



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

Office of the Assistant Secretary

MAY 04 1998

AFBCMR 96-01097

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the Air Force Board for Correction of Military Records and under the authority of Section 1552, Title 10, United States Code (70A Stat 116), it is directed that:

The pertinent military records of the Department of the Air Force relating to [REDACTED] [REDACTED] be corrected to show that he was promoted to the grade of first lieutenant, with an effective date and a date of rank of 7 Jun 95.

It is further directed that he be considered for promotion to the grade of captain by a Special Selection Board (SSB) for the CY96D Central Captain Board, which convened on 9 Sep 96.

EBERG
Director
Air Force Review Boards Agency

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 96-01097

COUNSEL: NONE

HEARING DESIRED: NO

MAY 04 1998

APPLICANT REQUESTS THAT:

By amendment, he be retroactively promoted to the grade of first lieutenant (0-2), effective 7 Jun 95; and that he be given Special Selection Board consideration for promotion to the grade of captain (0-3).

APPLICANT CONTENDS THAT:

Title 10 of the United States Code (10 USC) as it applies to Uniformed Services University of Health Sciences (USUHS) service credit is unjust and is unjustly applied between the different services.

In support of his appeal, the applicant provided a personal statement, supportive statements, and other documents associated with the matter under review.

Applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS:

Applicant was appointed a second lieutenant, Reserve of the Air Force, Medical Service Corps (MSC), for the purposes of attending USUHS, on 27 Apr 92. On 6 Jun 95, the applicant was academically disenrolled from USUHS. On 1 Aug 95, the applicant was transferred from the MSC to the Line of the Air Force in the grade of second lieutenant effective and with a date of rank 7 Jun 95. He was promoted to the grade of first lieutenant on 7 Jun 97.

Information extracted from the Personnel Data System (PDS) indicates that the applicant is currently serving on active duty in the grade of first lieutenant. His Total Active Federal Military Service Date (TAFMSD) is 7 Jun 95.

After reviewing the applicable statutes, JA stated that they agree with the applicant's assessment that they do not permit him pay date credit for his USUHS time, but JA disagrees that they preclude date of rank credit. In other words, JA believes he is entitled to credit for his USUHS time for determining his date of rank and promotion eligibility.

The primary statutory provision is 10 U.S.C. § 2114(b), which provides in relevant part the following:

Notwithstanding any other provision of law, [USUHS students] shall serve on active duty in pay grade 0-1 with full pay and allowances of that grade....The service credit exclusions specified in section 2126 of [Title 10] shall apply to students covered by this section.

According to JA, Section 2126 provides that USUHS students (as well as Health Professions Scholarship Program (HPSP) students) are not entitled to count the medical student time for basic pay or retirement eligibility purposes. The basic pay exclusion, obviously, precludes the applicant from obtaining this portion of his requested relief.

However, the section 2126 exclusions do not preclude use of the USUHS time for date of rank and promotion eligibility purposes. The key phrase in section 2114(b) is "[n]otwithstanding any other provision of law, [USUHS] students serve on active duty...." Active duty time counts for determining appointment grade and date of rank/promotion eligibility.

An important factor in fashioning a remedy for this case is the peculiar nature of the active duty service of USUHS students. They are not on the active duty list (ADL) and, consequently, are not eligible for promotion. They serve their entire USUHS student time in the pay grade of 0-1. Therefore, the applicant could not have been promoted until he was disenrolled from USUHS on 6 June 1995. On 7 June 1995, he was on the ADL as an 0-1 with almost three years of active commissioned service.

According to JA, there are two ways to handle the crediting and promotion eligibility of the applicant. One is to treat him as an 0-1 with almost three years of time-in-grade on 7 June 1995 and promote him to 0-2 on such date. This would have the effect of giving him two years of service credit for promotion for his nearly three years of USUHS time. The other is to promote him to 0-2 effective 7 June 1995 (the first time he was statutorily eligible because before such time he was not on the ADL), but with a date of rank of mid-1994 (24 months after beginning active duty). In this second case, he would not be eligible for back pay for the almost one year of backdated 0-2 grade because he was not then eligible for such rank and pay, but he would gain the benefit of his third year of active duty time in USUHS and would be an 0-2 with almost one year in grade. Consequently, he would

AIR FORCE EVALUATION:

The GME Program Manager, AFPC/DPAME, reviewed this application and recommended denial. DPAME noted that the applicant signed his USUHS Military Service Obligation Contract on 27 Apr 92. According to DPAME, paragraph 10 of his contract states, "USUHS Reserve Officer will be subject to most of the same laws, regulations, and policies that apply to other Reserve officers on active duty, except that service performed while a member of the program is not counted:.." Paragraph 10c of his contract states, "In computing date of rank, promotion service date or total years service date. (Completion of M.D. degree will, however, result in award of appointment and entry credit according to DOD Directive 1320.7)" The applicant's disenrollment from USUHS does not affect the intent/contents of his USUHS contract. Contractually, both the Air Force and the individual still need to comply with contents of the contract. The rules--and in the applicant's case, knowledge of these rules--in effect at the time an individual signs his contract should be binding on both the Air Force and the individual. Since the applicant has signed his contract, in DPAME's view, his request has no merit.

A complete copy of the DPAME evaluation, with attachment, is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

In his initial response, dated 8 Jul 96, the applicant indicated that the Air Force interpretation of 10 USC and resultant action taken to "correct" his statement of service to effectively erase three years of his life spent on active duty as an officer, is unjust in light of the two situations described below.

The applicant stated that the first example was described on page three of his personal statement in his application. He feels it is necessary to re-emphasize it here as no one has addressed the issue thus far. In paragraph 10 of page three of his personal statement, there is an account of another Air Force officer who found herself in a very similar yet very different situation from his. At the date of this writing, the officer he is referring to is paid as an O-2 with over five years of service. He is paid as an O-1 with one year of service. She was commissioned in May of 1991, following a Reserve Officer Training Corps (ROTC) program. He was given a direct commission in Apr 92. She came on active duty for three months in the summer of 91, then went to law school on an educational delay for four years in an inactive reserve status. He came on active duty in Jul 92 to begin a post-commissioning officer training program, then reported to his medical officer training program, and has remained on uninterrupted active duty since that time. She failed (at least twice) to pass the Bar exam required for her to use her degree in the USAF. He academically failed to complete his medical officer

training program at USUHS after three years. She returned to active duty in Oct 95, and enrolled in the Intelligence Officer's Training Course at [REDACTED]. He enrolled in the same course in Dec 95. [REDACTED] as retroactively promoted to O-2 as of the summer of 1995, and received several months of back pay. Although in the past five years she has been in uniform on active duty as an officer for less than one year, she got half of the time for promotion, and all of the time for her time in service. She did not serve, and she cannot use the education she received for the good of the USAF. He has been in uniform on active duty for four years. Though he also cannot use the education he received, he did serve, in several capacities, as a USAF officer. He and his superiors at [REDACTED] believe this comparison is unjust.

The applicant indicated that the second example is new information he has compiled since he submitted his original application to the AFBCMR. In 1989, the United States Navy (USN) decided that there was indeed an inequity in the way their policies interpreted 10 USC as it concerned USUHS students, and subsequently published SECNAV INSTRUCTION 1421.4D (copy attached). Within a couple of months of his disenrollment from USUHS, three USN officers, ensigns, were also academically disenrolled. After several discussions and subsequent research, these officers found the above instruction. This instruction, paraphrased, states that not considering time spent at USUHS for pay and promotion is inconsistent with mission requirements of the USN. Please note: although the US Code explicitly states that officers on the active duty list are to be promoted, it does not explicitly say that officers not on the active duty list cannot be promoted. With this in mind, 1421.4D states that officers not on the active duty list (including USUHS students) are to be promoted in the same manner as USN officers that are on the active duty list. Based on this argument and the attached copies of the above instruction, these three former classmates of his, the USN officers, were promoted to lieutenants, junior grade, on 30 May 96, retroactive to their original two year mark (20 May 1994, on the one example case attached). These officers have begun to receive back pay, and their promotion folders will go before the O-3 board this summer (1996) as "above the zone-not previously considered." Again, he must ask, based upon the DOD's and each individual service's requirement to accurately, correctly, consistently, and fairly apply the US Code, is this example, when compared with his own, an injustice? Again, many individuals at several levels in the USAF and DOD have verbally stated to him that this is an injustice. The USN, while not the USAF, changed its policy for promotion and pay of former USUHS students while staying within the boundaries of the law. This action has set a precedent.

According to the applicant, there are only two valid reasons why an individual can request consideration from the board. One is for an error in their record. According to current Air Force policy, there is not an error in his record. The recommendation

from AFPC argues, in a few more words, that his request is not valid because there are no errors. At no time has he claimed an error was present. However, he does claim an unjust entry has been made, based on an unjust policy. That is the only other reason (number two) for making an application to the AFBCMR. Clearly in this case, policy has been followed closely. In this case, Air Force policy (interpretation of the US Code) should be changed as it concerns former USUHS students. His ability to serve his nation as a USAF officer cannot and should not, be directly compared to his academic ability to complete USUHS. Though he did not meet the qualifications necessary to be a medical corps officer, at no time did he fail in qualifications required to be a USAF officer. Many future officers will not have what it takes to successfully complete the USUHS curriculum. However, the USAF would be wise to consider these officers as assets to the mission, based on their experience and time in service. Though frustrating, he has not allowed this issue to negatively affect his future in the USAF. Immediately following USUHS, he put a large amount of effort into starting another program where he could effectively pay back his commitment, as well as continue a career in the USAF. In only a few short days, he will complete the Intelligence Operations Officer training course, and have a permanent change of station (PCS) to Kelly AFB, to begin an exciting assignment. He has performed at the top of his class, professionally and academically, for the entire time of this program. He looks forward to the opportunities before him as an Air Force officer. This entire request is simply a plea for equal benefits and equal consideration, both with fellow junior Air Force officers as well as with fellow USN officers whose military background (time and experience) is identical to his own.

In light of the above two examples, and the comparative lack of fairness shown to Air Force officers like himself, he would have to question the validity and logic of DPAME's statement that his request has no merit. As stated earlier, there has been no error; however, there is a disagreement on the interpretation of the law, US Code, between services.

Applicant's complete response and additional documentary evidence are at Exhibit E.

Applicant provided a subsequent response, dated 13 Dec 96, with additional documentary evidence, which are attached at Exhibit F.

ADDITIONAL AIR FORCE EVALUATION:

Pursuant to the Board's request, the Office of the Staff Judge Advocate, AFPC/JA, reviewed this application and provided an assessment of the appeal. In JA's view, the applicant's plea for "justice" in his case is articulate but pleonastic. According to

his understanding of the applicable statutes and his **USUHS** contract, he concedes that he is not eligible for the credit he seeks. Nevertheless, he claims such provisions amount to an injustice. Moreover, he cites what he believes to be examples of inequitable application of the statutes.

JA indicated that, to begin with, to the extent the application can be read to ask the AFBCMR to grant relief contrary to the express requirements of a statute or statutes, it is incapable of being granted. Obviously, the Board cannot change a statute, nor can it ignore statutory law. Consequently, the critical issue here is what the law provides insofar as credit for USUHS student time is concerned. But first, they will examine the applicant's alleged examples of inequitable application of the law.

The applicant refers to two other officers, who he claims were given favorable service credit unlike himself. One is an Air Force officer who twice failed to pass the bar exam after attending law school in an ROTC educational delay program, and attended intelligence school with the applicant. He complains that this officer received credit for time in grade and service and is senior in rank to him, yet only has nine months of active duty time. The other, a Navy officer and former USUHS classmate of the applicant, allegedly after failing out of USUHS as an Ensign in the Navy, was given a promotion to LTJG (0-2) on 30 May 96, with a date of rank retroactive to 20 May 1994. Further, according to the applicant, this Naval officer was promoted to Lieutenant (0-3) on 30 Oct 96. The applicant claims that his and the Naval officer's circumstances are almost identical, but that while he is in pay grade 0-1 with under two years of creditable service, the other officer is an 0-3 with over four years of creditable service. The applicant decries how two officers with the same appointment criteria to the military service, who were both academically disenrolled from USUHS at approximately the same time, can end up with two totally different results.

According to JA, no discussion of the applicant's example of the lieutenant who failed to qualify as a judge advocate is necessary. The applicant and this lieutenant entered the Air Force under different programs, with different statutory and regulatory rules and guidelines. Comparing her case to the applicant's is clearly a case of comparing apples and oranges. More closely aligned to the applicant's situation is the example of the Naval USUHS student who was ostensibly retroactively promoted. While illustrative, because the Air Force and the Navy labor under the same statutory constraints, the decision by the Navy is not dispositive or controlling in this case. JA indicated that they simply do not know the complete basis for the Navy's relief, nor the extent of such relief. Therefore, they do not know whether the Navy complied with the applicable statutes. Suffice to say that the law--not the anecdotal cases cited by the applicant--must form the basis for the Board's decision.

be eligible for consideration for promotion to 0-3 approximately one year earlier (in 1996).

JA recommended the first remedy set forth above because it has a better basis in law. It would give promotion credit for USUHS time, while recognizing the statutory ineligibility of the applicant to be promoted during the time he spent in USUHS. Because he was transferred to the line, in lieu of being given a new appointment, there is no authority for awarding pre-appointment credit for active service, which would be the effect of remedy two. In other words, the only way to award credit and obtain an earlier date of rank than an officer would otherwise be entitled to is to do so upon the officer's original appointment--either by awarding constructive service credit or pre-appointment reserve active status and active service credit."

JA briefly addressed the provision in the USUHS contract the applicant signed that excludes USUHS active duty service time "[i]n computing date of rank, promotion service date or total years service date." In the case of officers who successfully complete the program and are appointed into the medical corps as regular Air Force officers, this provision has had no adverse effect. The Air Force has awarded such officers four years of constructive service credit upon appointment into the medical corps, and by statute, an officer cannot receive double credit for any period of time. Parenthetically, JA noted that the statute and a soon to-be-released DOD Instruction require USUHS time to be credited first as day-for-day active service credit and then, to the extent students complete USUHS earlier than four years, any time short of 48 months to be credited as constructive service credit. To the extent the contract would exclude this time from consideration for officers who do not complete the program and are transferred to another competitive category, JA disagreed, because this interpretation of the contract is inconsistent with statutory and regulatory guidance.

Based on the foregoing, JA recommended that the Board deny the request for pay date credit for the applicant's USUHS time, but that it approve a portion of his request for promotion credit for such time--namely, effective upon the day following his disenrollment from USUHS, 7 June 1995, the applicant should be promoted to the grade of 0-2. Consequently, he should be awarded special selection board (SSB) consideration for promotion to 0-3 at the two-year point from such date.

A complete copy of the JA evaluation is at Exhibit G.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

Applicant indicated that he concurred with the recommendation made in AFPC/JA's advisory opinion. He requests that the board

award him a retroactive promotion to 0-2 (with zero/less than two years for pay) effective 7 June 1995, and SSB consideration for retroactive promotion to 0-3 (with two years for pay) effective 7 June 1997, with compensation for difference in pay during this period. This request is in full accordance with statutory and regulatory guidance, as interpreted by HQ AFPC/JA. After one year and eight months of pursuing a correction of his record, he believes that this is a very fair and just resolution to the issues he has presented.

Applicant's complete response is at Exhibit I.

~~THE BOARD CONCLUDES THAT:~~

1. The applicant has exhausted all remedies provided by existing law or regulations.
 2. The application was timely filed.
 3. Sufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. Having carefully reviewed this application, we agree with the recommendation of AFPC/JA and adopt the rationale expressed as the basis for our decision that the applicant has been the victim of an error or an injustice. Accordingly, we recommend that the applicant's records be corrected to reflect that he was promoted to the grade of first lieutenant effective and with a date of rank of 7 Jun 95, and, that he be considered for promotion to the grade of captain by an SSB for the first board when he would have met the eligibility criteria, the CY96D Captain Board.
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THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force relating to APPLICANT, be corrected to show that he was promoted to the grade of first lieutenant, with an effective date and a date of rank of 7 Jun 95.

It is further recommended that he be considered for promotion to the grade of captain by a Special Selection Board (SSB) for the CY96D Central Captain Board, which convened on 9 Sep 96.

The following members of the Board considered this application in Executive Session on 26 Feb 98, under the provisions of AFI 36-2603:

Ms. Martha Maust, Panel Chair
Mr. William E. Edwards, Member
Mr. Richard A. Peterson, Member

All members voted to correct the records, as recommended. The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 19 Jan 96, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, AFPC/DPAME, dated 20 May 96, w/atch.
Exhibit D. Letter, SAF/MIBR, dated 17 Jun 96.
Exhibit E. Letter, applicant, dated 8 Jul 96, w/atchs.
Exhibit F. Letter, applicant, dated 13 Dec 96, w/atchs.
Exhibit G. Letter, AFPC/JA, dated 6 Aug 97.
Exhibit H. Letter, SAF/MIBR, dated 18 Aug 97.
Exhibit I. Letter, applicant, dated 6 Sep 97.


MARTHA MAUST
Panel Chair



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE MILITARY PERSONNEL CENTER
RANDOLPH AIR FORCE BASE TEXAS

20 May 1996

MEMORANDUM FOR HQ AFPC/DPAMF2
HQ AFPC/DPMDOO
HQ AFPC/AFPC/JA
AFBCMR

FROM: HQ AFPC/DPAME
550 C Street West Ste 27
Randolph AFB TX 78150-4729

SUBJECT: Application for Correction of Military Records [REDACTED]

A thorough review of [REDACTED] request for correction of military records has been conducted. [REDACTED] request is based on his contention that he receive promotion credit for time spent in medical school (USUHS). His request should be denied for the following reasons:

a. He signed his Uniformed Services University of the Health Sciences (USUHS) Military Service Obligation Contract 27 April 1992. Paragraph 10 of his contract states, "USUHS Reserve Officer will be subject to most of the same laws, regulations, and policies that apply to other Reserve officers on active duty, except that service performed while a member of the program is not counted..." Paragraph 10c of his contract states, "In computing date of rank, promotion service date or total years service date. (Completion of M.D. degree will, however, result in award of appointment and entry credit according to DOD Directive 1320.7)" Atch 1

b. [REDACTED] disenrollment from USUHS does not affect the intent/contents of his USUHS contract. Contractually both the Air Force and the individual still need to comply with contents of the contract.

c. He states in paragraph 1 of his letter, dated 19 Jan 96, to the Board of Correction of Air Force Records, "I ask for the time I've spent on AD to be credited toward my promotion eligibility/time in rank and time in service. Based on this, I respectfully request immediate promotion to the rank of First Lieutenant." Based on [REDACTED] contract signed 27 April 1992/public law, promotion credit cannot be granted.

d. The rules--and in [REDACTED] case, knowledge of these rules--in effect at the time an individual signs his contract should be binding on both the Air Force and the individual. Since [REDACTED] signed his contract, his request has no merit.

e. If you have any questions please feel free to contact me at DSN [REDACTED].

[REDACTED]
GME Program Manager

9601097



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE PERSONNEL CENTER
RANDOLPH AIR FORCE BASE TEXAS



6 August 1997

MEMORANDUM FOR AFBCMR

FROM: HQ AFPC/JA (Lt Col Posey, Capt Whitney)
550 C Street West Suite 44
Randolph AFB TX 78150-4746

SUBJECT: Application for Correction of *i* R [REDACTED]

REQUESTED ACTION AND SUMMARY OF OPINION: The applicant, who is an active duty second lieutenant, paygrade O-1,¹ requests that time which he spent as a medical student in the Uniformed Services University of Health Sciences (USUHS) be credited to him as time in grade for promotion and pay purposes. He also requests his immediate promotion to first lieutenant, paygrade O-2.

BASIS FOR REQUEST: The applicant bases his requests for relief on the contention that Title 10 of the United States Code as it applies to USUHS service credit is unjust and is unjustly applied between the different services.

RELEVANT FACTS: What follows is a chronology of the applicant's case:

1. On 27 April 1992, the applicant was commissioned a second lieutenant in the United States Air Force Reserve, Medical Service Corps, for purposes of attending the USUHS in [REDACTED]
2. He entered active duty on 16 July 1992 as a medical student and has remained on continuous active duty since then.
3. He was academically disenrolled from USUHS on 6 June 1995.
4. On 1 August 1995, the applicant was transferred from the Medical Service Corps to the Line of the Air Force as a 2Lt with an effective date of rank of 7 June 1995.³

¹ As of 7 Jun 97, the applicant was promoted to the permanent grade of 1Lt. See Special Order 895, dated 7 Jun 97.

² The authority cited for his appointment was 10 U.S.C. § 593 and AFR 36-15.

³ Per Department of the Air Force, Special Order JB2-0127, dated 1 Aug 95.

9601097

Shortly after his disenrollment, the applicant entered the Intelligence Officer's Fundamentals Course at [REDACTED], from which he has graduated and is currently assigned to duty at [REDACTED]. During his tenure at Intelligence School, the applicant filed this application. Since the original filing of his request, the applicant has been promoted to 1Lt in his regular cycle based on his 7 June 1995 date of rank.

DISCUSSION: The applicant's request for relief was timely filed within the three-year statute of limitations specified in 10 U.S.C. § 1552(b).

The applicant's plea for "justice" in his case is articulate but pleonastic. According to his understanding of the applicable statutes and his USUHS contract, he concedes that he is not eligible for the credit he seeks. Nevertheless, he claims such provisions amount to an injustice. Moreover, he cites what he believes to be examples of inequitable application of the statutes.

We note, to begin with, that to the extent the application can be read to ask the AFBCMR to grant relief contrary to the express requirements of a statute or statutes, it is incapable of being granted. Obviously, the Board cannot change a statute, nor can it ignore statutory law. Consequently, the critical issue here is what the law provides insofar as credit for USUHS student time is concerned. But first, we will examine the applicant's alleged examples of inequitable application of the law.

The applicant refers to two other officers, who he claims were given favorable service credit unlike himself. One is an Air Force officer who twice failed to pass the bar exam after attending law school in an ROTC educational delay program, and attended intelligence school with the applicant. He complains that this officer received credit for time in grade and service and is senior in rank to him, yet only has nine months of active duty time. The other, a Navy officer and former USUHS classmate of the applicant, allegedly after failing out of USUHS as an Ensign in the Navy, was given a promotion to LTJG (0-2) on 30 May 96, with a date of rank retroactive to 20 May 1994.⁴ Further, according to the applicant, this Naval officer was promoted to Lieutenant (0-3) on 30 Oct 96. The applicant claims that his and the Naval officer's circumstances are almost identical, but that while he is in pay grade 0-1 with under two years of creditable service, the other officer is an 0-3 with over four years of creditable service. The applicant decries how two officers with the same appointment criteria to the military service: who were both academically disenrolled from USUHS at approximately the same time, can end up with two totally different results.

No discussion of the applicant's example of the lieutenant who failed to qualify as a judge advocate is necessary. The applicant and this lieutenant entered the Air Force under different programs, with different statutory and regulatory rules and guidelines. Comparing her case to the applicant's is clearly a case of comparing apples and oranges. More closely aligned to the applicant's situation is the example of the Naval USUHS student who was ostensibly

⁴ See last page of Tab 3 in the applicant's package.

⁵ Both were apparently appointed to USUHS in 1992; the applicant in the Air Force, the other in the Navy.

retroactively promoted.⁶ While illustrative, because the Air Force and the Navy labor under the same statutory constraints, the decision by the Navy is not dispositive or controlling in this case. We simply do not know the complete basis for the Navy's relief, nor the extent of such relief. Therefore, we do not know whether the Navy complied with the applicable statutes. Suffice to say that the law—not the anecdotal cases cited by the applicant—must form the basis for the Board's decision.

After reviewing the applicable statutes, we agree with the applicant's assessment that they do not permit him pay date credit for his USUHS time, but we disagree that they preclude date of rank credit. In other words, we believe he is entitled to credit for his USUHS time for determining his date of rank and promotion eligibility.

The primary statutory provision is 10 U.S.C. § 2114(b), which provides in relevant part the following:

Notwithstanding any other provision of law, [USUHS students] shall serve on active duty in pay grade **O-1** with full pay and allowances of that grade. ... The service credit exclusions specified in section 2126 of [Title 10] shall apply to students covered by this section.

Section 2126 provides that USUHS students (as well as Health Professions Scholarship Program (HPSP) students) are not entitled to count the medical student time for basic pay or retirement eligibility purposes. The basic pay exclusion, obviously, precludes the applicant from obtaining this portion of his requested relief.

However, the section 2126 exclusions do not preclude use of the USUHS time for date of rank and promotion eligibility purposes. The key phrase in section 2114(b) is "[n]otwithstanding any other provision of law, [USUHS] students serve on active duty" Active duty time counts for determining appointment grade' and date of rank/promotion eligibility.*

An important factor in fashioning a remedy for this case is the peculiar nature of the active duty service of USUHS students. They are not on the active duty list (ADL)⁹ and, consequently, are not eligible for promotion. They serve their entire USUHS student time in the pay grade of **O-1**. Therefore, the applicant could not have been promoted until he was disenrolled from USUHS on 6 June 1995. On 7 June 1995, he was on the ADL as an **O-1** with almost three years of active commissioned service.

⁶ Although it should be noted that, apparently, the Naval student's promotion came after some sort of appeal two years later.

⁷ 10 U.S.C. § 12207(a) (reserve officers) (at time of applicant's original appointment and his transfer to the line of the AF, the applicable statute was 10 U.S.C. § 8353, now rescinded).

⁸ *Id.* at § 619.

⁹ *Id.* at § § 101(b)(13) and 641(5). The ADL is defined in § 101(b)(13) and excludes active duty officers described in § 641 of the same title. Section 641(5) excludes USUHS students from Chapter 36 (promotion and retirement) consideration under Title 10.

There are two ways to handle the crediting and promotion eligibility of the applicant. One is to treat him as an O-1 with almost three years of time in grade on 7 June 1995 and promote him to O-2 on such date. This would have the effect of giving him two years of service credit for promotion for his nearly three years of USUHS time. The other is to promote him to O-2 effective 7 June 1995 (the first time he was statutorily eligible because before such time he was not on the ADL), but with a date of rank of mid-1994 (24 months after beginning active duty). In this second case, he would not be eligible for back pay for the almost one year of back dated O-2 grade because he was not then eligible for such rank and pay, but he would gain the benefit of his third year of active duty time in USUHS and would be an O-2 with almost one year in grade. Consequently, he would be eligible for consideration for promotion to O-3 approximately one year earlier (in 1996).¹⁰

We recommend the first remedy set forth above because it has a better basis in law. It would give promotion credit for USUHS time, while recognizing the statutory ineligibility of the applicant to be promoted during the time he spent in USUHS. Because he was transferred to the line, in lieu of being given a new appointment, there is no authority for awarding pre-appointment credit for active service, which would be the effect of remedy two. In other words, the only way to award credit and obtain an earlier date of rank than an officer would otherwise be entitled to is to do so upon the officer's original appointment—either by awarding constructive service credit or pre-appointment reserve active status and active service credit.¹¹

Before concluding, we briefly address the provision in the USUHS contract the applicant signed that excludes USUHS active duty service time “[i]n computing date of rank, promotion service date or total years service date.”¹² In the case of officers who successfully complete the program and are appointed into the medical corps as regular Air Force officers, this provision has had no adverse effect. The Air Force has awarded such officers four years of constructive service credit upon appointment into the medical corps,¹³ and by statute, an officer cannot receive double credit for any period of time. Parenthetically, we note that the statute and a soon-

¹⁰ The promotion eligibility criteria for officers is established by 10 U.S.C. § 619 and promulgated in AFI 36-2501, Attachment 2, which specifically states:

A2.1. Eligibility for Promotion to First Lieutenant. Second lieutenants on the ADL are eligible for promotion as soon as they have 24-months time-in-grade computed from their date of rank as a second lieutenant.

A2.2. Eligibility for Promotion to Captain. Promote first lieutenants on the ADL selected for promotion to captain after completing 24-months time-in-grade computed from their date of rank as a first lieutenant, or upon the Assistant SECDEF (Force Management and Personnel) approval of the captain selection board report, whichever is later....

¹¹ 10 U.S.C. § 12207.

¹² Paragraph of the applicant's contract reads, in pertinent part, “[S]ervice performed while on active duty as a member of the program is not counted:

- a. In determining eligibility for retirement, other than by reason of physical disability incurred while on active duty as a member of the program, and
- b. In computing years of service creditable for basic pay; and
- c. In computing date of rank, promotion service date or total years service date. (Completion of M.D. degree will, however, result in award of appointment and entry credit according to DOD Directive 1320.7)

¹³ See 10 U.S.C. § 533

to-be-released DoD Instruction require **USUHS** time to be credited first **as** day-for-day active service credit and then, to the extent students complete **USUHS** earlier than four years, any time short of **48** months to be credited **as** constructive service credit.¹⁴ To the extent the contract would exclude this time from consideration for officers who do not complete the program and are transferred to another competitive category, we disagree, because this interpretation of the contract is inconsistent with statutory **and** regulatory guidance.

RECOMMENDATION: Based on the foregoing, we recommend the Board deny the request for pay date credit for the applicant's **USUHS** time, but that it approve a portion of his request for promotion credit for such time—namely, effective upon the day following his disenrollment from **USUHS**, **7 June 1995**, the applicant should be promoted to the grade of **0-2**. Consequently, he should be awarded **an SSB** for consideration for promotion to **0-3** at the two-year point **from** such date.

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Senior Attorney Advisor

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¹⁴ See *Id.* at § 533(d)(1).