DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 1999-116

FINAL DECISION

[redacted]:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was docketed on May 24, 1999, upon the Board's receipt of the applicant's request. The application was complete on July 28, 1999, the date the Board received the applicant's military record.

This final decision, dated June 20, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant asked the Board to correct his dates of rank for lieutenant junior grade (LTJG) through captain to the dates of rank for those grades held by the most senior member of the Coast Guard Academy class of 1969. He further requested that all of his fitness reports (FRs) and his officer evaluation reports (OERs) for these ranks be corrected to show the earlier dates of rank. He also requested all back pay and allowances due to him as a result of the corrected dates of rank.

The applicant had a June 4, 1969 date of rank as an ensign. He retired at the rank of captain on May 31, 1996.

EXCERPTS FROM RECORD AND SUBMISSIONS

The applicant stated that he was in year group 69 on the Coast Guard Active Duty Promotion List (ADPL). The ADPL is a list used to indicate the precedence of Coast Guard officers and to determine the order of promotions. He stated that despite his chronologically earlier commissioning, he was listed below the members of the Coast Guard Academy Class of 1969, in precedence, on the ADPL. As a result of his placement on the ADPL, he was promoted later than the last member of the 1969 Academy class who remained on the ADPL for each rank. The applicant claimed that because of these later promotions, he lost pay and allowances due to him at the higher rank for the period of time between the promotion of the first member of the Academy class and his promotion.

The applicant did not attend the Coast Guard Academy, but rather, he was an enlisted [redacted] cadet. The applicant stated that on June 3, 1969, he completed all requirements of his training and he was discharged from his enlisted status to accept an appointment as an ensign. Pursuant to regulation, he was commissioned an ensign in the Coast Guard Reserve on June 4, 1969 at approximately 1:30 a.m.

The applicant stated that [redacted] he took the oath of office in [redacted]

The applicant stated that the Academy class graduated the afternoon of [redacted] They were also to receive their commissions as regular officers at that time. Pursuant to 14 U.S.C. § 185, the commissioning of Academy cadets as regular officers requires Senate confirmation. The applicant stated that he recently learned that the Senate did not confirm the Academy class until [redacted] the day after their graduation ceremony from the Coast Guard. The applicant stated that despite the fact that the Academy class was not confirmed by the Senate until June 5, 1969, he was placed below them on the ADPL.

The applicant stated that the commissioning requirements for aviation cadets and graduates of the Coast Guard Academy are different. He stated that pursuant to section 709(h) of title 14, United States Code, aviation cadets may receive their commissions in the Reserve under the authority of the Commandant, as delegated by the Secretary of Transportation. The applicant stated that officers in command of the aviation cadet program had authorization from the Commandant to commission aviation cadets, like himself, as soon as they completed their training requirements.

The applicant stated that the commissioning of Coast Guard Cadets as regular officers requires the "advice and consent of the Senate" as a prerequisite. The applicant argued that an attempt to commission Academy graduates before obtaining Senate confirmation would be of no effect, because the action did not meet the statutory requirement.

With respect to the 1969 Academy class, the applicant stated as follows:

> The Coast Guard advised the class members on July 10, 1969 that there had been a delay in obtaining Senate confirmation for commissioning the class .... The Senate did not approve the list until June 5, 1969. ....
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> To avoid the public embarrassment which would have resulted through a delay in their graduation (to obtain or await) Senate confirmation, the graduation ceremony proceeded as scheduled and the Class of 1969 was purportedly commissioned, without Senate confirmation. However, the validity of those oaths taken to accept a regular commission on June 4, 1969, without notice to the oath taker and without the statutorily required Senate confirmation, is legally questionable. Those flaws in the commissioning process did not effectively commission the Academy class.
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> Months later, each of the members of the Academy Class of 1969 was individually presented with a new commissioning letter and took a new oath. The anecdotal evidence indicates that the real nature of the original error and the request for a new oath was simply presented as a minor, technical, administrative requirement, without any explanation of its legal

> effect. Such a flaw in the "second" commissioning process arguably did not effectively re-commission the class. This situation casts doubt on the authority, precedence, and status of the officers in the Class of 1969, while serving on active duty.

In summary, the applicant stated, in pertinent part, as follows:

> After [my] commissioning on [redacted] [I] was placed lower on the list of Officers in Year Group 1969, than the Academy Class of 1969, who were scheduled to be commissioned on the afternoon of June 4, 1969, but were not commissioned until June 5, 1969 .... In either event, the Academy Class of 1969 was commissioned chronologically later than [I was]. Throughout [my] entire career, [I] was affected by that injustice, because [I] was consistently promoted to the ranks of [LTJG], through Captain, later in time than the first Academy graduate in Year Group 1969 who remained on the list.

Pertinent Entries from the Applicant's Military Record

The applicant enlisted in the Coast Guard Reserve on March 5, 1968 as an aviation cadet. He completed Naval flight training on June 2, 1969. He was discharged from his enlisted aviation cadet status on June 3, 1969, to accept a Reserve commission. The applicant accepted his commission in the Reserve and took the oath of office on June 4, 1969. The document which the applicant signed stated that his date of rank was the date he signed the oath, which was June 4, 1969. The authority to appoint the applicant as an ensign appeared to have been "COMDT (Ra-2) ltr 1120 dtd 9 January 1969." A copy of the letter was not in the applicant's military record and was not presented by either the applicant or the Coast Guard for the Board's consideration.

Views of the Coast Guard

On February 24, 2000, the Board received an advisory opinion submitted by the Chief Counsel of the Coast Guard. He recommended that the Board deny relief in this case.

The Chief Counsel stated that although the applicant executed his commissioning oath of office [redacted] on June 4, 1969 he was not appointed an ensign until July 1, 1969. (This is the date on which a certificate was signed evidencing the applicant's appointment.) The Chief Counsel stated that the applicant' s rank was then established as June 4, 1969.

The Chief Counsel stated that the three components to the appointment process are making the appointment by proper authority, tendering the appointment to the individual, and accepting the appointment by the individual. The Chief Counsel stated that the Academy class of 1969 could not be commissioned as regular Coast Guard officers on June 4, 1969, because they had not been confirmed by the Senate. The Chief Counsel stated however, that the Secretary, pursuant to the alter ego doctrine, appointed the Academy class of 1969 as ensigns in the Coast Guard Reserve. This constituted the making of their appointments.

After the making of the appointments, the Secretary had to merely tender the appointments, and the Cadets simply had to accept their appointments. According to the Chief Counsel, this was done at the Academy graduation/commissioning ceremony on June 4, 1969. (The Chief Counsel did not provide the Board with a copy of the Reserve appointments for any of the Academy graduates.)

The Chief Counsel stated that the governing statute in the applicant's case is 14 U.S.C. § 758(a) (not § 709, as stated by the applicant), which was added to the code in 1969. Section 758(a) of title 14 provided for the appointment of Reserve aviation pilots as ensigns in the Coast Guard Reserve and section 709 provided for the appointment of student aviation pilots as ensigns in the Coast Guard Reserve. The Chief Counsel stated that under the "alter ego" doctrine, the Secretary could appoint applicant an ensign in the Coast Guard Reserve. According to the Chief Counsel this was done on July 1, 1969, after the applicant accepted his appointment and took the oath of office.

The Chief Counsel argued that the applicant was commissioned before he was tendered an appointment. The Chief Counsel stated that since the applicant's appointment was not made until July 1, 1969, he could not have completed the last act necessary in the appointment process, which was the acceptance of the appointment, until July 1, 1969. The Chief Counsel cited Laningham v. United States, 5 Cl. Ct. 146, 151 (1984).

The Chief Counsel stated that the applicant was further confused because his date of rank was listed as June 4, 1969 on the letter appointing him as an ensign. The Chief Counsel stated, however, that 14 U.S.C. § 773 allowed for an appointee to "be placed in a commensurate position on the Reserve lineal list to reflect his combined years of experience, education, and other such qualifications as may be prescribed by regulations promulgated by the Secretary." The Chief Counsel stated that officers like the applicant could receive a date of rank different from their appointment date. The Chief Counsel argued that the applicant's appointment date was after the appointment date of the 1969 Academy class.

The Chief Counsel stated that even if the Board were to determine that the applicant and the Academy Class of 1969 were appointed Coast Guard ensigns on the same day, Coast Guard regulations provide that Academy graduates take precedence on the ADPL. In this regard, the Chief Counsel stated as follows:

> In 1969, the year Applicant was appointed an Ensign, CGPERSMAN (CG-207), Article 2.A.2, directed officers of the same grade to determine precedence by following Coast Guard Regulations, Chapter 13. That chapter states "Ensigns appointed upon graduation from the Coast Guard Academy shall take precedence among themselves in the order of their class standing upon graduation, and ahead of other appointees with the same date of commission or date of rank." ... The Coast Guard continues to follow the policy .... See CGPERSMAN, Chapter 2.A.6.e.1-7.

> Therefore, even assuming *arguendo* Applicant was appointed earlier on the same day as the CGA Class of 1969, his request for relief must still be denied. The applicable service regulation ... does not make the precedence of CGA graduates vis-à-vis other appointees time-dependent. . . . [The] regulation was constructed to purposely ensure Coast Guard Academy graduates maintained parity with the graduates of other Service Academies and is a policy followed by each of the five Services.

Documentary Evidence Presented by the Coast Guard

The Coast Guard submitted a copy of a letter from the Commandant to one of the 1969 Academy graduates, dated July 10, 1969. The subject of the letter was "Appointment as Permanent Commissioned Officer." The Commandant stated the following:

> 1. Pursuant to the authority of Section 211, Title 14, U.S. Code, the President, by and with the advice and consent of the Senate, appointed you a permanent commissioned officer in the grade of ensign in the United States Coast Guard, effective upon your acceptance, to rank from 4 June 1969.
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> 2. Because the Senate acted on 5 June 1969, subsequent to your graduation and initial appointment on 4 June 1969, your prior commissioning is viewed technically as an appointment in the Coast Guard Reserve, the authority which the Commandant could exercise at the time without congressional action.
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> 3. You are requested to execute the accompanying acceptance and oath of office in recognition of your permanent status and forward the original to the Commandant (PO-3). Execution shall operate automatically to terminate your prior status without interruption of your continuous commissioned service from 4 June 1969.

The Coast Guard also submitted an "Acceptance and Oath of Office" for a member of the 1969 Academy class. It is dated August 5, 1969 and appoints the member as an ensign to rank from June 4, 1969, in accordance with the Commandant's letter dated July 10, 1969.

The Coast Guard also submitted a copy of Article 2-A-2 of the Personnel Manual-1967 (CG-207). This provision stated that "Each officer shall take precedence over all offices of lower grade .... Within the same grade, precedence shall be as defined in Chapter 13 Coast Guard Regulations."

Chapter 13-1-2A. of the Coast Guard Regulations stated as follows: "The names of all commissioned officers of the Coast Guard on active duty, including those officers whose permanent status is commissioned warrant officer, warrant officer, or enlisted, and of those officers of the Coast Guard Reserve on active duty whose names appear in the Register of Commissioned and Warrant Officers and Cadets of the United States Cost Guard shall be carried on a single lineal list. These officers shall take precedence

in the order in which their names are listed in the official Coast Guard Register kept at Headquarters."

Chapter 13-1-2B. stated that "[p]recedence in grade shall be determined by date of rank in present grade, without distinction as to whether permanent or temporary, except for officers who have lost numbers in grade."

Chapter 13-1-2G. stated as follows: "[O]fficers with the same date of commission or date of rank shall take precedence in the following order: (1) Officers promoted from the next lower grade. (2) Appointees as permanent commissioned officers. (3) Appointees as temporarily commissioned officers."

Chapter 13-1-2H. stated that "[e]nsigns appointed upon graduation from the Coast Guard Academy shall take precedence among themselves in the order of their class standing upon graduation and ahead of other appointees with the same date of commission or date of rank."

Chapter 13-1-3 (Date of Rank) of Coast Guard regulations state, in pertinent part, as follows:

> A. The date of rank in permanent grade of a commissioned officer shall be determined as follows, depending upon whether or not a date is specified in the Confirmation of Appointment approved by the Senate, or, in the case of a recess appointment, in the letter of appointment signed by the President:
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> (1) When a date is specified, it shall be the date on which the officer was appointed to the given grade for temporary service provided he is currently serving in that grade for temporary service, or the date when a vacancy in the given grade is expected to occur.

Attached to the advisory opinion was a statement from the office of the Commander, Coast Guard Personnel Command (CGPC). He stated that the application was not timely and the doctrine of laches was applicable. CGPC stated that "although the applicant submitted his petition within three years of his retirement, the alleged grievance occurred over 30 years ago and should have been addressed at that time."

Applicant's Reply to the Views of the Coast Guard

On April 21, 2000, the Board received the applicant's response to the advisory opinion. He disagreed with it.

The applicant stated that he executed his "commissioning oath of office" as an ensign in the Reserve on June 4, 1969, prior to the execution of any similar document by the Academy class of 1969. The applicant stated that the document he signed on that date was his acceptance of the appointment tendered to him by the Commandant. He argued that the signing of this "acceptance and oath of office" was the final act necessary to complete his appointment as an ensign in the Reserve. The applicant

stated that the document given to him on July 1, 1969 (a certificate memorializing his appointment as an ensign) was nothing more than a ceremonial document.

The applicant stated that contrary to the Coast Guard's allegation, members of the Academy class of 1969 were not appointed ensigns in the Reserve on June 4, 1969. The applicant stated that there is no evidence that the Coast Guard offered the members of the 1969 academy class a valid regular or reserve appointment on June 4, 1969.

In this regard, the applicant submitted a page from the Academy's Personnel Diary which contained the following notation on June 4, 1969: "Apptd ENS USCG. Rank fm 6/4/69. COMDT ltr 1426 of 6/3/69. Estab PBD 06 04 69[.]" He also submitted two copies of the "acceptance and oath of office" documents from two different members of the Academy class. These documents were dated June 4, 1969 and show appointments as ensigns in the United States Coast Guard (not Coast Guard Reserve). The authority for the appointment was COMDT LTR 1426 of June 3, 1969. The execution of these documents were subscribed and sworn to before a Coast Guard officer on June 4, 1969. The applicant stated that these June 4, 1969 regular appointments were not valid because there had been no Senate confirmation.

The applicant also submitted a third "acceptance and oath of office" dated November 5, 1969. It showed that this individual was appointed an ensign in the Coast Guard, with the phrase "Coast Guard Reserve" crossed out. This document referenced the Commandant's letter of July 10, 1969, which explained the problem with the June 4, 1969 appointments.

The applicant stated that the Academy class members did not accept Reserve appointments on June 4, 1969. He stated that there was no valid acceptance of any tendered Reserve appointment by the members of the Academy class because they had no knowledge of any tender of a Reserve appointment and did not accept a Reserve appointment on that date. The applicant further stated that based on a Coast Guard submission in BCMR No. 109-79 (which dealt with the issue of a Reserve uniform allowance for one of the Academy graduates), the Service had no intention of offering the members of the Academy class Reserve appointments on June 4, 1969.

In BCMR No. 109-79, the applicant requested a uniform allowance on the ground that as an ensign in the Coast Guard Reserve from June 4, 1969, to August 6, 1969, he was entitled to the allowance. The Board in that case relied on an advisory opinion written by the Chief Counsel of the Coast Guard, which stated in pertinent part:

> With respect to the request for initial uniform allowance, it is apparent from the acceptance and Oath of Office executed by the applicant on 4 June 1969 that he and the Coast Guard intended that he be appointed on that date a permanent commissioned regular (vice reserve) officer in the Coast Guard .... The Court of Claims has held that an appointment which by law requires Senate confirmation does not become effective in law until the Senate confirms, and during the interim the person if performing service can only be considered a de facto officer .... In this case the appointment was made on 4 June 1969, but not confirmed by the Senate until the next day, 5 June. Thus, on 4 June 1969, the applicant became

> de facto a permanent commissioned regular officer of the Coast Guard and, when confirmed by the Senate at its next session on 5 June he became de jure a regular officer. He was never appointed an officer of the Coast Guard Reserve, notwithstanding the unfortunate choice of words in the letter to the applicant from the Commandant ... dated 10 July 1969. To the contrary, I believed the absence of intent to tender a Reserve appointment in the first place is manifest, and even if the acceptance and oath of office executed on 6 August were read as expressing such an intention on the part of the parties at that time, the intention would not be given retroactive effect for purposes of establishing legal entitlements to allowance.

On August 29, 1980, the Board entered a decision in that case, agreeing with the comments of the Chief Counsel at that time. That Board stated the following:

> We find that the Coast Guard clearly intended to commission [the applicant] an officer in the Regular Coast Guard on June 4, 1969. Petitioner was commissioned upon graduation from the Academy, his nomination was submitted to the Senate for confirmation as a permanent commissioned officer in the Coast Guard, his appointment was made pursuant to 14 USC § 211 (which provides for commissions in the Regular Coast Guard), and the date of his initial appointment and his date of rank were considered by the Commandant to be June 4, 1969. These facts provide convincing evidence that the Coast Guard intended to issue [the applicant] a commission in the Regular Coast Guard.
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> The fact that the Commandant ... on July 10, 1969, may have believed that a second Acceptance and Oath of Office was required is not conclusive upon the question of [the applicant's] status. The appointment of officers is governed by statute .... We agree with the Chief Counsel that [the applicant] was a de facto Regular officer from June 4, 1969, to June 5, 1969, and he was a de jure Regular officer as of June 5, 1969.

Additional Information

On April 28, 2000, the Board asked the Coast Guard to review its records and submit any further evidence that it might have showing that the members of the 1969 Academy class were appointed as Reserve officers on June 4, 1969. The Board also invited a discussion on the entitlements of a de facto officer.

On May 9, 2000, the Board received additional comments from the Chief Counsel. The Chief Counsel takes the position that the members of the Academy class received valid (e.g. perfected) Reserve appointments in 1969. He admitted in a footnote that the Coast Guard's position in this case is contrary to its position in BCMR No. 109-79, wherein that Chief Counsel stated that the applicant in that case, a 1969 Academy graduate, was not appointed as a Reserve officer on June 4, 1969, but rather was a de facto officer until he was confirmed by the Senate on June 5, 1969.

The Chief Counsel restates his position that the Academy class members were appointed as Reserve officer on June 4, 1969. He relies, in part, on the June 10, 1969 letter issued by the Commandant to the members of that class. The letter stated, in pertinent part, "[b]ecause the Senate acted on 5 June 1969, your commissioning is viewed technically as an appointment in the Coast Guard Reserve, the authority which the Commandant could exercise at the time without congressional action."

In response to an applicant submission showing that a member of the 1969 class received a regular commission with COMDT letter 1426 of June 3, 1969 as the authority to proceed with the appointment, the Chief Counsel now argues that this was the authority for the Reserve appointments. In this regard, he states that there would have been no reason for the Commandant to act on June 3, 1969 to reissue or restate the regular commissioning authority of the Senate. The Chief Counsel stated that "[u]nder the strong presumption of regularity afforded Coast Guard officials, and in the absence of a copy of the 03 June 1969 memorandum which is missing due to Applicant's inaction, the Board should reasonably conclude the Commandant was acting under his authority to provide appointment authority for reserve commissions in the Coast Guard Reserve in view of the Senate's failure to act in a timely manner."

The Chief Counsel stated that the applicant has not shown, as he alleges in his application, that the members of the 1969 Academy class received defective regular appointments on June 4, 1969.

The Chief Counsel asserted that the applicant's claim is more than 30 years old and should be barred by the doctrine of laches. The Chief Counsel stated the following:

> [T]he government's case has been prejudiced by the lack of evidence and witnesses and applicant has presented no valid excuse for his thirty-year delay in presenting his case .... In the present case, the Coast Guard has been severely prejudiced in its efforts to fully reconstruct the facts and circumstances of this case due to the passage of time. Applicant had constructive notice of the irregularity in the CGA commissioning since 1969, when record of the Senate's confirmation of the appointments was completed on 05 June. At every promotion point in his career, Applicant had the opportunity and motive to raise the matter with the Board. Applicant's admits in his brief ... that he "search[ed] for some explanation [for his lower placement] during his whole career", albeit with a notable lack of intensity. His inaction, when considered, does not make this case as worthy of redress by the Board for equitable purposes. Considering the substantial delay between the alleged error and the date of application in this case, and that applicant has the burden of proof, the Board should dismiss this application with prejudice.

Applicant's Rebuttal to the Supplemental Views of the Coast Guard

In his rebuttal, dated May 15, 2000, the applicant stated that contrary to the Coast Guard's assertion, the Board did not state, in BCMR No. 109-79, that the Commandant validly appointed the members of the Academy class as Reserve Ensigns, on June 4,

1969. That decision states that the Coast Guard intended that the members of that class have regular commissions.

The applicant stated that the first mention of Reserve appointments for the members of the Academy class of 1969 came in the Commandant's letter, dated July 10, 1969. The applicant stated that that letter offered the Academy class members regular appointments, which the Commandant was authorized to do after the Senate confirmed their appointments on June 5, 1969.

The applicant stated that in Bennett v. United States, 19 Ct. Cl. 379 (1884), the plaintiff was determined to be a de facto officer because his appointment had not been confirmed by the Senate on the date he began performing his duties. Bennett did not become a de jure officer, with entitlement to rank, pay and benefits, until February 23, 1987, the date of his Senate confirmation. The applicant stated that the Court found that as a de facto officer Bennett was not legally in office and not legally entitled to the emoluments of that office, but since he had been paid during that period, the Court would not, in equity, take that pay from him. The Court also restated the rule from earlier cases that neither the President alone, nor with the consent of the Senate, could antedate the appointment to give an officer legal entitlement to his office prior to the date of actual, legal appointment. With respect to the 1969 Academy, the applicant stated that they may have looked like officers to the outside world, but they were not entitled to the pay, allowances, or authority of their apparent office.

The applicant stated that the Coast Guard should not be allowed to use the presumption of regularity to prove that the June 3, 1969 memorandum offered Reserve appointments. The applicant stated that in comparing the content of the documents signed by the Members of the Academy Class on June 4, 1969 with that signed in August 1969, that there was no intent to offer the Reserve commissions on June 4, 1969. The applicant stated that the content of the Commandant's letter dated June 10, 1969 and the Board's decision in BCMR No. 109-79 supports this position.

The applicant stated that the doctrine of laches requires a showing of real prejudice or substantial harm. The applicant stated that ample documents have been presented and ample witnesses exist. He alleged that there are many living Members of the 1969 Academy class that the Coast Guard could have consulted. The applicant stated that the absence of only one document, the June 3, 1969 Commandant letter, especially where its content can reasonably be inferred from other documents in evidence and the Coast Guard's argument in a prior BCMR case, does not constitute the required showing. He alleged that the only reason the Coast Guard is making the laches argument is to reverse its position in BCMR 109-79 in an effort to defeat the applicant's claim. He argued that the Coast Guard should be held to its earlier, official position. The applicant denied that he was aware of the error or injustice during his whole career. The applicant further stated as follows:

> In passing the Soldier's and Sailor's Civil Relief Act of 1940 ... Congress specifically extended Judicial Board deadlines ... during periods of active duty. Congress was certainly aware of the longevity of military careers. The Coast Guard is arguing ... that an equitable doctrine should defeat that clear statutory pronouncement which the Court in Detweiler v. Pena,

38 F.3d 591 (D.C. Cir. 1994) stated is applicable to the three (3) year period established by the [Board's] regulations. Since this [applicant] filed his Application within three (3) years of his retirement date, he has met the statutory requirement extended to him by Congress.

FINDINGS AND CONCLUSIONS

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

1. The BCMR has jurisdiction of this case pursuant to section 1552 of title 10, United States Code. The application meets the Board's statute of limitations for timeliness, pursuant to Detweiler v. Pena, 38 F.3rd 591 (D.C. Cir. 1994).

2. The Chairman has recommended disposition of the case without a hearing. 33 CFR 52.31 (1993). The Board concurs in that recommendation.

3. The Board finds that this case should be denied due to laches. The Court ruled in Detweiler v. Pena, 38 F.3d 591 (D.C. Cir 1994), that active duty periods are not included in the Board's three year statute of limitations. Contrary to the applicant's arguments, the Court also stated in the Detweiler case that when the Soldiers and Sailors Civil Relief Act (SSCRA) tolls a statute of limitations, the doctrine of laches remains available to the government to protect itself from stale claims. The Court saw no reason why laches would not be available before a BCMR. Id. at 595. See also Deering v. United States, 620 F.2d 242, 245 (1980). Accordingly, the Board finds that the SSCRA does not prevent it from denying a servicemember's claim on the ground of laches.

4. In denying this claim based on laches, the Board finds that there has been inexcusable delay by the applicant, with resulting prejudice to the Coast Guard. See Sargisson v. United States, 12 Cl. Ct. 539, 541 (1987). In this regard, the Board notes that on the date the applicant filed his application with the Board, May 21, 1999, he and the members of the 1969 Academy class had been commissioned for approximately 30 years. The Board believes that the applicant had some knowledge, earlier than May 31, 1996, that the Senate's confirmation of the Academy class came on June 5, 1969, a day after the graduation and commissioning of the Academy class as regular Coast Guard officers. In this finding, the Board is influenced by the applicant's statement that he searched for some explanation for his lower placement on the ADPL during his whole active duty career. The Board finds that the applicant certainly had constructive knowledge of the alleged error on June 5, 1969, the date the Senate confirmed the Academy class as ensigns in the regular Coast Guard. The applicant has not provided a sufficient reason for not filing his application sooner.

5. The Board notes that even after the alleged discovery of error on May 31, 1996, the applicant did not file a claim with the Board until May 21, 1999, almost three years later. He provided no explanation why he could not have filed his application immediately after allegedly discovering the error in 1996, especially in light of the fact that significant time had already passed since the alleged error occurred in 1969.

6. The Board finds that the Coast Guard has been prejudiced by the applicant's delay. The Service has asserted that the June 3, 1969 letter, which it alleges would prove that the members of the Academy class were appointed as Reserve officers, cannot be found. From references to it in the record, the Board finds that a letter dated June 3, 1969 existed at one time. Neither party has presented that letter to the Board, although each claims that it would be proof of their assertions. Without the letter, the Board cannot make a determination with respect to the relevancy of its contents. The Board also recognizes the Coast Guard's assertion that it has been prejudiced by the lack of witnesses after 30 years.

7. Additionally, the Board finds that the Coast Guard will suffer financial prejudice by having to pay back pay and allowances to the applicant and possibly others, if this application were granted. Such back pay awards could have been limited, if the applicant's claim had been brought to the Board sooner. Other prejudice suffered by the Coast Guard would be to the members of the 1969 Academy class, if because of corrections to the applicant's record, the Coast Guard is forced to make adjustments to the records of those other members, who might be above the applicant on the ADPL. While, the applicant has argued that only his record would be affected because he is no longer on the ADPL, he has not presented the Board with any reasoning or evidence of why this is so.

8. In rebutting the Coast Guard's claim that it has been prejudiced by his delay, the applicant asserted that the Service must show substantial prejudice in order to prevail on the defense of laches. The applicant asserted that the inability to locate one document is not substantial prejudice. After a period of 30 years, the Board notes that the Coast Guard need only show that it has been prejudiced. The Board finds that "[t]he longer the delay by a plaintiff in filing suit, the less need there is to search for specific prejudice and the greater the shift to a plaintiff in demonstrating lack of prejudice." Deering at 246. Under the circumstances of this case, the Board is satisfied that the Coast Guard has been prejudiced by the applicant's delay as discussed above to meet the standard of laches.

9. Even if the applicant had shown error, the Board finds that he has not demonstrated that he was prejudiced by it. As the Court stated in Guy v. United States, 608 F.2d 867, 872 (1979), not all errors warrant judicial relief. The Board notes likewise that not all errors before a BCMR warrant relief. In this case, the Board finds that the applicant has not shown harm, even if he were incorrectly placed below the 1969 Academy class on the ADPL.

10. The applicant alleged that he was promoted later than the members of the Academy class for each grade from LTJG through Captain because of his lower placement on the ADPL. He claimed that he had lost pay and allowances by being promoted later in each grade than the members of the 1969 Academy class. However, it could have been that a higher placement on the ADPL would not have been as beneficial to the applicant's selection opportunities as the placement that he held. Higher placement on the ADPL could have placed the applicant in a different promotion zone where the competition might have been stronger. He has not presented the Board with any evidence that he would have been selected for promotion to the grades of LTJG through captain by the selections boards that first considered him

for promotion to those grades, if he had been higher on the ADPL. Therefore his argument in this regard is not convincing.

11. Additionally, the applicant has not presented any evidence, except for his own conclusory statement, that he suffered the loss of any job or school assignments because of his lower placement on the ADPL. Moreover, there is no evidence that his career was cut short because of his lower placement on the ADPL. In other words, there is no evidence that the applicant's placement on the ADPL caused him to serve a shorter period on active duty than the members of the Academy class who were above him on the ADPL. The evidence of record indicates he voluntarily retired from the Coast Guard. Therefore, the Board assumes that he had the opportunity to stay longer, if he had desired to do so.

11. The applicant asks the Board to upset the status quo based on an alleged error without some showing that he has been harmed by it. This the Board refuses to do.

15. Accordingly, the Board finds that the application in this case should be denied on the ground of laches, and the lack of proven harm to the applicant.

ORDER

The application of [redacted] USCG (Ret.), for correction of his military record is denied.

[redacted]