used the incorrect opportunity of selection for LCDR. I also showed that the [calendar year 2005] selection board was not afforded an equal opportunity of selection [with] the other ADPL selection board in violation of 14 U.S.C. 276."

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 failed to prove that her failure of selection for promotion to LCDR by the calendar year 2005 RPA selection board should be removed because that board was not constituted in accordance with Article 14.A.12.b. of the Personnel Manual. In this regard, she alleged that the Coast Guard acted capriciously, arbitrarily, or not in accordance with law when it determined that only two RPAs were available for service on the calendar year 2005 RPA selection board. Article 14.A.12.b. of the Personnel Manual governs the constitution of RPA selection boards. This provision states as follows:

A board convened to consider RPAs for promotion to the next higher grade shall consist of five or more officers serving in or above the highest grade to which the board may recommend officers for promotion. Three members shall be RPAs. If enough are not available to satisfy this requirement, Commander, (CGPC-opm) may reduce the number of RPA members, but the board must have at least one RPA. If no Reserve officer serving on active duty is senior to all officers under consideration, Commander (CGPC-opm) may recall to active duty a retired Reserve officer or one serving on inactive duty senior to all officers the board will consider to serve on the board."

3. The evidence of record established that there were seven RPA captains on active duty and therefore eligible to serve on the selection board. Because the RPA selection board considered officers for promotion to LCDR, CDR, and captain, only captains could be members of the selection board.

4. Two of the seven RPAs on active duty served on the selection board, along with two ADPL officers, and one inactive duty Reserve officer called to active duty to serve on the selection board. The Coast Guard determined that the other five RPAs were not available to serve on the selection board for the following reasons: one RPA was unavailable due to commitments with IRAQI FREEDOM; one was unavailable due to operational commitments at her command in Hawaii; and three were unavailable due to Katrina response assignments. The regulation does not define the term "available" and therefore, the Coast Guard's determination of whether the officers were available should stand unless arbitrary, capricious, or contrary to law. In *Godwin*, the Court accepted that nine of ten RPAs were unavailable because three had served on the

previous year's board; one was being considered for continuation by the same selection board; one officer's record was inadequate; two officers were too junior and a classmate of an officer being considered by the board; and two officers had schedule conflicts. The reasons for unavailability as determined by the Coast Guard in this case are similar to those accepted by the court in *Godwin*, and as such they are not arbitrary, capricious, or contrary to law. In *Godwin*, the court rejected that a soon-to-rotate RPA officer was unavailable to serve on the selection board, finding the Coast Guard's determination in this regard to be arbitrary, capricious or contrary to law. The court stated that it was inconsistent with the regulation to recall a retired or inactive duty officer to active duty to serve on the board rather than assigning a soon-to-rotate active duty RPA officer to the selection board. However, as stated above, the reasons for the unavailability of the officers in this case do not conflict with the Personnel Manual and are akin to those the court found acceptable in *Godwin*.

5. The applicant has not offered any evidence to prove that the five RPAs were indeed available for service on the selection board. Instead, she argued that CGPC should have recalled one of the six retired RPA captains she identified to active duty to serve on the selection board rather than having ordered a drilling reservist to active duty for that purpose. In her opinion, recalling a retired reservist to serve on the Board would have met the intent of Coast Guard policy that a majority of the RPA selection board members be RPA officers. The applicant overlooked the fact that where there was an insufficient number of RPAs, the regulation permitted CGPC to use a Reserve officer on active duty, but if no such Reserve officer was available, the regulation permitted the CGPC to recall a retired *Reserve* officer or *one serving on inactive duty* to serve on the selection board. According to the record, there was one Reserve officer on active duty in the grade of captain eligible to serve on the board, but he was not available due to an operational assignment in Mexico. Therefore, CGPC had two options remaining: to recall a retired Reserve officer or order an inactive duty officer to active duty to serve on the selection board. CGPC ordered an inactive duty captain to active duty to serve on the Board, as permitted under the regulation. CGPC was not required to first seek out a retired Reserve officer before choosing an inactive duty officer. The pertinent portion of the regulation in this regard states: "Commander (CGPC-opm) may recall to active duty a retired Reserve officer or one serving on inactive duty senior to all officers the board will consider to serve on the board." Moreover, there is no requirement that the retired officer be an RPA, as suggested by the applicant. A retired Reserve officer can also be used. Therefore, the Board finds that the calendar year 2005 RPA selection board complied with the regulation by having two RPAs, two ADPL officers, and one inactive duty Reserve officer called to active duty for that purpose. The Coast Guard also complied with the spirit and intent of the regulation by having a majority of the members on the selection be reserve officers, of which RPAs are a part.

6. The applicant next argued that the calendar year 2005 RPA selection board was illegally constituted because one of its members had served on the calendar year 2003 RPA selection board that had considered the record of a CDR for promotion to captain who was also before the 2005 RPA selection board. She argued that by doing so, the Coast Guard violated Article 14.A.10.b. of the Personnel Manual, which states that no officer may serve on two successive boards convened to consider officers of the same grade for promotion. Successive is defined as "following each other without interruption." See *Webster's Ninth New Collegiate Dictionary*, p. 1178. One of the RPA officers on the 2005 board had also served on the 2003 board. The applicant noted in *Godwin* that the Coast Guard determined that three RPAs were not available for that year's selection board because they had served on *the previous year's board*. The Board finds that the phrase "*the previous year's board*" means the one immediately preceding the current one, or put another way there was no intervening year between "*the previous year's board*" and the current board for that year. Since there was an intervening year between the 2003 and 2005 boards, the RPA member about whom the applicant complains did not serve on two successive boards. Therefore, his membership on the 2005 selection board was not in violation of the regulation. In addition, the applicant's interpretation that a member who has served on a previous board cannot serve on any subsequent boards for that grade would deny the Coast Guard the future use of that member for selection boards of that grade no matter how many years had elapsed since that member first served on the selection board for promotion to that grade. This Board finds it highly unlikely that Congress would tie the hands of the Coast Guard in such a manner.

7. The applicant further argued that the intent of the regulation that an officer could not serve on two successive selection boards considering officers for promotion to the same grade was to maintain a level playing field whether an officer was above or in the promotion zone. She maintained that the Coast Guard acts to maintain this level field for all officers by not identifying officers above the zone to the promotion boards. It is reasonable to conclude, as the applicant did, that a level field might well be one of the reasons that the Coast Guard does not identify officers who have once failed of selection for promotion to the next higher grade. It is also reasonable to conclude that by preventing service on two successive selection boards for the same grade, the regulation ensures that officers who fail to be selected the first time will have a second best opportunity before a completely new board. However, the regulation provides no explanation for the provision and is a restatement of 14 U.S.C. § 252, which reads: "A board convened under section 251 of this title [which speaks about selection boards for officers on the ADPL] shall consist of five or more officers on the active duty promotion list who are serving in or above the grade to which the board may recommend officers for promotion. No officer may be a member of two successive boards convened to consider officers of the same grade for promotion." Therefore, the Board finds that the Coast Guard did not violate the law or regulation because the officer concerned did not serve on two successive boards, although he had served on the selection board two

years earlier in 2003. Moreover, the applicant has not argued or offered any evidence that the selection board knew she was above the zone. Therefore, the Board finds that she was on a level field with the other candidates in her grade who were considered for promotion to the next higher grade.

8. The CDR who was considered by the RPA member who served on both the 2003 and 2005 selection boards had already failed twice (2003 and 2004) for promotion to captain when he came before the 2005 RPA selection board. Therefore, he had two successive opportunities for promotion to captain before two different RPA selection boards. Applying the regulation prospectively, if this CDR is before the calendar year 2006 selection board, no member on the 2005 selection may serve on that selection board. In addition, the Board questions whether the applicant has standing to raise this issue since she was not the officer who was considered by the RPA member who served in 2003 and 2005, and therefore was not prejudiced by his service, even if it were illegal, which it was not.

9. Last, the applicant has failed to prove that the Coast Guard improperly calculated the opportunity for selection of RPA LCDRs before the 2005 selection board. Article 5.A.6.e.2. of the Personnel Manual governs in calculating the opportunity for selection of RPAs. It provides as follows:

If RPAs going before the selection board include only first-time candidates and those who once failed of selection for promotion to the grade being considered, the percentage is the total number of ADPL officers selected for promotion, divided by the total number of ADPL officers considered for promotion to that grade in the ADPL zone plus the number of officers above the ADPL zone who have been once not selected. Fraction of a percentage shall be rounded to the next higher number.

10. Article 5.A.6.f. provides guidance on determining the number of RPA officers to be selected once the opportunity for selection has been determined. This provision states that

[b]efore convening a board to recommend RPAs for promotion to any grade, the Commandant will determine the total number of RPAs who may be selected for that grade by multiplying the computed opportunity of selection by the number of RPAs in the promotion zone. In applying the computed percentage, a fraction of five-tenths or greater shall be counted as a whole number.

11. In the September 5, 2005 precept, the Commandant directed the selection board to select 5 of the 7 RPA LCDRs from the promotion zone. The applicant argued that the Commandant should have directed the board to select 6 of the 7. The number

to be selected is determined by multiplying the computed opportunity of selection by the number of RPAs in the promotion zone. The applicant's computation shows the selection opportunity to be 77%, and the Coast Guard states that the opportunity of selection was 75%. The only difference in the calculations of the parties is the number of ADPL officers above the zone (officer who had failed once to be selected for promotion to a LCDR). The applicant stated that there were 37 officers above the zone and the Coast Guard stated that there were 45 officers above the zone. The parties agree that there were 234 ADPL LCDRs selected for promotion by the calendar year 2005 board and there were a total 267 LCDRS in the zone.

12. The applicant calculated the opportunity for selection for RPA LCDR 2005 selection board as follows: 234 officers selected divided by 267 officers in the zone plus 37 above the zone (304) = 77%. Again using the applicant's figure to determine the number to be selected, multiply 77% times 7 (the number of RPAs in the promotion zone) equals 5.39%. The applicant argues that the 5.39% should have been rounded up to 6 under Article 5.A.6.e.2., which states that a fraction of a percentage in calculating the opportunity for selection shall be rounded the next higher number. The applicant is incorrect. The 5.39% should be rounded down to 5, as required by Article 5.A.6.f., which states that "[I]n applying the computed percentage, a fraction of five-tenths or greater shall be counted as a whole number. In this regard, using the applicant's calculation the number to be selected (5.39%) is not equal to or greater than 5.50%. Therefore, even if the applicant's calculation for opportunity of selection (77%) were correct, it still would not have resulted in more than 5 RPA LCDRs being selected from the promotion zone by the 2005 RPA selection board.

13. The applicant has failed to prove that the Coast Guard violated the law or regulation in assigning members to the 2005 RPA selection board or that it committed any error with respect to that board. Therefore, it is not necessary for the Board to reach the question of whether her failure should be removed. By way of information, even if the Board had granted her application, it would not have ordered a special selection board as requested because Coast Guard policy is not to convene such boards.

14. All of the applicant's allegations have been considered by the Board, those not discussed with the above findings and conclusions are considered to be not dispositive of this case.

15. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of LT XXXXXXXXXXXXXXXXX, USCGR, for correction of her military record is denied.

Elizabeth F. Buchanan

Adrian Sevier

Thomas H. Van Horn