


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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-069


XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

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 BCMR docketed this case on February 18, 2004, upon receipt of the applicant's completed application.

This final decision, dated January 13, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, an ensign (O-1E) in the Coast Guard Reserve, asked the Board to correct her record to show that she was commissioned as a lieutenant (LT; O-3E) on , instead of as an ensign, and to award her backpay and allowances.

The applicant alleged that under 14 U.S.C. § 727,¹ she should have been commissioned as a lieutenant. At the time of her commissioning, she was "a licensed attorney assigned to a purely legal billet, acting as an attorney." She stated that according to the Coast Guard "law specialists" are either Direct Commission Lawyers (DCLs) or are "officers who have gone to law school under the Coast Guard's postgraduate advanced

¹ Title 14 U.S.C. § 727, titled "Constructive credit upon initial appointment," states that "[u]nder 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. [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." In 2004, the credit was reduced to one year. Pub. L. 108-293, Title II, § 208, 118 Stat. 1035 (Aug. 9, 2004).

education program, or on their own." The applicant stated that she graduated from law school in [REDACTED] and was admitted to a state bar in [REDACTED]. Therefore, she met the eligibility criteria for designation as a law specialist at the time she was commissioned. She stated that "[b]ased on [her] law license and prior to commissioning, [she] was assigned as a legal assistance attorney at USCG xxxxx District, which is a legal billet. After [her] commissioning, [she] was returned to that legal billet at XXX Legal. When [she] was activated pursuant to Title 10, [she] ... served as a legal assistance attorney. [Her] RPAL remains XXX Legal and [she is] scheduled to attend Army JAG School in xxxxxxxx."

In support of her allegation, the applicant submitted a copy of one of her officer evaluation reports, which shows that she is a "legal assistance attorney" for the xxx District.

SUMMARY OF THE RECORD

On [REDACTED], the applicant enlisted in the Coast Guard. She served on active duty as a [REDACTED] until [REDACTED]. Thereafter, she advanced to [REDACTED] second class (E-5) while drilling in the Reserve and performing short periods of active duty. In [REDACTED], while still an enlisted reservist, she graduated from law school and passed the bar. She was assigned to serve as a legal assistance attorney for the xxx District. On [REDACTED], while still an E-5, she was designated a "legal assistance attorney." On her performance evaluation for the period ending [REDACTED], she received marks of 7 (on a scale of 1 to 7, with 7 being best) in the performance categories "Professional/Specialty Knowledge," "Quality of Work," "Using Resources," "Setting an Example," and "Adaptability."

On [REDACTED], at the age of [REDACTED] and upon completing officer training, the applicant signed an Oath of Office, accepting a commission as an ensign (O-1E) through the Selected Reserve Direct Commission (SRDC) Program. Thereafter, she continued to be assigned to the xxx District as a legal assistance attorney. On [REDACTED], she was involuntarily recalled to serve on extended active duty.

VIEWS OF THE COAST GUARD

On June 22, 2004, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. TJAG attached and adopted a memorandum on the case prepared by CGPC.

CGPC stated that the applicant never applied for designation as a law specialist in accordance with the Military Justice Manual and Article 6.A.6. of the Personnel Manual. CGPC stated that the applicant applied for her commission through the SRDC program rather than the DCL program. CGPC stated that the two programs differ in

significant ways. For example, the DCL program is intended to recruit lawyers for full-time active duty billets, whereas the SRDC program is intended to commission officers with various needed skills (not just legal) in a part-time Reserve status. CGPC stated that the "SRDC selection panels also consider advanced ranks for candidates, but this is typically reserved for those with prior military officer experience. ... The preponderant majority of SRDC candidates are commissioned as O-1s/O-1Es."

CGPC stated that because the applicant had served as a legal assistance attorney for two years before seeking a commission, she "knew or should have known that the service obtains military law specialists through one of three avenues: DCL, active duty officers selected to attend law school at Coast Guard expense, and any member who becomes a lawyer through some other means." CGPC noted that "[w]hile Applicant exceeded the maximum allowable age for admission to DCL by the time she was commissioned an O-1E in [REDACTED] ..., Applicant would have been eligible to apply for DCL soon after graduating from law school." CGPC pointed out that she not only applied through the SRDC but also accepted the commission as an O-1E that the SRDC selection board offered.

CGPC stated that officers are designated as law specialists only after submitting a written application and being certified by the Chief Counsel. CGPC further stated that the applicant had never submitted an application although "[t]he service expects all attorneys serving in a legal program billet on extended active duty to earn designation as a law specialist However, the reverse does not hold true: an attorney's service in a legal program billet does not by itself constitute the basis for designation."

CGPC further stated that, even if the Board decides to correct the applicant's record to show that she was commissioned as a lieutenant, she should not be awarded backpay because she "has not overcome the presumption of regularity with respect to the SRDC selection process that commissioned her an O-1E." Moreover, "[d]esignation as a law specialist does not itself require the Coast Guard to appoint candidates as O-3E, either on initial commissioning or retroactively."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 25, 2004, the BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited her to respond within 30 days. The applicant was granted an extension of 60 days and responded on September 23, 2004.

The applicant stated that she remains a legal assistance attorney assigned to the xxxx District Legal Office, which "is clearly NOT a 'general duty officer billet'" since only attorneys may be assigned to the billet. The applicant stated that because 14 U.S.C. § 727 requires that persons appointed for the purpose of assignment or designation as a

law specialist be credited with three years of service by using the word "shall," the matter is not discretionary.

The applicant further stated that she "originally applied to the DCL program in [REDACTED] during her last year of law school and prior to exceeding the maximum age limit. Because the application process is not, as the Coast Guard suggests, nearly as clear cut and easily navigated as it should be, [her] application had to be resubmitted three times, through no fault of [her] own, and required special attention and support from various commands, and ultimately a request for an age waiver, before it made it to the proper channels." She alleged that her applications were never rejected but "simply 'disappeared' after [she] submitted [them] to the person and office to which [she] was directed to submit the application." Thereafter, she alleged, her application was converted to an SRDC application "by others, but with [her] tacit consent, solely for the reason that [she] was unwilling to sign a four-year active duty contract as a condition of eligibility for that program." The applicant stated that she repeatedly asked why she should not receive the rank of lieutenant but received no explanation.

The applicant argued that the requirement in Article 4.D.5.b. of the Recruiting Manual, COMDTINST M1100.2D, that applicants to the DCL program be required to commit to a minimum of four years of active duty contravenes the plain language of 14 U.S.C. § 727. She also argued that the requirement frustrates the purpose of the statute "by ensuring that no Reserve officers serving in a Reserve capacity will actually realize the benefit of the statute." She alleged that "[a]lthough it is true that [she] was denied a *designation* as a law specialist solely because [she] was unwilling to sign a 4 year EAD contract, I was unquestionably appointed *for the purpose of assignment* as a law specialist" because her sole duties as a legal assistance attorney are to provide legal services. She argued that the "practical effect of the Coast Guard's policies regarding 14 USC 727 is to provide the 3-year credit not on the basis of the person's experience, education or other qualifications as mandated by the statute, but solely on the basis of the person's willingness to serve on 4 years of active service upon commissioning. ... There is no logical, rational or legitimate reason which is served by the application of this policy, at least none that is in keeping with the purpose and spirit of the statute. Furthermore, the policy degrades Reserve attorneys, their contributions and performance." She alleged that the policy unfairly deprives Reserve attorneys of the rank and pay that would reflect their education, experience, and other qualifications as required under 14 U.S.C. § 727.

The applicant argued that CGPC's suggestion that "because a Legal Assistance Attorney is not a 'law specialist,' [her] designation as such does not satisfy the requirement that [she] be appointed 'for the purpose' of assignment as a law specialist" lacks merit because only attorneys may be designated as Legal Assistance Attorneys. She argued that her billet is clearly a "legal program billet" since only an attorney can fill

the position and that if a legal assistance attorney were not available, the billet would be filled by a law specialist or perhaps a contracted civilian attorney.

The applicant pointed out that six months after she refused to commit to four years of active duty so that she could become a law specialist, she was involuntarily recalled to extended active duty and had to close her own law practice to serve full-time as an O-1E, while her active duty colleagues have all received the three years of constructive credit under 14 U.S.C. § 727 and do not face separation without income.

APPLICABLE LAW

COMDTINST 1131.23

Commandant Instruction 1131.23 contains the regulations for the Coast Guard's direct commission programs. 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.” Paragraph 10.b. provides that candidates must serve a minimum of four years on active duty. Paragraph 10.d. provides that candidates “must not have reached age 38” as of the date they would begin Direct Commission Officer training.

Paragraph 11.a. of COMDTINST 1131.23 concerns the SRDC² and provides that “[u]nder this program, individuals may apply for a direct commission in the Coast Guard Selected Reserve at the ranks of ensign, lieutenant (junior grade), and lieutenant. ... Enlisted candidates may apply for a direct commission at the rank of ensign. Prior or current officers may apply for the highest rank held, up to lieutenant (O-3).” Paragraph 11.b. states that “[a]pplicants who receive commissions shall be assigned to Selected Reserve units.” Paragraph 11.d. provides that applicants must not have reached 36 years of age and have “a bachelor’s or higher degree” or two years of college credit and “be at least E-4 and have passed the most recent Servicewide Examination for E-5.”

COMDTINST M1100.2D (Recruiting Manual)

Chapter 4.D.5.a. of the Recruiting Manual provides that “[q]ualified law school graduates are commissioned in the Coast Guard Reserve as lieutenant (junior grade) to serve as lawyers.”³ Chapter 4.D.5.b. provides that “[a]ppointed applicants who have been admitted to

² Although the Coast Guard refers to this as the Selected Reserve Direct Commission (SRDR) Program, the regulations refer to it as the Ready Reserve Direct Commission Program.

³ In 2001, the Coast Guard determined that DCL officers should be commissioned as lieutenants rather than LTJGs.

practice as a member of the bar of any State or the District of Columbia shall serve a minimum of four years on active duty.”

Chapter 4.D.11.a. provides that under the SRDC, “[a]ll candidates may apply for appointment as an ensign. ... Applicants with commissioned officer experience may apply for the highest grade previously held, up to lieutenant (O-3).”

COMDTINST M1000.6A (Personnel Manual)

Article 6.A.6.a. of the Personnel Manual provides that a “Coast Guard Law Specialist is a commissioned officer of the Coast Guard who has successfully completed all requirements specified in paragraph b. of this article and has been designated as a law specialist by the Commandant.” Article 6.A.6.b. provides that “[a]ctive duty commissioned officers of the Coast Guard and commissioned officers of the Coast Guard Reserve serving on active duty or in a Coast Guard Reserve legal billet if not on active duty are eligible to be designated a law specialist” Article 6.A.6.c. provides that “[c]ommissioned officers desiring designation as a law specialist shall submit a letter request via their chain of command to Commandant (G-LPD) for determination by the Chief Counsel. ...”

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.
2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.
3. The applicant alleged that she was denied designation as a law specialist and three years of constructive credit under 14 U.S.C. § 727 because upon her commissioning in [REDACTED], she refused to sign a four-year contract. She alleged that the requirement to sign a four-year contract contravenes both the language and intent of 14 U.S.C. § 727, which provides that “[u]nder 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. [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.”

4. The statute does not state that any person appointed for the purpose of practicing law, serving as an attorney, or filling a legal billet shall be credited with three years of active service. Instead, it provides that the person must be appointed for the purpose of assignment or designation as a "law specialist," and it leaves the definition of that designation up to the Secretary (or his delegate). Therefore, the Board finds that the requirement to sign a four-year contract does not contravene the language of the statute.

5. The applicant's argument that the four-year requirement contravenes the spirit or intent of the statute assumes that Congress intended every attorney practicing law in the Coast Guard to receive the three-year credit. However, the statutory language is not so broad. Instead, it limits the three-year credit to persons appointed specifically for the purpose of assignment or designation as a "law specialist," and it allows the Secretary (or his delegate) to define the position. Under paragraph 10.a. of COMDTINST 1131.23, the Commandant has chosen to limit the direct commissioning of lieutenants to those attorneys who are willing to commit to four years of active duty. The Coast Guard apparently uses the statute, in part, to entice attorneys to commit to four years of active duty by offering them the higher pay and rank that comes with three years of constructive credit. The applicant has not proved that the Coast Guard's implementation of this statute is contrary to the intent of Congress.

6. The Board, however, is not limited to correcting legal errors in members' records, but may also remove injustices. "Injustice" is "treatment by the military authorities that shocks the sense of justice, but is not technically illegal."⁴ The applicant complained that the Coast Guard's refusal to commission her as a lieutenant without a four-year commitment has worked a great hardship and injustice upon her and other similarly situated Reserve attorneys, who must practice law alongside active duty Coast Guard attorneys without the same rank and pay.

7. The Coast Guard makes COMDTINST 1131.23, which governs all direct commission programs, and COMDTINST M1100.2D, which governs the recruitment of direct commission officers, readily available on Internet. Therefore, upon applying for a commission under the DCL program, the applicant knew or should have known that she would be required to make a four-year commitment to be eligible. Likewise, she knew or should have known that under the SRDC program, only prior service officers receive commissions above the rank of ensign. With these two options available, the applicant voluntarily accepted a commission as an ensign under the SRDC to avoid having to commit to four years of active duty. Moreover, she did so knowing that she remained subject to recall to extended active duty as an O-1E and, in light of the war, was perhaps even likely to be recalled to extended active duty.

⁴ See *Reale v. United States*, 208 Ct. Cl. 1010,1011 (1976); Decision of the Deputy General Counsel, BCMR Docket No. 2001-043.

8. The Board understands that the applicant's decision in ██████ to try to stay in the Reserve and seek a commission as an officer on inactive duty may have created a significant financial hardship and placed her in an unequal status with respect to other new attorneys in the Coast Guard, especially since she has been recalled to extended active duty. However, the Board is not persuaded that the Coast Guard's implementation of its direct commission programs in such a way as to offer only attorneys willing to commit to four years of active duty the immediate rank and pay of a lieutenant upon commissioning constitutes "treatment by the military authorities that shocks the sense of justice."⁵

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

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

⁵ *Id.*

ORDER

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

