

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 48-96

FINAL DECISION ON RECONSIDERATION

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This is a proceeding for reconsideration of a final decision issued under the provisions of section 1552 of title 10, United States Code. The decision to be reconsidered, BCMR No. 216-94, was issued by the Board for Correction of Military Records on July 21, 1995.

The application for reconsideration was docketed by the BCMR on December 22, 1995, as BCMR No. 48-96..

The final decision on reconsideration, dated January, 3, 1997, is signed by the three duly appointed members who were designated to serve as the Board in this case.

Application for Relief

The applicant asked the Board to reconsider its decision in BCMR Docket No. 216-94 denying his request for removal of his PY (promotion year) 94 failure of selection for promotion to lieutenant commander (LCDR). The applicant is a Reserve Program Administrator (RPA), who alleges in the current case, as he did in the original case, that the PY94 RPA selection board was improperly constituted.

The applicant was selected for promotion to LCDR by the PY95 RPA selection board.

BCMR Docket No. 216-94 (original case)

The applicant argued in this case that the RPA selection board was improperly constituted because 50 percent of the selection board members were not Reserve officers, as required by section 730(a)(2) of title 14, U.S. Code. The applicant also alleged that the Coast Guard violated its own regulations by not having at least three RPAs on the selection board.

The 1994 RPA selection board consisted of 7 members, only two of whom were RPAs.

The BCMR in this case determined that although RPAs are Reservists, their selection for promotion is not governed by 14 U.S.C. 730, a general law, but rather by a more specific law found at 14 U.S.C. 728. The BCMR stated the following in the findings and conclusions of BCMR No. 216-94:

5. Section 730 of Chapter 21B, title 14, U.S. Code, applies to the selection of Reserve officers in general, but it does not apply to the selection of Reserve Program Administrators because they are on extended active duty. Section 728 of Chapter 21B of title 14, U.S. Code, provides that a "Reserve officer on active duty . . . shall be considered for promotion under chapter 11 of this title." Chapter 11, the appropriate chapter, does not contain a provision requiring that a minimum number of selection board members be Reserve officers. [This quote has been corrected by deleting the word not from the second sentence.]

6. The applicant . . . admits that the interpretation set forth in Finding 5 is "plausible," but he suggests that it was the intent of Congress to have the 50% Reserve officer requirement apply to RPA selection boards as well as other Reserve selection boards. His only support for that argument is that the Coast Guard regulation requires that three members of each RPA selection board be RPA officers. The argument is without merit because the language of section 728 is unambiguous. The intent of Congress is clearly to require Reserve officers on extended active duty, such as RPA's, to be considered for promotion under chapter 11 of title 14, U.S. Code.

7. Article 14-A-12b. of the Personnel Manual provides that not less than three RPAs shall be members of an RPA promotion board. The regulation provides, however, that a smaller number of RPAs may be appointed to such a Board "[i]f a sufficient number of RPA's are not available to satisfy this requirement." In this case, the Coast Guard made a determination that only two of the 12 RPA Captains in the Coast Guard were available to serve on the 1994 RPA promotion board.

8. The Coast Guard explained why the other 10 RPA Captains in the Coast Guard were not available to serve on the PY94 RPA Selection Board. The term "available" is not defined in Coast Guard rules, so the Coast Guard may determine its meaning. . . . The Coast Guard's determination should be rejected only if it is determined to be arbitrary, capricious, or contrary to law. The BCMR makes no such determination.

BCMR Docket No. 48-96 (current case)

The applicant claimed that his case should be reconsidered by the BCMR because of "newly discovered evidence or information, not previously considered by the Board" which justifies and supports "a determination other than that originally made." He

alleged that this newly discovered evidence or information fell into the following three categories:

"a. the recent discovery of a decision of the BCMR (98-93) made last year which addressed virtually the same issues of Reserve membership on a selection board as are presented in this case, but which reached an opposite conclusion, and was decided in favor of the applicant;

"b. the action of the Coast Guard in the most recent RPA Selection Board which met in October, 1995, which negates factual assertions and arguments made by the Coast Guard which were accepted by the BCMR in reaching its decision [in the original case];

"c. evidence sought out after discovery of a. and b. which confirms and supports the fact that a. and b. were correct actions, thus further calling into question and undermining the decision of the BCMR in [applicant's case]."

The applicant argued that "while the precise issue was slightly different in 98-93 (failure to include any reserves where a minimum of one was required), the larger issue is the same: a selection board which is not 'properly constituted' as required by law is defective, mandating the removal of records of failure of selection of those affected. Applicant's selection board was required by law to have three RPA officers unless three were unavailable. The Coast Guard's argument in both Applicant's case and in 98-93 is summed up in its own words: that it is 'extremely difficult, and at times virtually impossible' to follow the law. That argument did not work in 98-93, and if it is to be allowed in Applicant's case the Board has at least a duty to articulate why it reaches a different application of the law."

The applicant argued that the Reserve Officer Personnel Act (ROPA) of 1954 mandated that 50 percent of the members of any selection board appointed "shall to the extent practicable, be reserve officers." See ROPA of 1954, Pub. L. No. 83-773, § 203(b), 68 Stat. 1147, 1150 (Sept. 3, 1954). This law specifically excluded from this mandate Reserve officers whose names appeared in the Register of the Commissioned and Warrant Officers and Cadets of the United States Coast Guard (known today as the Regular Register). At this time, RPAs were listed in the Reserve Register. Therefore, since RPAs were not listed in the register of commissioned officers, the 50 percent rule applied to RPA selection boards.

The applicant stated that as late as 1964, the Regular Register consisted primarily of an "Officers Active List." In 1965, the Regular Register was expanded to include lists of other officers in addition to the ADPL (active duty promotion list), including RPAs. However, RPAs have never been included on the ADPL itself. Even with this 1965 change to the Regular Register, the applicant argued that the 50 percent rule continued to apply to all Coast Guard Reserve officers other than those carried on the ADPL. The

applicant argued that until 1988 the Coast Guard complied with the law by ensuring that 50 percent of the members on a RPA selection board were Reserve officers.

The applicant argued that the Secretary, by regulation, implemented not merely a de facto 50 percent Reserve officer requirement for RPA selection board membership, but went even further by requiring that the three required Reserve officers of the five member selection board come from that special category of Reserve officers who were RPAs. . . ." See Article 14-A-12b. of the Personnel Manual.

The applicant stated that there have been changes in the law governing Reserves since 1954, but the requirement for 50% Reserve membership on selection boards has been constant since the creation of the Reserve in 1952.

The applicant argued that the PY94 RPA selection board was not only in contravention of the Secretarial regulation, it was patently inconsistent with the DOD regulations and practice, thus making it inconsistent with the 1952 statute, which created the Reserve, and congressional intent. The applicant stated that the 1952 law required that "[i]nsofar as practicable, the regulations for all reserve components shall be uniform." The law also requires that promotion of all members of the reserve component, including the Coast Guard, be consistent with "standards and policies established by the Secretary of Defense." Armed Forces Reserve Act of 1952, Pub. L. No. 82-476, § 251, 66 Stat. 481, 495-6. The applicant stated that the RPA equivalents in the Navy (TARs), and in other services, are considered for selection for promotion by boards comprised of at least 50 percent Reserve membership, and routinely are entirely comprised of Reserve officer membership. The applicant stated that "[t]he regulations . . . , have been sometimes implemented in an inconsistent manner, to the degree that the Coast Guard has chosen to primarily (if not exclusively) to use regular officers rather than other reserve officers to fill out the boards."

The applicant claimed that the Coast Guard has changed its position on the meaning of the term "unavailable" by assigning individuals to the PY96 selection board whose circumstances were similar to potential members for the PY94 board who were found to be unavailable. In 1994, the Coast Guard used the same officers as members of the RPA selection board and RPA continuation board. The applicant noted that in BCMR No. 216-94, the Coast Guard stated that a certain captain was not available for membership on the 1994 RPA selection board because his record was to be considered by the RPA continuation board. The applicant stated that the PY96 selection board and PY96 continuation board were each comprised, at least in part, of different members. The applicant argued that the Coast Guard's decision to do what it argued it could not do in 1994 constituted new evidence and established that the Board's original decision was arbitrary and insupportable both in law and in fact.

In the previous case, the Coast Guard indicated that a captain was unavailable because he had less than a year in grade. However, the Service did use a captain with less than one year of service on the PY96 RPA selection board. This the applicant

asserted is new evidence in that it is contrary to the Service's earlier claim that an officer was unavailable for service on a selection board because he had less than a year in grade.

The applicant also noted that the Coast Guard considered a captain who had elected to retire not available for service on the PY94 RPA selection board. The applicant stated that this Captain believed that he was available and had actually sought a position on the selection board. The applicant argued that the Coast Guard's rejection of this captain for service on the PY94 RPA selection board was arbitrary and capricious.

The applicant asserted that BCMR No. 216-94 should be reconsidered because "the decision of the board [in that case] was taken in violation of due process and the intent of the BCMR's own regulations. The regulations provide for the [BCMR] application and supporting documentation to be forwarded to the Coast Guard for their views, and for those views . . . to be submitted to the applicant. . . ." In the original case, the applicant did respond to the initial Coast Guard views. The applicant further alleged that the Board then, without specific authority in the regulation (or notice to applicants), forwarded that response to the Coast Guard. The Coast Guard not only submitted further views and arguments, but it also raised new issues. Although the BCMR sent a copy of the supplemental Coast Guard views to the applicant, it did so via a letter that strongly discouraged any further effort to rebut or respond to that submission, by stating in that letter "[n]o further comments are needed from you." The applicant did submit a response to the supplemental views of the Coast Guard, but it was received after the Board decided BCMR No. 216-94.

The applicant asserted that it was particularly important that he have the opportunity to respond to the supplemental views of the Coast Guard since these views alleged that his attorney had intended to deliberately mislead the Board. He stated his rights to a fair consideration of his case were adversely affected because the BCMR decision-makers were left with this incorrect impression.

Statements Submitted by the Applicant

The applicant submitted a statement from a retired Coast Guard captain who was an RPA. Immediately prior to his retirement in 1990, he served for approximately two years as Deputy for Reserve, Office of Readiness and Reserve in Coast Guard Headquarters. From 1985 until 1988, he was assigned to duty as the Chief, Reserve Personnel Management Division. While serving in these positions, he was responsible for recommending officers for service on selection boards considering Reserve personnel. The captain stated that based on these positions and his 25 years as a Reserve and RPA, he would classify himself as an expert in the Coast Guard's Reserve personnel administration system.

The captain stated that certain arguments advanced by the Coast Guard and accepted by the Board in BCMR No. 216-94, were not consistent with established practices as he knew them to be applied during his Coast Guard career. He stated that the initial pool of officers for consideration on the RPA selection board were those who were serving in or above the officer in the highest grade before that board. He stated that an officer who sat on the previous board could not serve on the current board, and was therefore considered unavailable. In developing a slate of potential members for a selection board, many factors are considered. These factors are discriminators not disqualifiers. He stated that an officer is not unavailable because of his performance record, because he elected to retire, or because he has served less than one year in grade.

The applicant submitted a letter written to him by another captain who elected to retire and therefore was not permitted to serve on the selection board. This letter is dated March 30, 1994, and reads in the following manner: "This is to confirm our conversation of March 28, 1994, in which I told you I was available for, and willing to serve on, the December 1993 RPA Selection Board. In fact, I spoke to . . . , the Deputy for Reserve, early in 1993 to express my desire to serve on that board. My recollection is that he responded favorably to my request, indicating that he would discuss it with G-PO.

Views of the Coast Guard

The Coast Guard recommended that the applicant's request for reconsideration of BCMR No. 216-94 be denied.

The Coast Guard stated that the applicant has not submitted newly discovered evidence that would result in a determination other than that originally made by the Board. The Service argued that the federal statutes and the prior BCMR decision were either inapplicable or misapplied, or both, in the instant case. The Service further stated that such evidence should not be treated as "newly discovered."

BCMR 98-93 dealt with a Reserve officer on active duty who was considered for promotion by an ADPL board. No Reserve officers were assigned to serve as members of this selection board. Section 266(a) of title 10 United States Code required that "at least one" Reserve officer must be a member of a selection board considering Reserve officers. The Coast Guard argued that unlike the situation in Docket No. 98-93, which was governed by section 266(a), RPA selection boards are governed by section 276 of title 14, United States Code. Section 276 states that "[o]fficers who are not included on the active duty promotion list may be promoted under regulations to be prescribed by the Secretary. These regulations shall, as to officers serving in connection with organizing, administering, recruiting, instructing, or training the reserve components, provide as nearly as practicable, that such officers will be selected and promoted in the same manner . . . as officers on the [ADPL]."

Even if section 266(a) applies to Coast Guard RPA promotions, the Coast Guard did not fail to assign "at least one" Reserve officer member to the PY94 RPA selection board. There were two Reserve officers on the PY94 selection board. The Coast Guard stated that the facts in Docket No. 98-93 are different from the facts in this case.

Concerning the applicant's argument that ROPA requires that Reserve officers make-up 50 percent of the membership of a selection board considering reserve officers, the Service stated the following:

The ROPA applies the 50% rule to Reserve officers appointed under its provisions. However, Coast Guard Reserve officer promotions are generally governed by Title 14. 14 U.S.C. § 730(a) contains its own, actually stricter 50 [percent] rule to Coast Guard Reserve Officer selection boards. Coast Guard Reserve officer selection boards are allowed no exceptions to the 50% Reserve membership requirement for the DoD Services, --that is, the "to the extent practicable" exception does not apply. Under section 730, all Reserve officer selection boards, up to but not including flag rank, must have 50% Reserve officer membership. Notwithstanding that apparent support for Counsel's position, he has not established error in the composition of the PY94 RPA Board. . . . RPA promotions are governed by Chapter 11 of title 14, not by Chapter 21. . . . Section 728 of Title 14, U.S. Code expressly excepts RPA selection boards out of the requirement to have 50 [percent] Reserve officer membership, and section 276 requires them instead to conform to Regular officer selection board procedures. Thus, Counsel's reliance on the ROPA does not establish an error. The ROPA applies only to Reserve officers that are promoted under its provisions and Coast Guard RPAa are not so protected.

The Coast Guard argued that even if ROPA applied to the Coast Guard RPA selection board membership, the applicant would have to provide substantial proof that the Coast Guard violated the "to the extent practicable" exception to the 50% rule. The Service argued that the applicant failed to establish "that the Board erred in its findings (available vs practicable) that the CG did not abuse its discretion" (emphasis in original).

The Coast Guard asserted that the applicant has not presented evidence that its regulations governing RPA selection boards must be consistent with DOD regulations that govern the other Services. Coast Guard regulations on this matter are promulgated under the authority of 14 U.S.C. § 276. This statutory provision contains no limitations on RPA membership. Therefore, unless the regulation has been promulgated contrary to law, its provisions properly authorizes the Service to reduce the RPA promotion Board membership below three.

Moreover, the Coast Guard argued that Congress has drawn a significant distinction between the promotion Reserve officers like the member in BCMR No. 98-93 (on the Active Duty Promotion List (ADPL)), and the promotion of RPAs, who are not on the ADPL.

In PY94, the Coast Guard used one panel of members to serve on both the selection board and continuation board for RPAs. The Coast Guard used different members, at least in part, for each Py96 board. The Coast Guard stated the following with regard to the applicant's argument that the Board's original decision was arbitrary because the Service acted differently in composing the PY96 boards than it did in composing the PY94 boards:

[The applicant's] counsel contends that the PY96 RPA Promotion and Continuation Boards were composed of different members, unlike the PY94 RPA Promotion Board. . . . [T]he Coast Guard did not contend that Board composition had to be the same between selection and continuation. The issue had nothing to do with different membership between the selection and continuation board generally. The Coast Guard stated only that for PY94, the Coast Guard determined that certain Captains were not available for reasons particular to those Captains. . . . [T]he Coast Guard decided not to assign a Reserve Captain to the PY94 RPA Promotion Board because he was also due to be reviewed for continuation by that same board.

For the PY94 selection board, the Coast Guard did not use two captains because each had only five months time in grade. The Service stated the following concerning the applicant's contention that it acted differently in PY96 by assigning a member to that board with less than one year in grade:

[The] Applicant has failed to submit any evidence to support his contention concerning the PY96 Board. Further, Applicant has failed to note that the two Captains not used in PY94 Board each had classmates that were . . . considered by that Board, another potential conflict of interest. Thus, [a]pplicant's allegations that for the PY 96 RPA Board the Coast Guard used a Captain with under one year time in grade, even if true, do not warrant a determination from the Board different from that originally made in the instant case.

Concerning the applicant's contention that his due process rights were violated, the Coast Guard stated the following: "If [the applicant] felt the need to respond to the Coast Guard comments, he was not prevented from doing so. If the Board did not consider comments that were submitted beyond the prescribed time period, it did not err in doing so. . . . [The applicant] can point to no regulation that limits the quantity or quality of input from an applicant or the Coast Guard. . . ."

The Coast Guard commented that the statement from the retired RPA captain supported the BCMR's original determination, because he agreed that the Coast Guard had discretion and the Board found that the Coast Guard did not abuse its discretion. The Service stated that while the Coast Guard agreed that the retired captain's statement was not considered by the Board in its original decision, it should not be considered in this current case unless the applicant can explain why the statement could not have been presented earlier through the exercise of reasonable diligence.

Applicant's Response to the Coast Guard Views

The applicant took issue with each point raised by the Coast Guard and reiterated the arguments made in his basic application.

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 Board has jurisdiction of the case pursuant to section 1552(b) of title 10, United States Code. It is timely.

2. The Chairman has recommended disposition of the case without a hearing. 33 CFR § 52.31 (1994). The Board concurs in that recommendation.

3. For the reasons discussed below, the Board finds that the applicant has not met the standard for reconsideration of BCMR No. 216-94 because the evidence he submitted would not cause the Board to reach a different determination in the current case than that made in the original case. See 33 CFR § 52.67.

4. The applicant presented as new evidence the final decision of the Board in BCMR No 98-93, wherein the Board found that the Coast Guard committed an error by not including at least one Reserve officer as a member of an ADPL promotion selection board that was considering the record of a Reserve officer. Section 266(a) of title 10 U.S.C. requires that such boards have at least one Reserve officer as a part of its membership. The Board properly found that promotion selection board not to be properly constituted.

5. The facts in this case are different. Here the applicant, although a Reserve officer, is neither on the ADPL nor is he on the IDPL (inactive duty promotion list). He is in a unique category of Reserve officers called RPAs. RPAs are designated by the Secretary to serve on extended active duty, pursuant to Section 265 of title 10 U.S.C. This section states that "each armed force shall have officers of its reserve components on active duty (other than for training) at the seat of government, and at headquarters

responsible for reserve affairs. . . . While so serving, such an officer is an additional number of any staff with which he is serving."

6. The Secretary also has the authority to make regulations governing the promotion of RPAs. 14 U.S.C. § 276. This law requires only that such regulations ensure that the manner of selection and the opportunity of selection for RPAs is, "as nearly as practicable," the same as that for officers on the ADPL. The Secretary has delegated his authority to the Commandant. 33 CFR § 1.01-5. The Commandant exercised his authority to govern the RPA selection process by creating regulations at Article 14-A-12b of the Coast Guard Personnel Manual. This provision states that the RPA selection board shall consist of five or more members and that three of them shall be RPAs. However, this provision further states that if a sufficient number of RPAs are not available, then the number of RPAs on the selection board may be reduced to no less than one. The PY94 RPA selection board was in compliance with the law and with regulations.

7. Section 276 of title 14, United States Code, notwithstanding, the applicant argued that RPA selection boards are governed by 14 U.S.C. § 730. This provision states that a board considering Reserve officers shall consist of at least 50 percent Reserve officer membership. As support for this position the applicant relied heavily on ROPA and its legislative history. Section 203(b) of ROPA states that "[a]t least 50 per centum of the members of any selection board appointed under the provisions of this Act shall, to the extent practicable, be Reserve officers." The applicant's claim is without merit.

8. RPAs are not appointed to duty under ROPA, but pursuant to sections 265 and 715 of title 10, United States Code. The Board concludes, as it did in BCMR No. 216-94, that Section 730 of title 14 United States Code does not apply to the applicant's case. RPA selections are governed by sections 276 and 728(a) of title 14 U.S.C. Section 728(a) states that Reserve officers on active duty other than for temporary periods shall be considered for promotion under Chapter 11 of the United States Code.

9. Sections 276 and 728(a) of title 14 United States Code speak to Reserve officers on extended active duty while ROPA speaks to Reserve officers on inactive duty. Therefore, these laws are consistent with each other. ROPA describes classes of duty that are unique to Reservist on inactive duty. For instance with regard to promotion, Section 202 of the ROPA states that to be eligible for promotion under this act, a Reserve officer must be in an active status in the Reserve. Active status is not active duty. It is defined as "the status of a Reserve officer who is not in the inactive National Guard or inactive Air National Guard, on an inactive status list, or in the Retired Reserve." There are no such classifications as active and inactive duty for personnel on full-time active duty. ROPA does not speak to RPAs who serve on full-time extended active duty.

10. As stated above, section 276 of chapter 11 of title 14 United States Code, states that officers not on the active duty promotion list may be promoted under regulations to be prescribed by the Secretary.

11. Therefore, the Board finds that the applicant has not presented evidence that would cause it to reach a different result on this issue. The Board reaffirms findings five through eight of BCMR Docket No. 216-94, and they are hereby incorporated by reference.

12. The statements from the two Captains that more than two RPA of this grade were available for the PY94 RPA selection are their opinions and do not establish an abuse of discretion by the Coast Guard in determining that only two of twelve RPA Captains were available for service on the PY94 RPA selection board.

13. All of the applicant's contentions have been considered and those not discussed within the findings and conclusions are considered to be without merit.

14. The applicant has failed to submit evidence that would cause the Board to reach a determination other than that made in Docket No. 216-94. Accordingly, his request for reconsideration is denied.

ORDER AND SIGNATURES ON NEXT PAGE

ORDER

The application of
of his military record is denied.

EG, for correction

