

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-012

[REDACTED]

FINAL DECISION

[REDACTED]

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on December 7, 2001, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated October 10, 2002, is 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 adjust his signal number,¹ to provide him with a minimum of three years constructive credit, and to correct his dates of rank for lieutenant, lieutenant commander, and commander with entitlement to all backpay, accordingly. He stated that the corrections will allow him to receive the pay that Congress mandated pursuant to 14 U.S.C. § 727, in recognition of the advanced education and experience he obtained prior to entering active duty as a law specialist in 198X.

APPLICANT'S ALLEGATIONS

The applicant stated that 14 U.S.C. § 727 mandates that the Coast Guard provide constructive credit for a minimum of three years of active duty to Reserve officers who

¹ Signal numbers are annually assigned to each officer on the active duty promotion list. This number designates each officer's seniority in relation to other active duty officers, at the beginning of the year.

are appointed for assignment as a law specialist. The applicant alleged that when he was selected for an appointment as a lieutenant, through the Coast Guard's law specialist program, the Coast Guard failed to provide him with three years' constructive credit. The applicant stated that, in fact, the Coast Guard failed to inform him that he was entitled to receive the mandatory credit.

The applicant claimed that, based on his advanced education and the nature of his recruitment, he should have been provided with the mandatory credit. He explained that prior to accepting his appointment, he was interviewed for the direct commission lawyers (DCL) program, along with other candidates, by a direct commission screening panel. He further alleged that after he was appointed, he attended officer indoctrination training with other successful candidates and was thereafter assigned a new effective date of appointment, which initially differed from his original May 198X appointment to lieutenant in the Coast Guard Reserve. The applicant alleged that, because he was processed in an identical manner as other officers who received the constructive credit, he believed that he was entering active duty through the DCL program.

The applicant alleged that, had the Coast Guard provided him with the mandatory credit, he would have been assigned a signal number that corresponded to an officer who had been appointed to lieutenant three years prior to his original permanent appointment in May 198X. Therefore, the applicant contended, he would have been in zone for promotion to lieutenant commander, commander, and captain four years earlier for each grade.

SUMMARY OF THE APPLICANT'S RECORD

On November 17, 196X, the applicant enlisted in the Coast Guard for four years. He served on active duty until August 17, 197X, at which time he was transferred to the Coast Guard Ready Reserve. There, he drilled as a ready reservist from 197X to 198X.

On September 26, 198X, the applicant was informed by Commandant letter that, effective on his oath of office, he was appointed a Reserve commissioned officer in the grade of ensign. On October 5, 198X, he was administered the oath of office, making his appointment and date of rank effective from that date in accordance with Article 2.A.4.a. of the Personnel Manual. He was promoted to lieutenant junior grade on July 1, 198X, with a date of rank of April 2, 198X. On May 6, 198X, he was promoted to lieutenant, grade O-3, with a date of rank of May 1, 198X. (All of these promotions occurred prior to the applicant's applying for an appointment under the DCL program.)

In 198X, the applicant completed his legal education, earning a law degree. On March 25, 198X, he applied to enter active duty under the Coast Guard's law specialist

program. He was notified on June 8, 198X of his selection for a direct commission as a lieutenant in the Coast Guard Reserve through the program and received orders on July 11, 198X, calling him to extended active duty. *See* 14 U.S.C. § 745. The July 11th active duty orders provided, in part, that his “active duty agreement will be executed at RTC Yorktown. The agreement will serve as a 4-year contractual obligation between the member and the U.S. Coast Guard.”

On October 11, 199X, the applicant requested integration into the regular Coast Guard. His request was subsequently approved by the January xx, 199X integration panel. On August 7, 199X, he was appointed a permanent commissioned officer in the grade of lieutenant commander (grade O-4), having a date of rank of August 1, 199X. On May 1, 199X, he was selected for promotion to commander (grade O-5) with a corresponding date of rank. *See* 14 U.S.C. § 735 (b). To date, the applicant continues to serve on active duty as a commander.

VIEWS OF THE COAST GUARD

On June 28, 2002, the Chief Counsel of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant’s request for relief.

The Chief Counsel argued that “because [the applicant] was not ‘appointed’ a commission upon his entry onto active duty as a law specialist,” the constructive credit mandated by 14 U.S.C. § 727 does not apply in the applicant’s case. He stated that the applicant was tendered and accepted his initial appointment as a commissioned officer in October 198X, as an ensign in the Coast Guard Reserve. He further stated that on July 11, 198X, the applicant was ordered to extended active duty for the purpose of assignment to a law specialist billet, while he concurrently held the grade of lieutenant in the Coast Guard Reserve, ranking from May 1, 198X on the Inactive Duty Promotion List² (IDPL). The Chief Counsel contended that upon the applicant’s July 198X entry on active duty, however, his record fails to indicate that the applicant was tendered and accepted an appointment as a commissioned officer.

The Chief Counsel asserted that it is clear from the record that the applicant served continuously from his October 198X appointment as a commissioned officer in the Coast Guard Reserve, and that he has not proved that he was appointed in July 198X, within the meaning of the plain language of 14 U.S.C. § 727. The Chief Counsel argued that “14 U.S.C. § 727 clearly delineates the intent of Congress to provide an individual holding a Juris Doctorate degree a minimum of three years constructive service credit upon **initial** appointment of a commission in a military service for the purpose of serving as a law specialist.”(emphasis supplied) He therefore argued that,

² The IDPL is the lineal list of Coast Guard Reserve officers in an inactive status.

because the applicant was already holding a commission based on his 198X appointment, he was not entitled to the constructive credit or the attendant adjustment to his dates of rank.

The Chief Counsel admitted that in connection with processing the applicant's extended active duty, he was erroneously provided a "Notice of Intention" form, offering the applicant an original appointment as a lieutenant in the Reserves, when, in fact, he already held that status. The Chief Counsel argued, however, that the express terms of the Notice of Intention did not appoint the applicant a commission as a lieutenant. He contended, rather, that the applicant was recruited "through a lateral entry program (DCL), to transfer from his reserve status as a lieutenant who performed general duties to an active duty status as a lieutenant who was designated a law specialist."

The Chief Counsel further contended that even assuming *arguendo* that the applicant was appointed a commission through the DCL program, the applicant is entitled to no additional years of constructive credit because he entered active duty as a grade O-3 on July 30, 198X and, in fact, had been given credit for more than the minimum of three years service in an active status.³ He stated that 14 U.S.C. § 727 provides no requirement that the constructive credit supplement "other entitlements, such as DOR based on a prior appointment." The Chief Counsel added that, had Congress intended to award constructive credit for advanced education and experience outside an original appointments, it would have drafted legislation accordingly.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 1, 2002, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 15 days. On July 15, 2002, the applicant provided the Board with his response.

The applicant alleged that the advisory opinion is factually inaccurate and unsupported by the record. He argued that the Coast Guard was incorrect in its assertion that he accepted an extended duty contract because the record reveals that he applied for and was selected for a direct commission as a lieutenant in the Coast Guard Reserve through the DCL program. He maintained that he accepted his appointment by signing a Notice of Intention prior to entering active duty, and that the Coast Guard failed to offer evidence to the contrary. The applicant stated that the Coast Guard's

³ The Chief Counsel argued that, when the applicant was brought onto active duty as an O-3, it normally took 4.5 years for a new officer to reach grade O-3. He argued therefore that the applicant received five years and eight months of constructive credit (4 years and 6 months to O-3 plus 1 year and 2 months in grade).

explanation that documents tendered to him merely contained boilerplate language is inadequate to preclude the mandatory credit from applying under these circumstances.

The applicant asserted that the Coast Guard also failed to support its assertion that he entered active duty under a lateral entry program. He argued that, in fact, the Coast Guard produced no evidence of the program's existence. He contended that he was never informed of nor offered an alternative entry program at any time during the law specialist application process. He stated that he "applied for, competed as a candidate with other civilian candidates, interviewed and was accepted specifically into the direct commission program." The applicant alleged that contrary to the Coast Guard's opinion, the record of evidence demonstrates the Coast Guard's intention that he enter active duty through the direct commission program. The applicant moreover contended that the Coast Guard's reference to the 199X Register of Officers, wherein his name appeared as a lieutenant with a date of rank of May 1, 198X, was of no consequence in supporting the manner in which he was recruited onto active duty.

The applicant further alleged that in its advisory opinion, the Coast Guard misinterpreted the law. He contended that the Coast Guard incorrectly states that 14 U.S.C. § 727, entitled "Constructive credit upon initial appointment," provides for constructive credit only upon the initial appointment of a commission to an individual holding a law degree. (emphasis supplied) He argued that under the rules of statutory construction, section headings fail to provide appropriate interpretive guidance on the meaning of statutory provisions. Therefore, he argued, the Coast Guard's interpretation of 14 U.S.C. § 727 is particularly erroneous, in light of the fact that the term "initial" appears in the title of § 727, but not the body of the text. He claimed that, in fact, the development of the law, as revealed by the history of the predecessor legislation of 14 U.S.C. § 727, shows quite an opposite intent by Congress, and makes it abundantly clear that Congress specifically changed the law in contemplation of providing constructive credit to members who already held commissions in the Armed Forces.

The applicant alleged that the Coast Guard's alternative argument that he has been credited with a minimum of three years of active service is also unsupported. The applicant argued that because his lineal number precedence could not, by law, be reduced and his date of rank in the Ready Reserve remained as May 1, 198X, the Coast Guard's assertion that he has already received the minimum constructive credit is unfounded. He claimed that, had the Coast Guard correctly applied 14 U.S.C. § 727, his date of rank would have been adjusted to May 1, 1984 or earlier at the time he entered onto active duty in 198X and his precedence on the lineal list would have been adjusted, accordingly. He stated that he is entitled to receive the constructive credit, to have his DORs for "lieutenant commander, commander and captain (if selected in the current board)" adjusted accordingly, and to receive any back pay for such periods of adjustment.

APPLICABLE LAW

Title 14 U.S.C. § 727, entitled “Constructive credit upon initial appointment,” provides the following:

Under regulations prescribed by the Secretary, a person, appointed as a Reserve officer, may be assigned a date of rank and precedence which reflects that person’s experience, education, or other qualifications. For the purpose of this subchapter [14 USCS §§ 720 et seq.] only, a person appointed for the purpose of assignment or designation as a law specialist in the Reserve shall be credited with a minimum of three years service in an active status. ...

Under “Promotion; acceptance; oath of office,” 14 U.S.C. § 735 (b) provides that “[a] Reserve officer who has served continuously since taking the oath of office prescribed in section 3331 of title 5 [Oath of Office], is not required to take a new oath of office upon appointment in a higher grade.”

Title 14 U.S.C. § 745, entitled “Grade on entry upon active duty,” provides that “[a] Reserve officer ordered to active duty for training shall be ordered in the grade held”

Personnel Manual (COMDTINST M1000.6A)

Article 2.A.4.a. of the Personnel Manual entitled “Appointment,” states that “[u]pon original appointment in the Coast Guard, the date of rank of a commissioned officer ... shall be the date specified in the appointment letter, or, if there be no specified date, then the date the oath of office is taken.”

Article 5.A.12.a. of the Personnel Manual contains the procedures implemented to permanently appoint reserve officers. The article provides that “[w]ith the advice and consent of the Senate, the President shall appoint ... Reserve officers selected for integration as permanent Regular officers. ...”

Article 5.A.12.b., entitled “Acceptance,” states that “[a]n appointment as a permanent commissioned officer becomes effective only when the officer concerned accepts the appointment by completing the Acceptance and Oath of Office ... to indicate acceptance”

Article 5.A.12.c., entitled “Oath of Office,” provides that “[a]n oath of office is required The officer shall not execute the oath of office before the date of rank specified in the appointment letter. ...”

Provisions of the Direct Commission Program

Commandant Instruction 1131.23 contains the regulations for the Coast Guard's direct commission programs. Paragraph 4.c. of the instruction, entitled "Coast Guard Officers," contains the following provisions:

... If a Reserve Officer on the Inactive Duty Promotion List (IDPL) meets the criteria for on[e] of the direct commission programs, they may apply for the program provided a conditional resignation, approved by G-RSM, is included in the application. Reserve officers who meet the criteria for a direct commission may also apply for extended active duty to Commandant (G-PO) via their chain-of-command. ...

Paragraph 10.a. of the instruction concerns the direct commissioning of law school graduates as lawyers in the Coast Guard Reserve, and provides that, "[u]nder this program, graduates of accredited law schools may apply for appointment in the Coast Guard Reserve at the rank of lieutenant. The date of rank shall be the date of appointment to commissioned status in the Coast Guard Reserve."

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

2. The applicant contends that he was appointed as a lieutenant in the Coast Guard Reserve through the DCL program and was thereby entitled to three years' constructive credit, pursuant to 14 U.S.C. § 727, upon his entry to active duty in July 198X. However, under the facts presented, the applicant's contentions are unsupported by evidence which shows that he was appointed as a lieutenant in July 198X. While holding an appointment in the grade of lieutenant in the Coast Guard Reserve, the applicant applied for a new Reserve appointment through the Coast Guard Reserve DCL program. Under the DCL program, qualified law school graduates may apply for appointment in the Coast Guard Reserve at the grade of lieutenant. The date of rank is the date of appointment to commissioned status. COMDTINST 1131.23, Art. 10.a. Although the applicant was notified by letter dated June 8, 198X of his selection for a "direct commission as a lieutenant in the Coast Guard Reserve through the Lawyer Program," and received and affirmatively executed a "Notice of Intention" to accept the appointment, the record reveals that he was never appointed as an officer under the DCL program.

3. By the Coast Guard's letter of June 8, 198X, the applicant was advised that, if he indicated an intention to accept the appointment on a Statement of Intentions form enclosed therewith, "a formal appointment [would] be forwarded at a later date." The letter also advised the applicant that, "[i]t is anticipated that you will be sworn in and go on active duty in time to report to the Coast Guard Reserve Training Center" The record, however, fails to support a finding that the applicant received the formal appointment that was to follow his affirmatively executed Statement of Intentions form, or that he was sworn in, prior to his reporting to the Coast Guard Reserve Training Center. Personnel Manual, Articles 5.A.12.a. and 5.A.12.c.

4. It is well settled that no appointment to a position with the Federal Government is final until the last act required by the person or body vested with the appointment power is performed. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Goutos v. United States, 212 Ct. Cl. 95, 552 F.2d 922 (1976). In urging the Board to find that he was appointed as a lieutenant in July 198X, the applicant has overlooked the absence of actions required to finalize his alleged appointment. See Article 5.A.12.b. of the Personnel Manual. Consequently, the applicant has not presented persuasive evidence that he was tendered an appointment or administered an oath of office in acceptance thereof in July 198X. The Board therefore finds that the Notice of Intention alleged by the applicant to be an acceptance of his appointment was, in fact, a written acceptance of his selection, and not an appointment in the grade of lieutenant. Insofar as a member's entitlement to the mandatory credit provided in 14 U.S.C. § 727 presupposes an appointment as a Reserve officer in the law specialist program, the applicant has failed to show that he is entitled to the mandatory credit upon his entry onto active duty in July 198X because he has failed to demonstrate that he received a new appointment as a Reserve officer in the law specialist program at that time.

5. Moreover, at the time the applicant applied for an appointment in the Reserve under the DCL program, he already held a Reserve appointment in the grade of lieutenant and would not have been offered a new appointment in that grade without resigning the Reserve appointment he currently held. Paragraph 4.c. of COMDTINST 1131.23 clearly requires all applicants for a direct commission who are on the IDPL, like the applicant, to submit a conditional resignation in their application materials or, in the alternative, apply for extended active duty. The record contains no evidence that the applicant ever submitted a conditional resignation as part of his DCL program application. Instead, the applicant's record shows that on July 11, 198X he was ordered to extended active duty under his then current appointment.

6. Although the applicant applied for an appointment as a Reserve officer under the DCL program, he never received one despite his eligibility for such an appointment under that program. There is no evidence in the military record that explains why the applicant was never appointed under the DCL program. The

advisory opinion states that the applicant received a lateral assignment as a law specialist, rather than being reappointed under the DCL program. While this explanation seems plausible, the Coast Guard provided no evidence that this alternative method of assigning officers to the law specialty was in effect in 198X. It is possible that the applicant was never appointed under the DCL program because he failed to submit his resignation from his then current reserve status, as required by regulation. Nevertheless, since he was not appointed under program, the applicant maintained his original May 1, 198X lieutenant date of rank.

7. The Commandant, by delegation of the Secretary, issued COMDTINST 1131.23, which addresses credit to be given for those receiving a direct appointment in the Coast Guard. The regulation permitted law graduates to apply for a Reserve appointment at the rank of lieutenant, thereby giving them active service credit for years they would normally have spent in the grades of ensign and lieutenant junior grade. For these officers, the instruction states that the date of rank for appointment under the DCL program shall be the date of appointment. Neither the law nor the regulation requires law specialists to be given credit for time already spent in the Reserve if reappointed under the DCL program, and the applicant has not presented any law or regulation to the contrary. See Dock v. United States, 46 F.3d 1083, 1086 (Fed. Cir. 1995) (stating that the “rights and benefits of a member of the military services, including pay and allowances, are defined by statute”).

8. Section 727 of Title 14 of the United States Code provides that “under regulations prescribed by the Secretary, a person appointed as a Reserve officer shall be assigned a date of rank and precedence which reflects a person’s experience, education, or other qualifications.” The law requires that those Reserve officers appointed for assignments as law specialists receive a minimum of three years of active service credit. It does not require the Secretary to grant any additional credit to Reserve officers who already have at least three years of active service credit.

9. The Board finds that, had the applicant been appointed as a Reserve officer under the DCL program, he would have had a lieutenant date of rank not earlier than June 198X, which is approximately when his reappointment under the DCL program would have occurred. Because he maintained his original May 198X lieutenant date of rank, the applicant actually benefited by not being reappointed as a lieutenant under the DCL program, as the May 198X date of rank was earlier than any he would have received had he been reappointed under the DCL program. The applicant therefore has not persuaded the Board that the Coast Guard acted toward him in a way that “shocks the sense of justice”⁴ in not awarding him an additional three

⁴ Sawyer v. United States, 18 Cl. Ct. 860, 868 (1989), *rev’d on other grounds*, 930 F.2d 1577 (Fed. Cir. 1991); see also Reale v. United States, 208 Ct. Cl. 1010, 1011 (1976). The Deputy General Counsel has also ruled that in the absence of legal error, an applicant’s treatment by military authorities must “shock the sense of justice” to justify correction by the Board. BCMR Docket No. 346-89.

years' active service, as the record fails to demonstrate that the Coast Guard acted in bad faith.

10. In light of the foregoing, while the Coast Guard may have sent the applicant form letters that did not quite apply to his particular situation, the applicant has not been harmed by the error. Accordingly, his request for relief should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of [REDACTED], USCG, for the correction of his military record is denied.

