

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-116

FINAL DECISION

[REDACTED]

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was commenced upon the BCMR's receipt of the applicant's first application on July 17, 1998. That application was originally docketed as BCMR Docket No. 1998-094. On September 17, 1998, the applicant submitted another application to the BCMR requesting the same relief based on different grounds. In light of the Board's rules regarding new evidence and reconsideration (33 C.F.R. §§ 52.61(c) and 52.67), the Chairman consolidated the two applications under BCMR Docket No. 1998-116.

This final decision, dated June 10, 1999, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a lieutenant commander (LCDR; pay grade O-4), asked the Board to correct his military record by promoting him to commander (CDR) because the Coast Guard refused to promote him in accordance with the terms of the Board's order in the applicant's previous case, BCMR Docket No. 193-94.¹

Specifically, the applicant asked that his record be corrected to show that he was promoted to commander on February 1, 1997, (or, in the alternative, July 1, 1997), with a date of rank of July 1, 1994. He also asked that all of his officer evaluation reports (OERs) since February 1, 1997 (or July 1, 1997), showing his rank as lieutenant commander be removed. Furthermore, if he is separated from active duty at the time of this Final Decision, the applicant asked that he be of-

¹ The applicant has also filed suit against the Commandant of the Coast Guard in federal court, where he seeks the same relief. [REDACTED]

ferred an opportunity to return to active duty and to be placed on the active duty promotion list in the position that would result from a date of rank of July 1, 1994. He also asked that "his consideration by any [captain] selection board be delayed until he receives one additional regularly scheduled OER." In addition, he asked the Board to award him all back pay, allowances, and leave due as a result of these changes.

HISTORY OF BCMR DOCKET NO. 193-94

In BCMR Docket No. 193-94, the applicant asked the Board to remove certain comments attached to one of his OERs, as well as his reply to those comments. He also asked the Board to remove his failures of selection for promotion and to backdate his promotion should he be chosen by the next selection board.

The applicant alleged that the Superintendent of the [REDACTED] had improperly made himself a member of the applicant's rating chain and, as such, had attached a page of comments to the OER in which he stated that the applicant had been involved in an inappropriate relationship with a female student. At the time, the Superintendent had opened an investigation into the alleged affair, but the investigation was not complete. The applicant submitted a reply to that OER in which he denied having "any inappropriate relationship with any cadet." The applicant's supervisor and reporting officer submitted endorsements to the reply indicating that they had no knowledge of the alleged affair. During the investigation, the female student signed a sworn statement denying the alleged inappropriate relationship. After the investigation, the command determined that the evidence provided in the report was insufficient to justify punitive legal action.

The Board recommended granting the requested relief. It found that Coast Guard regulations prohibited OER comments concerning disputed facts that were the subject of an ongoing investigation. The Deputy General Counsel approved the Board's recommended decision. The following order was issued in Docket No. 193-94 on November 8, 1995:

The application to correct the military record of [the applicant] is granted. The comments of the Reviewer and the applicant's reply to those comments shall be deleted from the disputed OER. The applicant's failures of selection for promotion to CDR shall be removed. The block on the OER that indicates that comments from the Reviewer are attached shall be changed to one that indicates that no such comments are attached.

The applicant shall be given the opportunity to be considered by the next two CDR Selection Boards. If selected by the first such Board, he shall be given the date of rank he would have received had he been selected in 1993, and he shall be given applicable back pay and allowances. If he wishes, he shall be given the opportunity to compete to be on the Command Afloat List.

APPLICANT'S ALLEGATIONS

The applicant alleged that the Coast Guard refused to comply with the Board's order in Docket No. 193-94 by promoting him after he was selected for

promotion in July 1996 by the first commander selection board to meet after his record was corrected. The applicant alleged that the Coast Guard should have placed his name on the 1994 commander promotion list and promoted him at the first opportunity after his promotion was confirmed by the President and the Senate.² Then, he alleged, his promotion should have been back-dated to July 1, 1994, which is the date of rank he would have had if he had been selected for promotion in 1993.

Instead, the applicant alleged, the Coast Guard placed him third on the 1997 commander promotion list and refused to promote him on February 1, 1997, when the first vacancies arose after the list was confirmed by the President and the Senate on January 31, 1997. When the applicant protested to the Coast Guard Personnel Command (CGPC), he was told that he would be promoted on July 1, 1997, along with others on the 1997 promotion list. CGPC stated that 14 U.S.C. § 271(b) prevented the Coast Guard from promoting him prior to those on earlier promotion lists. The applicant alleged that this statute does not apply to him "because it mandates assignment of a date of rank by precedence on the promotion list, which is contrary to the order of the CGBCMR."

In his second application to the BCMR, the applicant alleged that the Coast Guard refused to promote him as promised on July 1, 1997. On May 21, 1997, he was warned that his promotion would be delayed pursuant to Article 5.A.13.f. of the Personnel Manual (COMDTINST M1000.6A) because he was the subject of a pending investigation into allegations of sexual harassment made by a female junior officer. However, he alleged, that investigation was concluded on June 23, 1997, prior to his promised date of promotion, and none of the charges against him were substantiated.

The applicant alleged that, under *United States v. MacDonald*, 456 U.S. 1 (1982), the investigation was no longer "pending" on July 1, 1997. Therefore, the Coast Guard violated statutes and its own regulations when it refused to promote him on that date. The applicant also argued that a Special Board of Officers that met a year later, in June 1998, to consider removing him permanently from the commander promotion list could not be considered "pending" on July 1, 1997. The applicant cited another case involving a Coast Guard officer, *Law v. United States*, 11 F.3d 1061 (Fed. Cir. 1993), for the proposition that a Special Board only becomes "pending" on the date that it is approved by Coast Guard Headquarters. The applicant alleged that his commanding officer did not request a Special Board until September 12, 1997, and that the request was not approved until May 1998. Furthermore, if the Special Board was the true reason for the delay of his promotion, the Coast Guard violated Article 5.A.13.f. by not giving him timely notice of it. Therefore, the applicant alleged, because neither the investigation nor the Special Board of Officers was "pending" on July 1, 1997, he should have been promoted on that date.

² The number of commanders in the Coast Guard is limited by statute. 14 U.S.C. § 42. Therefore, the Coast Guard promotes lieutenant commanders off the lists confirmed by the President and the Senate as vacancies occur.

VIEWS OF THE COAST GUARD

On April 20, 1999, the Chief Counsel of the Coast Guard issued an advisory opinion recommending that the Board deny the applicant's request for promotion to commander. The Chief Counsel alleged that, contrary to the applicant's allegations, the Coast Guard had "acted in conformance with statute and the CGBCMR's prior order."

The Chief Counsel described the facts of this case as follows: After the applicant had been selected for promotion, he was placed on the 1997 commander promotion list and frocked³ when that list was confirmed by the Senate on January 31, 1997. Soon thereafter, however, he "was suspected of sexual harassment of a female officer and obstruction of justice." His commanding officer (CO) notified him that he was forwarding a recommendation to the Commandant that his promotion be delayed pending a formal investigation of the allegations. Upon receiving the report of the investigation on June 23, 1997, the CO opened an informal investigation into the applicant's alleged misuse of government telephones for the alleged harassment. The report of this informal investigation was closed on July 31, 1997.

According to the Chief Counsel, on August 25, 1997, the applicant refused to accept nonjudicial punishment (NJP) proceedings as a result of the two investigations. His CO could have but did not initiate a court-martial. Instead, the CO asked CGPC to review the applicant's eligibility for promotion and consider separating him for cause. The CO also initiated a special OER to document the applicant's alleged abuse of government telephones. The special OER was completed on December 18, 1997. On February 19, 1998, the applicant submitted a reply to the special OER. However, the Chief Counsel alleged, the reply had to be rejected because it "failed to meet quality review standards." The applicant did not submit a revised reply when invited to do so.

As a result of the CO's recommendation, CGPC decided to convene a Special Board of Officers pursuant to 14 U.S.C. § 272(a) to consider the applicant's eligibility for promotion. CGPC decided to wait to convene the board until after the special OER was finished so that the record before the Special Board would be complete. On May 12, 1998, the applicant was informed of the pending board and allowed to submit evidence on his own behalf. On June 16, 1998, the Special Board met and recommended to the Secretary of Transportation that the applicant's name be removed from the 1997 promotion list. On June 30, 1998, the Secretary approved the findings of the Special Board and removed the applicant's name from the promotion list. The applicant was thereafter passed over for promotion by the 1998 commander selection board. He is therefore required to retire on June 30, 1999.

³ When an officer is "frocked," he is not yet promoted but may wear the uniform and perform the office of the higher rank. However, he is evaluated and paid at the lower rank. Article 5.A.14., Personnel Manual.

The Chief Counsel stated that 14 U.S.C. § 271(b) prohibits the promotion of officers off a promotion list until all officers on previous promotion lists have been promoted. Therefore, the Coast Guard could not promote the applicant until July 1, 1997, when all previous promotion lists were exhausted and vacancies arose allowing officers to be promoted off the 1997 list. The Chief Counsel argued that the Board's order in BCMR Docket No. 193-94 could not override the statute. Furthermore, the Coast Guard's actions in placing the applicant on the 1997 promotion list and waiting until July 1, 1997, to promote him were not inconsistent with the Board's order. If the applicant had been promoted on July 1, 1997, his promotion would have been back-dated to July 1, 1994, and he would have received back-pay and allowances.

The Chief Counsel alleged that, although the applicant had been selected for promotion, he nevertheless had to remain eligible for promotion and be authorized to fill a vacancy before the Board's contingent order concerning his promotion could be fulfilled. The Chief Counsel argued that the Board's authority to correct records "does not eliminate the authority of the Coast Guard to remove persons from the selection list when misconduct or lack of qualification becomes evident." The Chief Counsel argued that "[n]o selectee is entitled to an appointment merely by being selected by a Service Selection Board. . . . [C]ontinued satisfactory performance is necessary during the period between the officer's selection and the subsequent promotion" 14 U.S.C. § 272. The Board's order, he argued, does not preempt the application of other statutes. Furthermore, he stated, the order "did not contemplate future misconduct by Applicant and it does not shield him from appropriate action."

The Chief Counsel argued that 14 U.S.C. § 271(f), which authorizes delaying the promotion of an officer who is "under investigation or against whom proceedings of a court-martial or a board of officers are pending," is not the sole authority for the Coast Guard's actions against the applicant. He cited *Law v. United States*, 26 Cl. Ct. 382 (1992), *aff'd*, 11 F.3d 1061 (1993), for the proposition that an officer whose promotion is delayed under 14 U.S.C. § 271(f), may also be removed from the promotion list under § 272(a). He also cited clauses 1 and 2 of section 2 of article II of the Constitution and 14 U.S.C. § 271(b). He argued that the President's constitutional power to appoint and promote officers inherently includes the authority not to promote officers. He stated that this authority has been delegated to the Coast Guard. 49 C.F.R. § 1.45(a)(1). Furthermore, he pointed out that Article 5.A.13.f.(1) of the Personnel Manual does not state that pending actions are the only basis for delaying promotions; it merely states that pending actions are included among other proper bases.

The Chief Counsel also rebutted the applicant's argument that he should have been promoted on July 1, 1997, because the investigation was closed on June 23, 1997, and the Special Board had not yet been authorized. "Coast Guard authorities are simply not required to take instantaneous action once an investigation is completed. . . . Common sense and actual practice require that a convening authority take a reasonable time to read the investigation before exercising discretion and taking action on the results and recommendations of an investigation." The Chief Counsel alleged that the report of the investigation

noted several "pending" issues, such as alleged false statements and misuse of government property by the applicant. The fact that the CO chose to take administrative action, rather than criminal, "did not in any way absolve Applicant of his misconduct." Furthermore, the Chief Counsel argued, under 14 U.S.C. § 272(a), the Coast Guard had authority to delay the applicant's promotion even if there was no investigation pending, and 14 U.S.C. § 271(f) permits a delay of up to one year.

Finally, the Chief Counsel argued that under 33 C.F.R. § 52.61(c), the applicant had waived his right to a final decision within 10 months, under 14 U.S.C. § 425, by submitting the second application on September 17, 1998.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On April 21, 1999, the Chairman sent the applicant a copy of the views of the Coast Guard and invited him to respond within 15 days. After being granted an extension, the applicant responded to the views of the Coast Guard on May 17, 1999.

The applicant stated that two investigations had failed to substantiate the allegations against him. He argued that the third investigation, ordered in July 1997 by the applicant's CO, "merely reinterpreted the evidence rejected . . . in the second investigation," and also failed to prove any misconduct on his part. Therefore, he argued, "[t]here was no proven misconduct in this case."

The applicant argued that, because he would have been selected for promotion in 1993 if the Coast Guard had not included the reviewer's impermissible comments in his OER, "every minute that [the applicant] was deprived of his promotion was a further punishment and injustice to him." Therefore, he should have been promoted at the first opportunity: February 1, 1997.

The applicant also argued that 14 U.S.C. § 271(b) requires officers to receive dates of rank based on their order on the promotion lists. Because the Board's order required the applicant to have a date of rank of July 1, 1994, he alleged, he should have been placed on the 1994 promotion list as soon as his name was confirmed by the Senate on January 31, 1997. Then, he could have been promoted on February 1, 1997, without violating the statute. The applicant argued that there is no statutory authority for a selectee on the 1997 promotion list to have a date of rank of July 1, 1994. Therefore, the Board's order required the Coast Guard to place the applicant on the 1994 promotion list.

The applicant alleged that 14 U.S.C. § 271(f) limits the Coast Guard's authority to delay promotions from confirmed lists to the duration of a pending investigation or board of officers. He argued that the Coast Guard cannot expand this authority by regulation in Article 5.A.13.f. of the Personnel Manual. The applicant also alleged that the Coast Guard "has existing procedures to delay promotions which comply with the statute" but did not use any of them. He stated that 14 U.S.C. § 272(a) permits the President to remove a selectee from a promotion list but not to delay a promotion from the list. Furthermore, the

applicant argued, there were no "pending issues" after the close of the formal investigation on June 23, 1997, because he made no statement at all during the first investigation into the alleged inappropriate relationship and because the false statement allegation against the applicant was never pursued.

The applicant also contended that his CO's decision to remove him from the promotion list rather than try him at court-martial was no favor to him because he was punished even though the CO knew the allegations could not be proven.

Finally, the applicant stated that he had not waived the 10-month time limit by submitting his second application. He argued that his application on September 17, 1998, constituted the filing of a separate case rather than the submission of further evidence in the case filed on July 17, 1998.

SUMMARY OF THE RECORD

The applicant received his commission as an ensign on [REDACTED]. He was promoted to lieutenant junior grade on [REDACTED] to lieutenant on [REDACTED] and to lieutenant commander on [REDACTED]. From July 24, 1989, to July 27, 1993, he served as an [REDACTED]. From July 28, 1993, to July 14, 1996, he served as the [REDACTED]. Since then, he has served as [REDACTED]. After his record was corrected in accordance with BCMR Docket No. 193-94, he was selected for promotion to commander in 1996 and placed on the 1997 promotion list. On January 31, 1997, the 1997 promotion list was confirmed by the President and the Senate. The applicant was then frocked as a commander.

On February 14, 1997, Coast Guard Investigations issued a Notice of Investigation concerning allegations of sexual harassment by the applicant. The notice states that a former student of the applicant alleged that he had been telephonically harassing her since she attempted to end all contact between them. The allegations arose when the student was questioned concerning two anonymous letters that were received by her command. The letters described her in disparaging terms. She stated that she believed the applicant wrote them.

On May 13, 1997, the applicant's CO sent a letter to CGPC requesting that the applicant's promotion be delayed, because of accusations of sexual harassment and obstruction of justice, "until these matters are resolved." On May 21, 1997, CGPC informed the applicant that, based on the information in the CO's letter, his promotion was being withheld in accordance with Article 5.A.13. of the Personnel Manual. The letter stated, "You will be advised of our intent to initiate administrative action if deemed necessary."

On June 23, 1997, Coast Guard Investigations issued a Report of Investigation concerning the allegations of sexual harassment. The report stated that the investigation had failed to prove that the applicant had sent the letters, but it concluded that he was a "likely suspect." The investigation also stated that the

applicant and the student "may have provided false statements to [investigators] during an investigation into their inappropriate relationship when she was a cadet at the academy." The report stated that the investigation was closed.

On July 31, 1997, the applicant's CO received a report of an informal investigation he had initiated after receiving the Report of Investigation on June 23, 1997. The informal investigation concerned the applicant's alleged misuse of government telephones and email. The report stated that between July 1, 1996, and January 31, 1997, the applicant had placed 408 long-distance phone calls to his former student's personal phone number. The frequency varied from just one call per day to as many as 18 calls per day. The applicant was also found to have called another female junior officer long-distance up to 6 times per day during January 1997. Both recipients of the applicant's calls confirmed that the calls did not concern official business.

The report concluded that the applicant was guilty of failing to obey orders, larceny, wrongful appropriation, and false pretenses. It also concluded that there were aggravating circumstances that weighed against the applicant. The investigator recommended that all but the false pretense charge be dropped and that the applicant be taken to mast (NJP) on the false pretense charge. However, on August 25, 1997, the applicant signed an "Acknowledgment and Election" form stating that, after consulting with his private attorney, he chose to refuse NJP proceedings.

On September 12, 1997, the applicant's CO wrote to CGPC requesting that the applicant's record be reviewed to determine his fitness for promotion and to consider whether he should be separated from the Service. The CO stated that both the formal and informal investigations into the applicant's conduct were complete. He concluded that the investigations provided sufficient evidence to prove the allegations "by a preponderance of the available evidence," but not "beyond a reasonable doubt."

On December 18, 1997, the applicant's rating chain completed a special OER to document his misuse of government telephones. All of the marks in the OER are "not observed" except for a mark of 4 (out of 7) for Using Resources and marks of 3 for Judgment and Responsibility. The comments state that, although the applicant's "overall performance in 'using resources' has been far beyond that of a typically effective CG officer," the mark of 4 was assigned because of "misuse of the FTS telephone system."

On May 1, 1998, the applicant sent a letter to CGPC protesting his failure to be promoted in accordance with the BCMR's order in Docket No. 193-94. On May 12, 1998, CGPC responded, stating that 14 U.S.C. § 271(b) and the subsequent delay had prohibited the applicant's promotion and that the matter was still under review. On May 12, 1998, CGPC also informed the applicant that a Special Board of Officers would meet to consider his removal from the promotion list based on the special OER, the results of the formal investigation, and his CO's letter dated September 12, 1997.

On June 16 and 17, 1998, a Special Board of three Coast Guard captains met to consider the applicant's removal from the promotion list. After reviewing the record and the applicant's submissions, the board voted unanimously to recommend removing the applicant from the promotion list based on the "appearance" of two inappropriate relationships, adultery, and improper use of government telephones. On June 29, 1998, the Commandant endorsed the Special Board's recommendation that the applicant be removed from the promotion list. On June 30, 1998, the Secretary of Transportation signed an order removing the applicant's name from the promotion list.

APPLICABLE LAWS

Statutes

The BCMR's authorizing statute states that "[e]xcept when procured by fraud, a correction under this section is final and conclusive on all officers of the United States." 10 U.S.C. § 1552(a)(4).

Title 14 U.S.C. § 271 states the following:

(a) When the report of a board convened to recommend officers for promotion has been approved by the President, the Secretary shall place the names of all officers selected and approved on a list of selectees in order of their seniority on the active duty promotion list.

(b) Officers on the list of selectees may be promoted by appointment in the next higher grade to fill vacancies in the authorized active duty strength of the grade as determined under section 42 of this title after officers on any previous list of selectees for that grade have been promoted. Officers shall be promoted in the order that their names appear on the list of selectees. The date of rank of an officer promoted under this subsection shall be the date of his appointment in that grade.

• • •

(f) The promotion of an officer who is under investigation or against whom proceedings of a court-martial or a board of officers are pending may be delayed without prejudice by the Secretary until completion of the investigation or proceedings. However, unless the Secretary determines that a further delay is necessary in the public interest, a promotion may not be delayed under this subsection for more than one year after the date the officer would otherwise have been promoted. An officer whose promotion is delayed under this subsection and who is subsequently promoted shall be given the date of rank and position on the active duty promotion list in the grade to which promoted that he would have held had his promotion not been so delayed. [This authority has been delegated to the Commandant. 49 C.F.R. § 1.45]

Title 14 U.S.C. § 272 states as follows:

(a) The President may remove the name of any officer from a list of selectees established under section 271 of this title.

• • •

(c) An officer whose name is removed from a list under subsection (a) or (b) continues to be eligible for consideration for promotion. . . . However, if the officer is not selected by the next selection board or if his name is again removed from the list of selectees, he shall be considered for all purposes as having twice failed of selection for promotion.

Title 14 U.S.C. § 285 requires that any officer who has failed of selection to commander twice and who has completed at least 20 years of active service be retired on the June 30th following his second failure of selection.

Coast Guard Regulations

Article 5.A.13.f. of the Personnel Manual provides the following:

(1) It is the responsibility of each officer in the chain of command or Commandant (G-P) to withhold a promotion of officers if there is knowledge that they have disqualified themselves after being placed on a promotion list. Disqualification, as used herein, is deemed to be any circumstance which cast [sic] doubt on the moral or professional qualifications of the officer concerned. This includes pending action by a board of officers, courts-martial, or investigative proceedings. (14 U.S. Code 217f)

(2) A complete report of the circumstances shall be forwarded to Commandant (G-PO) recommending removal of the selectee's name from the promotion list under article 5-A-4g. . . . The selectee shall be furnished a copy of the report. . . .

• • •

(4) The Commandant shall refer the case to a board of officers to recommend whether or not removal of the selectee's name from the promotion list shall be recommended to the President. . . .

APPLICABLE DECISIONS

Law v. United States, 11 F.3d 1061 (Fed. Cir. 1993).

In *Law v. United States*, 11 F.3d 1061 (Fed. Cir. 1993), the plaintiff was a Coast Guard officer whose name appeared in the 107th position on a promotion list. The list was nominated by the President and confirmed by the Senate in January 1989. In May 1990, before a vacancy had occurred for the plaintiff, the Commandant directed that his promotion be withheld and that a board of officers should meet to consider removing his name from the promotion list because of crude behavior and sexual harassment that had been documented in an OER. A vacancy that the plaintiff would otherwise have filled occurred on June 1, 1990. On June 11, 1990, a Special Board met and recommended that his name be removed from the promotion list. The Secretary of Transportation removed the plaintiff's name from the list in March 1991. The plaintiff applied to the BCMR for relief, but his application was denied.

Among other allegations, the plaintiff argued that the delay of his promotion on June 1, 1990, was improper because the Special Board had not yet met

and therefore was not "pending." The court rejected this argument and determined that the board could be considered "pending" from the date it was directed by the Commandant. The court also found that the Secretary's removal of the plaintiff's name from the promotion list within one year was valid because "the Secretary of Transportation could act for the President without a specific delegation of the removal power of § 272(a)." *Id.* at 1066.

United States v. MacDonald, 456 U.S. 1 (1982).

In *United States v. MacDonald*, 456 U.S. 1 (1982), the defendant was an Army physician who was charged by military authorities in May 1970 with the murder of his wife and children. The Army dismissed the charges in October 1970 but continued to investigate the murders after the defendant was honorably discharged in December 1970. The Army presented the Department of Justice with reports of its further investigations in June 1972, November 1972, and August 1973. In August 1974, the Justice Department convened a grand jury, which indicted the defendant for the murders in January 1975. The applicant was convicted. He appealed on the grounds that his Sixth Amendment right to a speedy trial had been violated by the length of time that passed between the date he was first charged by the Army (May 1970) and the date he was indicted by the civilian grand jury (January 1975).

The Fourth Circuit overturned the conviction on the grounds that the defendant's Sixth Amendment right to a speedy trial had been violated. However, the Supreme Court reversed, holding that the time between the Army's dismissal of the charges and the civilian indictment did not count as time during which criminal charges were "pending" against the defendant. The Court noted that the primary purpose of the Sixth Amendment right was to limit the amount of time an accused could be incarcerated prior to trial, which was not an issue in the case. The Court also noted that neither the Army nor the Justice Department had acted in bad faith in the timing of the dismissal and indictment and that much of the delay had been caused by the defendant's own legal maneuvering. In a brief concurrence, Justice Stevens noted that "the interest in allowing the Government to proceed cautiously and deliberately before making a final decision to prosecute for such a serious offense is of decisive importance" *Id.* at 11.

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 the Coast Guard failed to comply with the Board's order in BCMR Docket No. 193-94 by not placing his name on the 1994 promotion list and by not promoting him on February 1, 1997, when the first vacancy for a commander arose after the 1997 promotion list was confirmed on January 1, 1997. However, the Board's order in Docket No. 193-94 did not require the Coast Guard to place the applicant on the 1994 promotion list or to promote him off the 1997 list out of order. It merely required that, if the applicant was selected for promotion by the next board, then upon promotion, his date of rank would be changed to July 1, 1994.

4. The applicant argued that 14 U.S.C. § 271(b) required the Coast Guard, when complying with the Board's order, to place his name on the 1994 promotion list and promote him at the first opportunity. The third sentence of 14 U.S.C. § 271(b) states that the date an officer is appointed shall be his date of rank. In its order in BCMR Docket No. 193-94, the Board exercised its authority to remove injustice under 10 U.S.C. § 1552 by prescribing a date of rank other than the date of the applicant's appointment.

5. The first sentence of 14 U.S.C. § 271(b) prohibits the Coast Guard from promoting an officer off a newly confirmed list of selectees before the officers on previously confirmed lists have been promoted. The Board's order did not require the Coast Guard to ignore the first sentence of the statute by promoting the applicant before officers on previously confirmed lists had been promoted. Therefore, the Coast Guard did not err by placing the applicant on the 1997 promotion list or by not promoting him ahead of officers on previously confirmed promotion lists.

6. In the alternative, the applicant alleged that 14 U.S.C. § 271(b) did not apply to him because it would give the applicant a date of rank different from that mandated by the Board's order. The fact that the Board ordered the Coast Guard to assign the applicant, if promoted, a date of rank other than that prescribed by the statute does not mean that the rest of the statute did not apply to him or that the Coast Guard could or should have ignored other statutory requirements when complying with the Board's order.

7. The order in BCMR Docket No. 193-94 assumed that there would be no further allegations against or investigations of the applicant. The Board cannot provide for every contingency in its orders. The Coast Guard did not err by delaying the promotion of and failing to promote the applicant in accordance with the Board's order when further allegations against him arose after he was selected for promotion.

8. The applicant also alleged that the Coast Guard erred by not promoting him on July 1, 1997, because the investigation into his alleged misconduct was closed the week before, and a board of officers to consider his removal from the promotion list had not yet been approved. Under 14 U.S.C. § 271(f), the "promotion of an officer who is under investigation or against whom proceedings of . . . a board of officers are pending may be delayed without prejudice by the Sec-

retary until completion of the investigation or proceedings." Although the first investigator reported that he had closed his formal investigation of the allegations on June 23, 1997, that does not mean that the applicant's command had "completed" its investigation within the meaning of 14 U.S.C. § 271(f). The applicant's CO initiated a further investigation and took administrative action after he determined that court-martial was not a viable option and the applicant refused NJP proceedings. Therefore, the Coast Guard did not err by failing to promote the applicant on July 1, 1997.

9. Article 5.A.13.f.(1) of the Personnel Manual permits the Coast Guard to delay or withhold a promotion whenever "any circumstance . . . cast[s] doubt on the moral or professional qualifications of the officer concerned." The applicant alleged that this regulation did not comply with the limits on delay Congress set forth in 14 U.S.C. § 271(f). However, 14 U.S.C. § 272(a) empowers the President to remove officers from promotion lists. This statute inherently authorizes the President (or his delegee, the Commandant, 49 C.F.R. § 1.45(a)(1)) to delay an officer's promotion when, as in the applicant's case, serious allegations arise and the officer's removal from a promotion list must be considered carefully. The language challenged by the applicant in Article 5.A.13.f.(1) constitutes a reasonable guideline for implementing the authority conferred under 14 U.S.C. § 272(a). The allegations and the findings of the investigations into the applicant's conduct met the conditions of Article 5.A.13.f.(1) and therefore justified the delay of the applicant's promotion while his CO and CGPC took steps leading to his removal.

10. The applicant argued, in effect, that under the first sentence of 14 U.S.C. § 271(f), the Coast Guard would have to authorize a board of officers immediately upon the termination of an investigation in order to justify not promoting an officer whose promotion had been delayed pending an investigation. This interpretation is unreasonable. As Justice Stevens noted in his concurrence in *United States v. MacDonald*, 456 U.S. 1 (1982), "the interest in allowing the Government to proceed cautiously and deliberately before making a final decision to prosecute for such a serious offense is of decisive importance . . ." *Id.* at 11. The Board does not think that 14 U.S.C. § 271(f) requires the Coast Guard, upon completion of an investigation, to make an instantaneous decision about whether to initiate proceedings to consider an officer's removal from a promotion list.

11. The statute must be read as a whole. After providing for the delay of a promotion pending the completion of an investigation or board of officers, 14 U.S.C. § 271(f) states that "unless the Secretary determines that a further delay is necessary in the public interest, a promotion may not be delayed under this subsection for more than one year after the date the officer would otherwise have been promoted." This language indicates that due process required the Coast Guard either to promote a confirmed selectee or to remove the selectee's name from the promotion list within one year of the date the officer would otherwise have been promoted. Absent the delay, the applicant would have been promoted on July 1, 1997. His name was removed from the promotion list within one year, on June 30, 1998. Therefore, the Coast Guard did not commit error or

injustice by delaying the applicant's promotion and failing to promote him prior to removing his name from the promotion list on June 30, 1998.

12. The applicant alleged that the Coast Guard violated Article 5.A.13.f. of the Personnel Manual by not providing him with notice of the reason for the delay of his promotion once the investigation was complete. However, the notice the applicant received in May 1997, stating that, because of the allegations of misconduct, his promotion would be delayed "until these matters are resolved" met the requirements of Article 5.A.13.f.

13. The applicant has not proved by a preponderance of the evidence that the Coast Guard committed error or injustice by placing him on the 1997 promotion list; by planning to promote him in accordance with the order mandated in 14 U.S.C. § 271(b); by delaying his promotion while investigating the allegations of misconduct and taking appropriate administrative action in light of the findings of the investigations; or by removing his name from the promotion list.

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

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application for correction of the military record of LCDR
[REDACTED] SCG, is hereby denied.

