

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-049

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. After receiving the completed application on February 27, 2015, the Chair docketed the case and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 18, 2015, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a former lieutenant (LT) in the Coast Guard, asked the Board to correct her record to make her entitled to separation pay. She stated that she was erroneously and unjustly denied separation pay because the Coast Guard failed to adjust her LT date of rank when she returned from a one-year, temporary separation in August 2009.

The applicant explained that she enlisted in the Coast Guard on April 27, 1999, and was appointed an ensign on March 10, 2004. On March 10, 2008, she was promoted to lieutenant. On August 15, 2008, she began a temporary separation under the Coast Guard's Temporary Separation Program,¹ and affiliated with the Individual Ready Reserve² during her separation. She returned to active duty less than a year later, on August 4, 2009.

The applicant further explained that she was non-selected for promotion in 2013 and 2014, although she had questioned her date of rank and eligibility for promotion in 2013.

¹ Article 12.F.1.1. of the Personnel Manual in effect in 2009 states that "[t]he Temporary Separation policy allows Coast Guard members to temporarily separate and pursue growth or other opportunities outside the service, while providing a mechanism for their return to active duty. The long-term intent of this program is to retain the valuable experience and training our members possess that might otherwise be lost. Under this policy, career oriented officers and enlisted members are allowed a onetime separation from Active Duty for up to two years."

² Article 1.C.1.b.(1) of the Reserve Policy Manual states that the "IRR members may voluntarily participate in Reserve training programs (i.e., IDT or ADT) for retirement points only, without pay, and shall be assigned to the same Coast Guard or selected Joint Service units as their SELRES counterparts. They may also apply to perform Active Duty Special Work (ADSW) or Readiness Management Periods (RMPs) for pay."

Because of being twice non-selected, she was mandatorily discharged from the Coast Guard on June 30, 2015, but although she had served more than 15 years on active duty, she was ineligible for separation pay because she was being discharged 34 days shy of having served six continuous years of service since her return from her temporary separation in August 2009. The applicant stated that if her date of rank had been properly adjusted upon her return from the temporary separation in August 2009, she would not have been eligible for promotion in 2013. Therefore, her 2014 non-selection would have been her first, in which case she could not have been discharged until June 30, 2016, at which time she would have served six years of continuous active duty since returning to active duty in August 2009.

The applicant stated that the Coast Guard's error in not adjusting her date of rank is preventing her from receiving more than \$113,000 in separation pay as a LT with more than 15 years of active duty. In support of her request, the applicant submitted the following:

- A memorandum dated June 10, 2009, stating that she was being offered an appointment as a LT to return to active duty following her temporary separation. The memorandum states, "As requested, you are appointed with an adjusted date of rank of 10 March 2008 in accordance with Article 12.F.3. of [the Personnel Manual]." It also states that she was being recalled as of August 1, 2009, but that she should confirm that date with her new unit and should sign her Acceptance and Oath of Office within five days of reporting to the unit.
- A similar memorandum issued to another officer on June 30, 2008, which states that his date of rank had been adjusted to May 30, 2007. (The applicant alleged that this was actually an adjusted date of rank, while hers was not.)
- The Acceptance and Oath of Office, which shows that the applicant's original LT date of rank is March 10, 2008, but states that she accepted the appointment as a LT "with rank as such from (date of rank) 10 MAR 2009."
- A series of emails sent in January 28, 2013, showing that the applicant questioned her date of rank, reported that it had not been adjusted, questioned whether she should be "in zone" for promotion in 2013, and was told that her date of rank had not been adjusted because she affiliated with the IRR during her temporary separation.
- The applicant's separation orders, which show that she was mandatorily separated on June 30, 2015, due to being twice non-selected for promotion and which do not mention separation pay.

VIEWS OF THE COAST GUARD

On August 18, 2015, the Judge Advocate General of the Coast Guard (JAG) submitted an advisory opinion in which he recommended that the Board grant relief in this case.

The JAG confirmed the facts reported by the applicant and stated that at the time of her temporary separation, the policy about adjusting an officer's date of rank following a temporary separation in Article 12.F. of the Personnel Manual was ambiguous. The JAG stated that the policy was particularly unclear with regards to officers who, like the applicant, affiliated with the IRR, in

which case they were not assigned a billet, instead of the Selected Reserve, in which the officers were assigned to billets, drilled regularly, and received performance evaluations.³

The JAG noted that the applicant's situation is further confused by the fact that the June 10, 2009, memorandum told her she would receive an adjusted date of rank "but then in the same sentence stated her original date of rank." The JAG concluded that given the ambiguity of the policies in the Personnel Manual in 2008 and the apparent error in the memorandum she received, the applicant "had a reasonable basis for believing her date of rank would be adjusted when she went on temporary separation." Therefore, the JAG stated, "the Coast Guard recommends granting the requested relief and such other relief as may be appropriate."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 21, 2015, the Chair a copy of the views of the Coast Guard to the post-discharge mailing address she provided on her DD 149 and invited her to submit a written response within thirty days. No response was received.

APPLICABLE LAW AND POLICY

Statutes

Title 14 U.S.C. § 41a states the following about regular officers' precedence:

- (a) The Secretary shall maintain a single active duty promotion list of officers of the Coast Guard on active duty in the grades of ensign and above. ...
- (b) Officers shall be carried on the active-duty list in the order of seniority of the grades in which they are serving. Officers serving in the same grade shall be carried in the order of their seniority in that grade. The Secretary may correct any erroneous position on the active duty promotion list that was caused by administrative error.
- (c) A person appointed in the grade of ensign or above in the Regular Coast Guard shall be placed on the active duty promotion list in the order of his date of rank and seniority.

Title 14 U.S.C. § 725 states the following about Reserve officers' precedence:

- (a) Reserve officers rank and take precedence in their respective grades among themselves and with officers of the same grade on the active duty promotion list and the permanent commissioned teaching staff in accordance with their dates of rank. When Reserve officers and officers on the active duty promotion list or the permanent commissioned teaching staff have the same date of rank in a grade, they take precedence as determined by the Secretary.
- (b) Notwithstanding any other law, a Reserve officer shall not lose precedence when transferred to or from the active duty promotion list, nor shall that officer's date of rank be changed due to the transfer.

³ Article 1.C.1.a. of the Reserve Policy Manual states that "SELRES members are generally authorized 48 paid Inactive Duty Training (IDT) drills and at least 12 paid Active Duty for Training (ADT) days per fiscal year."

Temporary Separation Policy

Article 12.F. of the Personnel Manual in effect in 2008 and 2009 contained the following rules for the Coast Guard's Temporary Separation Program:

12.F.2. Discussion

1. This policy allows:

- a. A member to separate with a guarantee of reenlistment or a new officer appointment upon return to Active Duty on meeting physical and other qualifying standards.
- b. A member to affiliate with the Reserves while in a temporary separation status.

2. A member separated under this policy will not receive any pay, allowances or Active Duty retirement points ...

3. In respect to advancement or appointment, the following applies:

- a. An officer separated under this policy will lose precedence on the Active Duty Promotion List (ADPL) and the following will apply:
 - (1) Upon return to active duty, an officer not previously considered for promotion to the next higher grade on the ADPL will go before the next selection board for which the officer is eligible for consideration based on the officer's adjusted date of rank.

4. If member affiliates with the Reserve during the up to 2 years separation under temporary separation, the member may receive pay for drills, ADT, ADSW, and SELRES affiliation bonus. Members will accumulate time in service while affiliated with the Reserve. Members will also receive qualifying service time creditable for Reserve retirement provided they meet the minimum points outlined in the Reserve Policy Manual, COMDTINST M1001.28 (series).

5. Temporary separation options. See Figure 12.F.2.1. [Figure 12.F.2.1. shows that an officer who does not affiliate with the Reserve during a temporary separation returns to active duty with adjusted date of rank and that an officer who affiliates with the Reserve during a temporary separation also returns to active duty with an adjusted date of rank.]:

- a. Officer and Enlisted: No Reserve Affiliation. For career members who do not desire to affiliate with Reserve during the temporary separation and desire guaranteed return to Active Duty within two years of discharge.
- b. Officer: From Active Status to Reserve Status.
 - (1) An officer may join the Reserve during the up to 2 years' separation under temporary separation with a guarantee to return to Active Duty as a permanent Regular officer with a modified DOR.
 - (2) Officers who choose to join the Reserve are subject to Reserve mobilization call-ups.
 - (3) While serving in the Reserves, the officer may request extended Active Duty with no loss of numbers based on the needs of the Service; however, this action will terminate the temporary separation agreement.
 - (4) An officer's date of rank would not change for officers who immediately affiliate with the Reserve upon separation from active duty. ...

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12.F.3.c. Subsequent Appointment Process for Former Officers Returning to Active Duty After Temporary Separation (For members with no Reserve affiliation)

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11. The person will be appointed to the same grade last held on Active Duty as follows:

- a. Such person shall be credited at the time of the subsequent appointment with any Active Duty commissioned service in grade he or she performed in the Coast Guard before subsequent appointment to the same grade.

- b. Such person who is receiving a subsequent appointment shall receive a new date of rank based on constructive credit for Active Duty commissioned service previously served in that grade in the Coast Guard.
- c. In determining a member's service time for computing time in grade under this section, each year, month and day is counted. Computations are based on the methods prescribed in the Personnel and Pay Procedures Manual, HRSICINST M1000.2 (series).

Separation Statutes

Under 14 U.S.C. § 283, a lieutenant in the Regular Coast Guard who has twice failed of selection for promotion shall be honorably discharged on the next June 30th or, at his request, on an earlier date with no loss of benefits.

Under 14 U.S.C. § 286(b), “[a]n officer of the Regular Coast Guard who is discharged under this section or section 282, 283, or 284 of this title and has completed 6 or more, but less than 20, continuous years of active service immediately before that discharge or release is entitled to separation pay computed under subsection (d)(1) of section 1174 of title 10.”

Under 10 U.S.C. § 1174(d)(1), the amount of separation pay the officer receives is “10 percent of the product of (A) his years of active service, and (B) 12 times the monthly basic pay to which he was entitled at the time of his discharge or release from active duty.”

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The applicant was timely filed.

2. The applicant alleged that her ineligibility for separation pay is erroneous and unjust because her date of rank should have been adjusted upon her return from temporary separation in August 2009 and, if it had been, she would not have been subject to mandatory separation until June 30, 2015. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁴ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁵

3. The Coast Guard has stated that its regulations about temporary separations were ambiguous about whether the applicant's LT date of rank should have been adjusted when she returned from temporary separation. The regulations are not a model of clarity because they appear to address only situations in which an officer either (a) never accepts a Reserve

⁴ 33 C.F.R. § 52.24(b).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

appointment during her temporary separation, in which case her date of rank is adjusted, or (b) immediately affiliates with the Selected Reserve, in which case her date of rank is not adjusted. The regulations in the Personnel Manual do not clearly state whether the date of rank should be adjusted when an officer does not affiliate with the Selected Reserve but signs the Reserve Oath of Office and is placed in the IRR during a temporary separation, as the applicant did:

- Article 12.F.2.3.a.(1) states that an officer loses precedence on the ADPL during a temporary separation and will go before a selection board for the next grade based on an adjusted date of rank.
- Article 12.F.2.4. states that during a temporary separation, members “will accumulate time in service while affiliated with the Reserve” but does not mention time in grade. It also states that while affiliated with the Reserve, the member may be paid for drills and receive a SELRES affiliation bonus, which is not true of members in the IRR, who are never paid for drills and for whom there is no affiliation bonus.
- Figure 12.F.2.1. shows that the date of rank of an officer is adjusted whether or not he affiliates with the Reserve.
- Article 12.F.2.5.b.(4) provides that an officer’s date of rank is not adjusted if he immediately affiliates with the Reserve upon separation from active duty.
- Article 12.F.3.d.2. provides that officers who do not affiliate with the Reserve during temporary separation receive an adjusted date of rank based on their prior period of active duty in the same grade.

4. These regulations indicate that an officer’s date of rank will only remain the same if she immediately affiliates with the Reserve upon separation from active duty and that, otherwise, her date of rank will be adjusted. Neither the Personnel Manual nor the Reserve Policy Manual define “affiliation.” The applicant immediately accepted an appointment with the Reserve during her temporary separation, but she did not affiliate with the SELRES and so was placed in the IRR. Upon returning to active duty, she was advised in the June 10, 2009, memorandum that her date of rank would be adjusted, but her original LT date of rank was stated. In addition, the Acceptance and Oath of Office she signed on August 4, 2009, shows her original LT date of rank as March 10, 2008, but states that she accepted the appointment as a LT “with rank as such from (date of rank) 10 MAR 2009.” When the applicant inquired about her date of rank in January 2013, she was advised that it was not adjusted because she had affiliated with the IRR during her temporary separation.

5. The applicant temporarily separated from the regular Coast Guard on August 15, 2008, and returned to active duty on August 4, 2009—a period of almost a year. The Coast Guard has confirmed that, as she alleged, she would not have been considered “in zone” for promotion in 2013 had her date of rank been adjusted upon her return to active duty in 2009. The 2014 non-selection would have been her first; she would have been on active duty and considered for promotion in 2015; and she would not have been subject to mandatory discharge if she had been non-selected in 2015 until June 30, 2016. If separated on June 30, 2016, she would have been eligible for separation pay because she would have had six years of continuous active duty, as 14 U.S.C. § 286(b) requires. Therefore, the Board agrees with the Coast Guard that the applicant has proven by a preponderance of the evidence that she has unjustly been denied separation pay because of an apparent error in her date of rank.

6. The applicant asked the Board to award her separation pay. The Coast Guard recommended “granting the requested relief and such other relief as may be appropriate.” To correct the applicant’s record to make her legally entitled to separation pay under 14 U.S.C. § 286(b), the Board must backdate her Acceptance and Oath of Office from August 4, 2009, to July 1, 2009. If she had signed this form on July 1, 2009, then upon separation on June 30, 2015, she would have served exactly six years of continuous active duty, the minimum required by § 286(b) to make her eligible for separation pay.

7. Accordingly, the Board should grant relief by backdating the applicant’s Acceptance and Oath of Office from August 4, 2009, to July 1, 2009, so that she will have served six years of continuous active duty from July 1, 2009, to June 30, 2015, and be entitled to separation pay pursuant to 14 U.S.C. § 286(b) and 10 U.S.C. § 1174(d)(1).

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of [REDACTED], USCG, for correction of her military record is granted as follows:

The Coast Guard shall correct her record by backdating her Acceptance and Oath of Office from August 4, 2009, to July 1, 2009, so that her record will show that she served six years of continuous active duty from July 1, 2009, through June 30, 2015, and is entitled to separation pay pursuant to 14 U.S.C. § 286(b) and 10 U.S.C. § 1174(d)(1). The Coast Guard shall pay her any amount due as a result of this correction.

December 18, 2015
Date

