

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-067

**XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX**

FINAL DECISION

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 February 8, 2008, upon receipt of the applicant's completed application and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated October 23, 2008, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct her pay entry base date retroactive to May 23, 2001, the date she had prior to her temporary separation¹ from active duty, with back pay and allowances. She further requested Reserve service credit from May 24, 2006 through July 1, 2007.

APPLICANT'S ALLEGATIONS

The applicant was commissioned an ensign in the regular Coast Guard on May 23, 2001 upon her graduation from the Coast Guard Academy. On June 23, 2005, she asked to resign her commission effective May 23, 2006, under the temporary separation program. At that time she also requested a commission in the Coast Guard Reserve as of November 23, 2006. On January 19, 2006, the Secretary approved the applicant's request for a Reserve commission with an appointment date of May 23, 2006. The Reserve Acceptance and Oath of Office was delivered to the applicant on January 25, 2006. She executed her oath of office for the Reserve on December 5, 2006.

¹ Article 12.F.1. of the Personnel Manual states that the Coast Guard's temporary separation policy allows members to temporarily separate and pursue growth or other opportunities outside the service, while providing a mechanism for their return to active duty. The long-term intent of this program is to retain the valuable experience and training our members possess that might otherwise be lost. Under this policy, career oriented officers and enlisted members are allowed a one time separation from active duty for up to two years.

The applicant alleged that upon her discharge from the active duty component she should have been accessed directly into the Reserve. In this regard, she noted that her separation orders stated that “[a]ccepting a Reserve commission is a condition of approval of this resignation pursuant to 14 USC 182² and 10 USC 651.³ She argued that she should have been accessed into the Reserve component without a break in service effective May 24, 2006 and that she was under a Reserve obligation from that date until July 1, 2007. She stated that the oath of office she signed on December 5, 2006 was never completed. The applicant further contended the following:

Upon re-entry to active duty, my pay entry base date was adjusted to [August 15, 2002]. Active duty base date and DIEMS date reflect May 23, 2001, the date of my graduation from the USCG Academy as an ENS. My pay entry base date needs to be corrected to reflect May 23, 2001. Since returning to active duty on July 2, 2007, I have been paid on the O-3 over 4 years scale. I should have been paid on the O-3 over six scale. I was not properly processed into the Inactive Ready Reserve and then the Ready Reserve to complete my obligation while on temporary separation. The error is not mine. I should receive the back pay due to me.

BACKGROUND

On May 23, 2001, the applicant was commissioned as an ensign upon graduation from the USCG Academy.

On June 23, 2005, the applicant submitted a request to resign her commission under the temporary separation policy and requested that her resignation become effective on May 23, 2006. She resigned her commission to continue her education and to explore civilian employment options. She requested a commission in the Reserve effective November 23, 2006. She stated that she desired a six-month break in service to determine employment, living arrangements and geographic stability.

² Section 182(b)(2)(B) of title 14 of the United States Codes states in pertinent part that upon graduation from the Academy, the cadet will serve on active duty for at least five years. Section (b)(3)(B) states that if an appointment is not tendered or if a cadet is permitted to resign as a regular officer before the completion of the commissioned service obligation of the cadet, he or she will remain in that reserve component until completion of the commissioned service obligation of the cadet. Subsection (b)(e) states that “commissioned service obligation” means the period beginning on the date of the officer’s appointment as a commissioned officer and ending on the sixth anniversary of such appointment or, at the discretion of the Secretary, any later date up to the eighth anniversary of such appointment.

³ Section 651 of title 10 of the United States Code states that each person who becomes a member of an armed force shall serve in the armed forces for a total initial period of not less than six years nor more than eight years, as provided in regulations prescribed by the Secretary of Homeland Security for the Coast Guard when it is not operating as service in the Navy, unless such person is sooner discharged under such regulations because of personal hardship. Any part of such service that is not active duty or that is active duty for training shall be performed in a reserve component.

On the same date the applicant signed a statement of understanding of conditions for temporary separation that included the following provisions:

[O]fficers returning to active duty receive a subsequent appointment to their former grade and an adjusted date of rank . . .

The member has up to 2 years from the date of discharge, unless otherwise specified, to return to active duty under the temporary separation policy and retain the last held pay grade.

The applicant also submitted a notice of intention to affiliate with the Reserve commencing November 23, 2006.

On October 11, 2005, CGPC issues orders approving the applicant's separation subject to acceptance by the Secretary. She was allowed to execute the separation orders while awaiting that acceptance. The applicant was advised that "accepting a Reserve commission is a condition of approval of this resignation pursuant to 14 USC 182 and 10 USC 651." She was also advised "to contact CGPC-rpm at [phone number] without delay to learn the impacts of your choice on a variety of entitlements and the impacts of delaying acceptance of a Reserve commission beyond 24 hours from your separation date and to learn about the application and selection process."

On January 19, 2006, the Secretary approved the applicant's appointment as a commissioned officer in the Coast Guard Reserve with an appointment date of May 23, 2006, in the grade of LT with a May 23, 2005 date of rank.

On January 25, 2006, the Chief of the Reserve Officer Personnel Management Office informed the applicant by letter that her request for a Reserve commission had been approved and that the Secretary had appointed her a LT with a May 23, 2005 date of rank. The applicant was given the following instruction in that letter:

If you accept this appointment, please sign and completely fill out both original Acceptance and Oath of Office forms (CG-9556) . . . You must completely fill out the Employee's withholding Allowance Certificate (W-4) form, Pay Delivery Worksheet, and Dependency Worksheet and return them with the two original Acceptance and Oath of Office forms to the Coast Guard Personnel Command (CGPC-rpm). You have up to one year from the date of this letter to initiate your Acceptance and Oath of Office forms. However, if you do not return the previously stated forms within 60 days from the date of this letter, it will be assumed that you do not desire this appointment and your file will be placed into a "hold status" for a maximum of one year.

On May 23, 2006, the applicant was separated from the Coast Guard after 5 years, and 1 day in the active duty Coast Guard. She did not execute her Acceptance and Oath of Office in the Reserve until December 6, 2005.

VIEWS OF THE COAST GUARD

On June 26, 2008, the Board received the views of the Coast Guard from the Judge Advocate General (JAG). He adopted the fact and analysis provided by CGPC and asked the Board to accept CGPC's comments as the advisory opinion in this case.

CGPC recommended that the date on the applicant's December 5, 2006 Reserve Oath of Office be corrected to May 24, 2006, to reflect no break in service and that the applicant should be paid any amount due to her as a result of the correction. In recommending relief, CGPC reached the following conclusions:

1. The applicant was clear in her intent to have a six month break in service between her resignation and affiliation with the Coast Guard Reserve . . . The applicant's request for temporary separation however included a condition that the applicant affiliate with the Coast Guard Reserve . . . pursuant to the requirement of 10 USC § 651 . . . which requires a minimum of six years of military service. At the time of the applicant's resignation she had completed the 5 years of required obligated service for Academy graduates . . . and met the requirement for . . . temporary separation.
2. The applicant was approved for affiliation and a commission with the Coast Guard reserve . . . However she delayed execution of the oath of office until more than six months post resignation on December 5, 2006 . . . The applicant provides no justification for the delay in executing the oath of office. The applicant alleges that the error is not hers. However, in January 2006, she was provided with authority and direction to execute the oath of office . . . The only apparent error is that the Coast Guard failed to ensure that the applicant executed the oath of office in a timely manner to ensure that she met the conditions placed upon her temporary separation for affiliation in the reserve as specified in [her separation orders].
3. The applicant had an obligation to serve in the Coast Guard Reserve as a condition of approval of her voluntary resignation. As such, the separation authorization contained . . . conditional approval and while the applicant did not execute the oath of office in a timely manner the Coast Guard also did not ensure that the applicant complied with the provisions of the separation authorization. Therefore, in the interest of justice, the applicant's record should be corrected to show that immediately upon her resignation on May 23, 2006 that she executed an oath of office in the Coast Guard Reserve in order to meet the statutory requirement of six years of military service under 10 USC § 651.

APPLICANT'S REPLY TO THE VIEWS OF THE COAST GUARD

On July 7, 2008, the Board received the applicant's reply to the view of the Coast Guard. She had no objection to the views of the Coast Guard.

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 submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. On May 23, 2001, the applicant was commissioned an ensign in the Regular Coast Guard after graduating from the Coast Guard Academy. On May 23, 2006, the resignation of her regular commission under the temporary separation program became effective. She had served five years and one day on active duty. In her resignation request, the applicant asked for a commission in the Reserve. On October 11, 2005, CGPC issued separation orders directing the applicant's resignation and stating that it was conditional upon her acceptance of a commission in the Reserve pursuant to 14 USC 182 and 10 USC 651. On January 19, 2006, the Secretary approved her commission as a LT in the Coast Guard Reserve with an appointment date of May 23, 2006. She was informed of her Reserve commission by letter on January 25, 2006. On May 23, 2006, she was discharged from the Coast Guard. She executed her Reserve Acceptance and Oath of Office on December 5, 2006. When she returned to active duty in July 2007, her pay entry base date was adjusted to exclude the period of time that she was not affiliated with the Coast Guard.

4. The applicant requested her pay entry base date be corrected to include the period in which she was not affiliated with the Coast Guard. She argued that according to her separation orders she should have been processed into the Reserve on May 23, 2006, without a break in service because she had a required Reserve obligation. She asserted that the Coast Guard failed to properly process her into the Reserve through not fault of her own. The applicant's separation orders issued on October 11, 2005, stated that the approval of her resignation was conditional upon her acceptance of a Reserve commission pursuant to 14 USC § 182 and 10 USC § 1061. In deed, the advisory opinion recommended that the Board grant relief to the applicant in the interest of justice. In this regard, the advisory opinion stated that "the applicant had an obligation to serve in the Coast Guard Reserve as a condition of approval [for] her voluntary resignation . . . and while the applicant did not execute the [O]ath of [O]ffice in a timely manner, the Coast Guard did not ensure that [she] comply with the provisions of the separation authorization."

5. The Board disagrees with the advisory opinion's recommendation for relief and denies this application. In *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) "injustice" is defined as "treatment by military authorities that shocks the sense of justice, but is not technically illegal"; *see also* Decision of the Deputy General Counsel in BCMR Docket No. 2002-040. The advisory opinion notes the Coast Guard's only error as its failure to ensure the applicant's compliance with her separation orders. The advisory opinion also noted that the applicant failed

to execute her Acceptance and Oath of Office in a timely manner without any explanation for the delay. She did not execute the Acceptance and Oath of Office until December 5, 2006, even after being told that she needed to execute it within 60 days of January 25, 2006 or it would be assumed that she did not want the appointment. Moreover, her separation orders directed that she contact the Reserve Branch at Headquarters “without delay” to learn the impacts of her choice on a variety of entitlements and the impact of delaying her acceptance beyond 24 hours from her separation date. The applicant presented no evidence that she sought any advice about her Reserve appointment from October 11, 2005, the date of her separation orders until December 5, 2006, the date she executed her Acceptance and Oath of Office. Her actions in this regard corroborate her statement that she wanted a six-month break in service before beginning her Reserve career, which she obtained through her deliberate choice not to execute her Acceptance and Oath of office until December 5, 2006. Only when she returned to active duty on July 2, 2007 and discovered that her pay entry date had been adjusted did she complain about not executing her Reserve Acceptance and Oath of Office earlier. More importantly, to change the applicant’s pay entry base date to include a period of time that she did not serve is unfair to all of those officers who actually performed that duty. Moreover, it would reward the applicant for being dilatory even when she was advised in her orders and in a letter from the CGPC Reserve Chief to contact that office to discuss the impact her Reserve appointment. Nothing under the circumstances here shocks the Board’s sense of justice.

6. The above findings are sufficient to deny this application. However, the Coast Guard’s notation, in its “injustice” assessment, that correcting the applicant’s record would allow her to meet her six year service requirement under 14 USC § 182 and 10 USC § 561 needs comment. In this regard, the Board notes that the separation orders do not state a time certain that the applicant was required to begin serving in the Reserve. Further, the January 25, 2006 letter from the Chief of the Reserve Officer Division does not mention that the applicant had any remaining obligated service requirement. More importantly, the Board finds that the applicant did not have a statutory obligation to serve in the Reserve when she resigned her regular commission because she had already met her five year cadet active duty obligation when her resignation became effective. Section 182(b)(2)(B) of title 14 of the United States Code provides that each cadet shall sign an agreement with respect to the cadet’s length of service in the Coast Guard. The agreement shall provide that the cadet agrees to serve on active duty for at least five years immediately after such appointment. The applicant completed 5 years of active duty on May 22, 2006 and her resignation became effective May 23, 2006. Therefore, she had satisfied her five year active duty cadet service obligation and had no further statutory service requirement.

7. Under the statute there is a different service obligation for those academy graduates who do not fulfill their five year active duty service obligation after graduation. In this regard, 14 USC § 182(b)(3)(A)&(B) states that if no appointment is tendered or if the cadet is permitted to resign as a regular officer prior to the completion of the commissioned service obligation of the cadet, that the cadet (A) will accept an appointment in the Reserve and (B) will remain in the Reserve until completion of the commissioned service obligation of the cadet.⁴ “The

⁴ Section 182(e) of title 14 of the United States Code defines commissioned service obligation as follows:

commissioned service obligation” of the cadet under this provision is defined as “the period beginning on the date of the officer’s appointment as a commissioned officer and ending on the sixth anniversary of such appointment or, at the discretion of the Secretary, any other date up to the eighth anniversary of such appointment.” See 14 USC § 182(e). Again, the applicant had completed her five year active duty obligation as required under 14 USC § 182(b)(2)(B) when her resignation became effective on May 23, 2006 and therefore did not fall under the requirements of 14 USC § 182(b)(3)(A)& (B). While the Board finds these two provisions of 14 USC § 182 some what ambiguous, we are satisfied and persuaded in our finding that the applicant had no further obligated service requirement because to find otherwise is to invalidate 14 USC 182(b)(2)(B), Article 1.E.4.f. of the Personnel Manual,⁵ and the agreement that cadets sign with the Coast Guard that upon their appointment to the Academy that they will serve on active duty for at least five years after graduation.⁶

8. The applicant’s separation orders indicated erroneously that she had further obligated service under 14 USC § 182 and 10 USC § 651. This provision in her separation orders was probably an administrative error that was not enforced by the Coast Guard. The applicant has produced no evidence that the Coast Guard was obligated to enforce an erroneous provision in her separation orders. The applicant began her service in the Reserve on a date that was commensurate with her initial request for a Reserve commission. The applicant received the break in service that she wanted and requested. She suffered no injustice under these circumstances in this case and is not entitled to a pay entry base date to reflect time in the Reserve that she did not actually perform.

9. The applicant requested Reserve service credit for the period from May 23, 2006 until July 2, 2007. The Board has disposed of the period from May 23, 2006 through December 4, 2006 as discussed above. The applicant has presented no evidence that would allow the Board to determine whether she is entitled to or has been denied any service credit from December 5, 2006 through July 2, 2007. The applicant has the burden of proof in this case and she has only made an allegation that she has not been credited with any Reserve time during this period. Mere allegations, with corroborating proof, are insufficient to prove error or injustice.

10. Accordingly, the applicant has failed to establish an error or injustice in her record that requires any corrective action. Her request should be denied.

[W]ith respect to an officer who is a graduate of the Academy, [it] means the period beginning on the date of the officer’s appointment as a commissioned officer and ending on the sixth anniversary of such appointment or, at the discretion of the Secretary, any alter date up to the eighth anniversary of such appointment.

⁵ Article 1.E.4.f. of the Personnel Manual states that “when appointed, a cadet agrees to serve five years as a commissioned officer in the Coast Guard on graduation from the Academy.

⁶ As a general military statute, 10 USC § 651 is not controlling in this situation. It is a general statute. However, 14 USC 182 is specific about the service obligation an academy graduate owes to the Coast Guard. It is an established legal principle that a specific statute takes precedence over a general one. See *Halverson, et. al. v. Slater*, 129 F. 3d 186 (D.C.C. 1997).

ORDER

The application of XXXXXXXXXXXXXXXXXXXX USCG, for correction of her military record is denied.

The applicant's December 5, 2006 Reserve Oath of Office shall be corrected to May 24, 2006 to reflect no break in service. The Coast Guard shall pay the applicant any amount due as a result of this correction.

(see below)*

Erin McMunigal

Richard Walter

Ryan Wedlund

*This Board member recused herself because of a potential conflict of interest. Under 33 CFR § 52.11, two members constitute a quorum of the Board.