

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-058

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. It was docketed on January 28, 2005, upon receipt of the applicant's completed application.

This final decision, dated June 30, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant asked the Board to award him the pay and allowances of a lieutenant commander (LCDR), rather than a lieutenant (LT), for his service from September 22, 2003, to December 9, 2004. He alleged that he is entitled to this relief because as a result of a prior case before this Board, he returned to active duty on September 22, 2003, and his date of rank as a LCDR was backdated to August 1, 2000, after he was promoted to LCDR on December 9, 2004.

BACKGROUND: APPLICANT'S PRIOR CASES

BCMR Docket No. 2002-110

On December 15, 1999, the applicant, who was a lieutenant in the regular Coast Guard, received a general discharge after he pled *nolo contendere* on February 17, 1998, to a State charge of aggravated sexual assault on a child and after his case was reviewed by a Coast Guard Determination Board, Board of Inquiry, and Board of Review. The charge had been filed because in 1996, his then nine-year-old niece told a friend that she had had sex with him in the summer of 1995. As a result of a plea bargain, on April 6,

1998, the judge accepted the applicant's plea and entered a Deferred Adjudication Order against him, placing him on probation for ten years with multiple conditions, including registration as a sex offender. However, on December 3, 2001, the criminal charge against the applicant was withdrawn because on November 27, 2000, at age 12, his niece had fully recanted her story as follows:

5. ... [My friend and I] started telling each other stories and I was trying to top the story that she had told me so that she and I could still be friends. I told her that my Uncle had sex with me. I never dreamed that this act of bragging to my friend would become such a serious problem.

6. After I told [my friend] the lie about my Uncle having sexual contact with me in the Summer of 1995, she went and told her mother what I had said. Her mother then told my mother. When my mother told my father, my father became enraged and upset and I was very scared and confused. Seeing how mad my father was, I was afraid that if I told him that it was a lie, that I would be punished quite severely. I was scared and could not bring myself to come forward with the truth. Later, I didn't come forward with the truth because my mother told me that we didn't have to go to court, so I thought nothing wrong happened because I told the lie. ...

On April 12, 2002, in his first application to the BCMR, the applicant asked the Board to correct his record by, *inter alia*,

- removing his separation from the Coast Guard on December 15, 1999, and his general discharge under honorable conditions and restoring him to active duty as a lieutenant with the same standing he had prior to his discharge;
- paying him back pay and allowances from the date of his discharge; and
- removing all documentation of the criminal proceedings and the circumstances of his discharge, including two officer evaluation reports (OERs), which documented the criminal proceedings and strongly recommended his discharge.

The applicant neglected to ask the Board to remove a third poor OER, covering his performance from June 1, 1998, to May 31, 1999, in his first application to the Board.

In response to the applicant's first application, the Coast Guard recommended that the Board grant most of the requested relief but not back pay. The Board found that the Coast Guard had not committed any error or injustice in discharging the applicant after his plea in State court. However, the Board also found that in light of his niece's recantation and the withdrawal of the criminal charge against him, he was entitled to substantial relief, including the following:

- correction of his discharge form to show that he was released to inactive duty in the Coast Guard Reserve on December 15, 1999, by reason of Secretarial Authority with an honorable character of service;

- removal of all documents referring to the proceedings or to his separation for cause, including all three poor OERs;
- removal of his failure of selection for promotion to LCDR and placement of a statement in his record instructing selection board members to disregard his release from active duty and his missing performance evaluations; and
- recall to active duty within six months and reintegration to the regular Coast Guard; sufficient additional time on active duty so as to allow him to acquire another regular OER before his record is reviewed by another LCDR selection board; and if selected for promotion by the next LCDR selection board to review his record, “the option of having his LCDR date of rank backdated to what it would have been if he had been selected for promotion in 1999.”

Although the Board’s order enabled the applicant to receive a backdated date of rank if he was selected for promotion to LCDR, it did not provide for payment of corresponding back pay and allowances. On April 4, 2003, the delegate of the Secretary approved the Board’s decision except for the removal of the third OER and the manner by which the applicant was released into the Reserve (which is not at issue in this case). She noted that because the Coast Guard had not addressed the matter of the third OER in its advisory opinion, the record had not been sufficiently developed for her to make an informed decision about it.

Pursuant to the Board’s order in BCMR Docket No. 2002-110, the applicant returned to active duty as a lieutenant in the Coast Guard on September 22, 2003.

BCMR Docket No. 2003-116

In his second application, which was docketed on July 21, 2003, the applicant asked the Board to remove the third OER. He alleged that it was unjust in that it failed to reflect his true performance as an officer because of the events and circumstances he was going through at the time.

Although the Coast Guard recommended denying the requested relief, the Board recommended that the third OER be removed because it found that the numerical marks in the OER “were almost certainly similarly tainted by the rating chain’s knowledge of the applicant’s alleged crime.”

On August 9, 2004, the delegate of the Secretary approved the Board’s recommendation. The applicant was selected for promotion to LCDR by the selection board that convened on August 16, 2004. Upon confirmation by the Senate, he was promoted on December 9, 2004. In accordance with the Board’s order, he opted to have his date of rank as a LCDR backdated to what it would have been had he been selected for promotion in 1999, which was August 1, 2000. However, because the Board’s order in

BCMR Docket No. 2002-110 had not expressly addressed the issue, the Coast Guard would not pay him back pay and allowances.

VIEWS OF THE COAST GUARD

On March 28, 2005, the Judge Advocate General submitted an advisory opinion in which he recommended that the Board grant the requested relief. In doing so, he adopted a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

CGPC stated that the applicant returned to active duty as a lieutenant on September 22, 2003, and continued to receive the pay and allowances of a lieutenant until his promotion to LCDR on December 9, 2004. CGPC stated that, in accordance with the Board's order, the applicant elected to have his date of rank backdated to August 1, 2000. CGPC noted that "[h]ad the applicant been promoted on 01 August 2000, he would have received the pay and allowances of a LCDR/O-4 for the period of time he was on active duty from 22 September 2003 to 09 December 2004." CGPC noted that in BCMR Docket No. 2002-110, the Board had concluded that the applicant was not owed back pay and allowances for the time when he was not on active duty—from December 15, 1999, to September 21, 2003—because the Coast Guard had not acted erroneously or unjustly in discharging him after he pled *nolo contendere* to aggravated sexual assault on a child.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 6, 2005, the applicant responded to the Coast Guard's advisory opinion. He stated that he agreed with the recommendation.

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 10 U.S.C. § 1552. The application was timely.

2. The applicant alleged that he is entitled to back pay and allowances due to the correction of his date of rank as a LCDR. In its decision in BCMR Docket No. 2002-110, the Board failed to address the matter of whether the applicant would be entitled to back pay if he chose to have his date of rank backdated upon selection for promotion by the next LCDR selection board to review his record. CGPC and the Judge Advocate General have recommended that the Board grant the applicant's request.

3. In *Caddington v. United States*, 178 F. Supp. 604, 606 (Ct. Cl. 1959), the Army BCMR had ordered the retroactive promotion of an officer but failed to order that he receive corresponding back pay and allowances, which was the difference between a lieutenant colonel's pay and allowances and a colonel's pay and allowances. The court ordered the Army to pay the plaintiff all back pay and allowances due as a result of his promotion and stated the following:

To acknowledge plaintiff's right to a promotion and at the same time to deprive him of one of the principal benefits of the promotion cannot truly be viewed as such action as would remove an injustice. ... An action which is designed to remove an injustice or correct an error, as this one must have been under the statutory enactments, should include every essential benefit. ...

There are certain principles of equity that through long usage have grown into maxims. These include ... "equity delights to do justice and not by halves." ...

We believe that the Board for Correction of Military Records and the Secretary who approved the findings reached a conclusion that falls short of complete justice.

Id. at 607-08.

4. In accordance with the decision in *Caddington*, the Board agrees with the Coast Guard that the applicant's request should be granted. Under the circumstances of this case, "complete justice" includes the pay and allowances he would have received as a LCDR since his return to active duty on September 22, 2003, had he actually been promoted on August 1, 2000. This decision is consistent with the Board's decisions in prior cases wherein officers' dates of rank and members' dates of advancement were backdated.¹

5. Accordingly, the applicant's request should be granted. He is entitled to the pay and allowances of a LCDR from his return to active duty on September 22, 2003, until December 9, 2004, when he was actually promoted and began to receive the pay and allowances of a LCDR.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

¹ See e.g., BCMR Docket Nos. 2004-115, 2004-095, 2003-127, 2001-041, 2000-157, 2000-030, 2000-016, 1999-187, 1999-183, 1999-142, 1998-073.

ORDER

The application of _____, USCG, for correction of his military record is granted. His record shall be corrected to show that he was entitled to pay and allowances as a lieutenant commander (O-4) from his return to active duty on September 22, 2003, until his actual promotion on December 9, 2004. The Coast Guard shall pay him the amount due as a result of this correction.

No copy of this final decision shall be entered in his military record.

Bruce D. Burkley

Raghav Kotval

Kevin M. Walker