

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2000-030



**DECISION OF THE DEPUTY GENERAL COUNSEL
ACTING UNDER DELEGATED AUTHORITY**

☒ I approve the recommended Order of the Board.

☐ I disapprove the recommended Order of the Board.

☐ I concur in the relief recommended by the Board.

DATE: Oct. 29, 2000

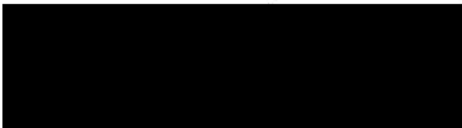


Rosalind A. Knapp
Deputy General Counsel
as designated to act for the
Secretary of Transportation

**DEPARTMENT OF TRANSPORTATION
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FINAL DECISION



Attorney-Advisor:

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The BCMR docketed this case on December 7, 1999, upon receipt of the applicant's completed application.

This final decision, dated August 17, 2000, 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 junior grade (LTJG; pay grade O-2) on active duty in the Coast Guard Reserve,¹ asked the Board to correct his record to show that on July 31, 1998, he was accessed by the Coast Guard Reserve through an inter-service transfer from the Naval Reserve, in which he was serving as a lieutenant junior grade already selected for promotion to lieutenant (O-3) at the time of his accession. He asked the Board to correct his grade, date of rank, and signal number in the Coast Guard Reserve accordingly and to award him all back pay and allowances that would be due as a result of the correction.

APPLICANT'S ALLEGATIONS

The applicant alleged that on November 13, 1997, while serving as a lieutenant junior grade in the Naval Reserve in pay grade O-2, he requested an inter-service transfer to the Coast Guard Reserve. He alleged that his request was approved by the Secretary of the Navy and forwarded to the Commandant of the Coast Guard for consideration.

¹ When the applicant filed his application for correction, he was still an ensign (pay grade O-1). However, on January 31, 2000, he was promoted to lieutenant junior grade (pay grade O-2) in the Coast Guard.

He further alleged that, on January 7, 1998, upon the advice of Coast Guard recruiters, he also submitted an application for a direct commission through the Maritime Academy Graduate (MARGRAD) program. On April 14, 1998, the Coast Guard recruiters offered him a commission as an ensign (O-1). The applicant stated that he accepted the offer only because he did not know that he could retain his date of rank and pay grade by waiting for the Coast Guard to approve his inter-service transfer request.

The Coast Guard Recruiting Command, he alleged, sent a letter to the Chief of Naval Personnel consenting to the inter-service transfer on April 20, 1998, after he had accepted his commission through MARGRAD.

The applicant further alleged that, on July 20, 1998, prior to the completion of his transfer to the Coast Guard, he was selected for promotion to lieutenant, pay grade O-3, by the Navy. He alleged that 10 U.S.C. § 716 and the Navy Military Personnel Manual require the service receiving an officer through an inter-service transfer to place the officer in the same grade he held in the first service and to honor any selection for promotion made by the first service prior to the completion of the transfer.

The applicant alleged that the Coast Guard refused to honor his rank in the Naval Reserve (O-2) or his selection for promotion to O-3. He argued that because he was an O-2 in the Naval Reserve and was selected for promotion to O-3 prior to the completion of the inter-service transfer, he should now be in pay grade O-3 in the Coast Guard, with a date of rank based on his O-2 date of rank, which was July 3, 1997.

As evidence that his entry into the Coast Guard Reserve should be considered an inter-service transfer, rather than a direct commission as an O-1, the applicant cited the fact that there was never a break in service, he received a dislocation allowance for a permanent change of station (PCS), and his outstanding leave balance was transferred from the Navy to the Coast Guard.

SUMMARY OF THE RECORD

In July 1995, the applicant graduated from the Maine Maritime Academy, was licensed by the Coast Guard as a third mate in the U.S. Merchant Marine, and was appointed an ensign in the Naval Reserve. On July 3, 1997, the applicant was promoted from ensign to lieutenant junior grade in the Naval Reserve.

On November 13, 1997, the applicant sent a letter to the Secretary of the Navy requesting an inter-service transfer from the Naval Reserve to the Coast Guard Reserve. He stated that he believed his background and training as a merchant marine officer made him better qualified to serve in the Coast Guard, one of whose missions is to regulate the merchant marine. He also tendered his resignation and requested "that it be accepted contingent upon final approval of my application for transfer to the U.S. Coast Guard Reserve and effective as of

the day preceding my acceptance of an appointment in the U.S. Coast Guard Reserve."

On November 15, 1997, the applicant's commanding officer forwarded the request to the Secretary of the Navy "strongly recommending approval."

On January 7, 1998, the applicant signed an application for a direct commission in the Coast Guard Reserve through MARGRAD.

On February 26, 1998, the Assistant Secretary of the Navy for Manpower and Reserve Affairs approved and forwarded the applicant's request for an inter-service transfer to the Commandant of the Coast Guard for consideration.

On April 14, 1998, the Chief of the Coast Guard Operations Branch notified the applicant that the Secretary of Transportation had approved his appointment as an ensign on active duty in the Coast Guard Reserve under the MARGRAD program.

On April 16, 1998, the Coast Guard published in ALCGPERSCOM 031/98 the results of the MARGRAD selection board that convened on March 16, 1998. The applicant's name appears on the list of "primary selectees."

On April 20, 1998, the Director of the Coast Guard Recruiting Center sent the Chief of Naval Personnel a letter stating that the applicant had been selected for commissioning through the MARGRAD program and that his appointment had been approved by the Secretary. The Director noted that his "application to the Coast Guard contained an approved inter-service transfer request." The Director asked that the applicant be released from all obligations to the Navy by July 24, 1998, so that he could enter a class for direct commission officers beginning on August 1, 1998. A copy of the applicant's notification dated April 14, 1998, was enclosed with this letter.

On April 21, 1998, the Chief of Naval Personnel sent the applicant official separation orders, which stated the following in pertinent part:

Your request to be transferred to the USCG submitted in your letter of 13 Nov[ember] 1997, has been approved pursuant to the provisions of 10 U.S.C. Sec. 716 and [the Military Personnel Manual] 3830140. When directed by reporting senior, detach in Jul[y] 98. ... By direction of the President, the Secretary of the Navy has accepted your resignation from the U.S. Naval Service submitted in your letter of 13 Nov[ember] 1997 Records and accounts will be handled in accordance with [the Military Personnel Manual] 3830140. In final endorsement to these orders, officer's CO is directed to include therein information concerning leave as required by [the Military Personnel Manual] 3830140.

The separation orders also contained instructions for the applicant's PCS and travel to a new duty station.

On May 4, 1998, the Commander of the Coast Guard Personnel Command sent the applicant orders for active duty to be effective upon his execution of an

oath of office and acceptance of an appointment as an ensign in the Coast Guard Reserve. The orders state that he should attend Direct Commission Officer Indoctrination training in August and that the orders "constitute a permanent change of station from the place from which ordered to active duty to Seattle, WA."

On July 22, 1998, the applicant's commanding officer wrote a letter to the Coast Guard's Human Resources Services, asking that his unused leave in the Naval Reserve be credited to him by the Coast Guard because he had been assigned to sea duty and could not take the leave prior to his transfer.

On July 30, 1998, the Navy discharged the applicant. His discharge form, DD 214, shows that he had performed 1 year, 1 month, and 12 days of sea service and that his 22.5 days of accrued leave "is requested to be carried over to USCG." It also shows that he was being transferred to the Coast Guard with a narrative reason for separation of "interdepartmental transfer."

On July 31, 1998, the applicant signed an "Acceptance and Oath of Office" accepting an appointment in the Coast Guard Reserve "in the grade of ENS/O-1 with rank as such from (date of rank) 31 July 1998." The following day, he signed an active duty agreement that showed his rank as ensign.

On November 25, 1998, the Secretary of the Navy issued a bulletin (ALNAV 094/98) with the results of the lieutenant (O-3) selection board that met in July 1998. The list shows that the applicant was selected for promotion in the Naval Reserve prior to his accession by the Coast Guard Reserve.

The applicant filed his application for correction with the BCMR on December 7, 1999. In it, he included a supporting letter from his commanding officer (CO) dated November 24, 1999. The CO outlined the facts and stated that although the Coast Guard accessed the applicant through MARGRAD, "all requirements for an interservice transfer appear to have been met." The CO stated that the Board should determine which of the accession applications took precedence and whether an inter-service transfer actually took place. The CO stated that the lack of a break in active duty service, the applicant's receipt of a dislocation allowance for a PCS, and the transfer of his leave balance indicate that an inter-service transfer did, in fact, occur.

On December 3, 1999, and again on February 15, 2000, the Commander of the Coast Guard Personnel Command responded to inquiries by a United States Senator on the applicant's behalf. In both letters, he denied that the applicant had ever applied for an inter-service transfer.

On February 3, 2000, the Commander of the Navy Personnel Command wrote a letter to the Chairman of the BCMR stating that, based on the April 20, 1998, letter from the Director of the Coast Guard Recruiting Center, which referenced the applicant's November 13, 1997, inter-service transfer request, the Navy had issued him "inter-service transfer orders." He alleged that the applicant "was released to service in the U.S. Coast Guard based on the consent of both

services to an interservice transfer." He also stated that the applicant did not submit "an unqualified resignation through this office."

VIEWS OF THE COAST GUARD

On June 19, 2000, the Chief Counsel of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request.

The Chief Counsel alleged that after the applicant submitted a request to the Navy for an inter-service transfer to the Coast Guard, he was properly counseled by a Coast Guard recruiter about the low acceptance rate of requests for inter-service transfers. Because of the low rate, the Chief Counsel alleged, he was counseled that his chance of receiving a commission in the Coast Guard "would be greatly increased if he applied for accession under the MARGRAD program." The Chief Counsel further alleged that accession through the MARGRAD program gave the applicant his best chance at having a long career in the Coast Guard. He alleged that if the applicant had been accessed as an O-2 or O-3 through an inter-service transfer or the MARGRAD program, he might have been "at considerable risk for non-selection for promotion before his first 'best qualified' selection board" because his officer evaluations from the Navy would not have been considered by the selection board. Moreover, he alleged, the applicant did not meet the criteria for accession as an O-2 through MARGRAD, which include at least one year of creditable sea service. The Chief Counsel stated that the applicant had served only nine months aboard the *USS Hopper* at the time his application was reviewed by the MARGRAD selection board.

The Chief Counsel argued that, after the applicant offered to accept a commission in the Coast Guard through either an inter-service transfer or the Direct Commission MARGRAD program, the Coast Guard was free to accept either of the applicant's two offers, even though the record reflects that he was qualified for an inter-service transfer. He alleged that the Coast Guard "chose to access Applicant through the MARGRAD program" and "chose not to accept the Applicant for an inter-service transfer, and never forwarded the application to the Secretary of Transportation." The Chief Counsel further alleged that the Coast Guard's failure to inform the applicant of his non-selection for an inter-service transfer was not an error because the Coast Guard "is not required to notify an applicant who is not selected for an inter-service transfer."

The Chief Counsel alleged that there was never any contractual agreement for an inter-service transfer. Instead, he alleged, the Coast Guard and the applicant entered a valid contract for his direct commission as an ensign through the MARGRAD program. The terms of the contract, he argued, should be "determined by the objective manifestations of the parties, rather than their subjective intent." He argued that the significant objective manifestations of the terms of the applicant's contract are the oath of office and active duty agreement he signed, both of which show that his rank in the Coast Guard Reserve was to be ensign.

The Chief Counsel also argued that the applicant has not presented evidence that "overcome[s] the presumption that Coast Guard officials carried out their duties correctly, lawfully, and in good faith," nor shown that the Coast Guard committed any "error or injustice entitling him to the requested relief." He stated that any determination by the Board that the Coast Guard was required to accept one of the applicant's offers (inter-service transfer) over the other (direct commission through the MARGRAD program) would have "the potential to effect significant issues of Coast Guard policy."

The Chief Counsel argued that "the Navy's action in characterizing Applicant's case as an inter-service transfer has no effect on the Coast Guard's valid and enforceable contract to accept Applicant through the MARGRAD program." The Navy "was never a party to any contract between Applicant and the Coast Guard" and that the Navy's release of the applicant "was merely a condition precedent to the separate and independent contractual arrangement between Applicant and the Coast Guard." Thus, he argued, even if the Navy released him under the perception that the applicant was joining the Coast Guard through an inter-service transfer, that misperception is "of no legal moment to this case." In a memorandum attached to the Chief Counsel's advisory opinion, the Commander of the Coast Guard Personnel Command stated that the Navy may have referred to an inter-service transfer in the applicant's "detachment orders" because it had approved his request for an inter-service transfer but was unaware of his application for a direct commission through the MARGRAD program.

Finally, the Chief Counsel argued that although the Coast Guard "conferred certain [benefits] normally associated with inter-service transfer arrangements, such benefits did not dictate or otherwise govern the terms of Applicant's MARGRAD program contract with the Coast Guard." He argued that the dislocation allowance for a PCS and the transfer of the applicant's leave balance were collateral to the contract and did not change the nature and terms of the contract.

The Chief Counsel attached to his advisory opinion an affidavit signed on April 12, 2000, by a lieutenant commander who served in the Officer Personnel Management (OPM) Division of the Coast Guard Personnel Command from July 1996 to May 1999. He stated that his duties included management of the Inter-Service Transfer (IST) program and that he processed each request for an inter-service transfer. He stated that he believes he spoke with the applicant on the telephone at least once, although he cannot remember the date. He alleged that he remembers the following about that conversation:

We discussed the IST process, as well as the likelihood of approval. Generally, IST to the Coast Guard was not encouraged. The primary reason for this was that most of the other services' experience fields (MOS) did not correlate with Coast Guard specialties. Therefore, it was difficult to place them at a Coast Guard unit. When [the applicant] indicated he was also applying for a direct commission, I recall specifying that the "Direct Commission" program would be his best chance to obtain a Coast Guard commission.

The lieutenant commander also stated that "during my assignment [at OPM from July 1996 to May 1999], only *one* request for IST was approved. That person was a Naval Officer (female aviator) who had previously served in the Coast Guard as a Coast Guard aviator."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 20, 2000, the BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited him to respond within 15 days. On July 3, 2000, the applicant responded.

The applicant alleged that the Coast Guard erred and committed an injustice when it refused to abide by the policies for inter-service transfers even though it was aware that this was the purpose for which the Navy was releasing him. Moreover, the applicant alleged, under COMDTINST 1131.23, he was not qualified for the MARGRAD program because when he applied in January 1998 he did not have an approved release date from the Navy, which is a requirement for application to the program. He alleged that the Navy's statement that he would be released upon appointment in the Coast Guard did not fulfill the requirement for applying to the MARGRAD program although it was sufficient for an inter-service transfer.

The applicant also alleged that COMDTINST 1131.21 requires selectees for a direct commission who are on active duty in another service to be discharged from that service at least two days before being commissioned in the Coast Guard. He alleged that the two-day break is required "to ensure that all dates of rank, service entitlements and precedence begin anew upon commissioning in the Coast Guard." Because he had no such break in service, he argued, his accession must be considered an inter-service transfer.

The applicant argued that he never submitted an unqualified resignation to the Navy. His resignation dated November 13, 1997, was premised upon the consent of both services that he receive an inter-service transfer. Therefore, he argued, the only legal way he could have been accessed to the Coast Guard was by inter-service transfer. He argued that the inter-service transfer orders he received from the Navy were not based on an erroneous assumption but "on the Coast Guard's communications with the Chief of Naval Personnel." The Coast Guard's letter to the Chief of Naval Personnel, he argued, clearly indicates the existence of an approved inter-service transfer request, although the Chief Counsel denied that his request had ever been approved. Moreover, he stated, the Coast Guard received copies of both his inter-service transfer orders and his DD 214 at the time of his transfer but never questioned or contested them.

The applicant also alleged that the absence of a written contractual agreement for an inter-service transfer between him and the Coast Guard is irrelevant because "interservice transfer regulations do not require written contracts between the two services as [the Coast Guard] would like to lead the Board to believe."

The applicant alleged that the benefits he received upon his commissioning in the Coast Guard are not collateral to a contract but evidence that he was accessed by inter-service transfer. He alleged that he received a dislocation allowance for his moving expenses² and that, under Chapter 5, U5630, of the Joint Forces Travel Regulations (JFTR), only officers executing an inter-service transfer are entitled to a dislocation allowance. He alleged that the transfer of his leave balance from the Navy to the Coast Guard is also evidence that he executed an inter-service transfer under Article 12.A.3. of the Personnel Manual.

The applicant alleged that the Coast Guard itself treated his application to MARGRAD and his request for inter-service transfer as one "offer," rather than two separate offers, because the Coast Guard put a copy of his "approved inter-service transfer request" in his application to MARGRAD and referred to it in communications with the Navy concerning his transfer. He alleged that the Coast Guard's confusion of the circumstances surrounding his transfer is shown by the two letters from the Commander of the Personnel Command to the Senator denying that he had ever applied for an inter-service transfer.

The applicant denied ever having spoken with the lieutenant commander at OPM. He alleged that he never spoke with anyone at OPM but "dealt exclusively with the Coast Guard Recruiting Command (CGRC) in Washington DC and their local office in Honolulu HI." In addition, he stated he was never told by anyone that the Coast Guard "would not entertain my interservice transfer request."

The applicant strongly disputed the Chief Counsel's argument that accession through the MARGRAD program was in his best interest. He did not lack relevant experience because prior to joining the Navy, he had "worked in the marine industry for such entities as Crowley Maritime Corporation and the US Army Corps of Engineers in both an afloat and shoreside capacity." He alleged that at his last Coast Guard duty station, a marine safety office, he was the only junior officer with experience in the merchant marine and was put in the "precarious and sometimes uncomfortable position of being responsible for training officers to whom I was junior in rank." Moreover, he stated, if he had been properly accessed as an O-2 already selected for promotion to O-3, he would have received seven years' worth of officer evaluations before he would have been considered for selection to lieutenant commander. Seven years, he alleged, "is more than sufficient time to establish a career track and competitive performance record."

The applicant also stated that, contrary to the Chief Counsel's allegation, he did meet the qualifications for accession as an O-2 through the MARGRAD program. At the time he was commissioned, he had more than one year of sea duty, as required by regulation. Therefore, he stated that even if the Board considers his accession through direct commission to have been legal, it should still correct his record to show that he was commissioned as an O-2.

² The applicant submitted a copy of his travel voucher, which indicates that the Coast Guard paid him a dislocation allowance of \$1,260.59.

Finally, the applicant stated that he only accepted his commission as an ensign because he was unaware that he could retain his rank and pay grade through an inter-service transfer. He alleged that the Coast Guard either intentionally or unintentionally misled him into believing that he had to accept the demotion in order to transfer to the Coast Guard. The regulations the Coast Guard violated in accessing him through the MARGRAD program, rather than through inter-service transfer, "are in effect to protect not only the service, but the member as well." He argued that the Coast Guard, in effect, used the inter-service transfer process to procure his release from the Navy, switched to treating his accession as a direct commission to save money by demoting him to ensign, but then "returned to recognizing me as an interservice transfer" by awarding him the benefits of an officer accessed through inter-service transfer.

APPLICABLE LAWS

Laws Concerning Inter-Service Transfer

Title 10 U.S.C. § 716 states the following:

- (a) Notwithstanding any other provision of law, the President, within authorized strengths and with the consent of the officer involved, may transfer any commissioned officer of a uniformed service from his uniformed service to, and appoint him in, another uniformed service. The Secretary of Defense, the Secretary of Transportation, the Secretary of Commerce, and the Secretary of Health and Human Services shall jointly establish, by regulations approved by the President, policies and procedures for such transfers and appointments.
- (b) An officer transferred under this section may not be assigned precedence or relative rank higher than that which he held on the day before the transfer.

Department of Defense Directive 1300.4, entitled "Inter-Service Transfer of Commissioned Officers," was issued on November 15, 1996, and applies to the Coast Guard "by agreement with the Department of Transportation." In the directive, the terms "military service" and "military department" do not apply to the Coast Guard unless it is operating under the Navy. The Coast Guard is included in the term "uniformed services." Paragraph 3.3.1. of the directive states the following:

Except for commissioned officers in the [Public Health Service], a commissioned officer transferred under this Directive shall continue to hold the same grade and date of rank held in the losing Uniformed Service. The officer shall be placed on the active duty list of the gaining Uniformed Service in accordance with regulations prescribed by the gaining Uniformed Service. ...

Paragraph 3.3.5. states the following:

If a commissioned officer transferred between two Military Services is on a promotion list to the next higher grade under [10 U.S.C. § 624], the Secretary of the Military Department concerned may integrate the officer into the promotion list of the gaining Military Service based on the officer's date of rank in his or her current grade in the losing Military Service.

Paragraph 3.6. states the following:

If the request for transfer has received final approval, termination of current commission and reappointment in the gaining Uniformed Service shall be accomplished by the Military Departments concerned without interruption of the continuity of the officer's total service. Commissioned officers so transferred shall be credited with the total amount of unused leave and service as of the date before such transfer.

Part 1 of Chapter 25 of the Navy Military Personnel Manual (MILPERMAN 1300-080) governs inter-service transfers of officers out of the Navy. It provides that officers transferred out of the Navy under 10 U.S.C. § 716 "will continue to hold the same grade and date of rank held in the losing Uniformed Service." It specified that a "Reserve Naval officer on active duty ... transferred out of the Navy under this map is awarded a permanent Reserve grade and the date of rank as determined by applying the amount of service accrued in the Navy to the appointment laws then in effect for the gaining Uniformed Service. The officer is placed on the active duty list following regulations of the gaining service." Preservation of a transferring officer's status on a promotion list is required only when the gaining service is a "Military Service." Officers being transferred to a "Uniformed Service" are credited with all unused leave. The manual also requires an application for an inter-service transfer to contain a resignation that is "contingent upon final approval of [the officer's] application for transfer to the (specify service) and effective as of the day preceding [the officer's] acceptance of an appointment in the (specify service)."

The Coast Guard has no regulations or written procedures for processing inter-service transfer requests from officers in other services seeking commissions in the Coast Guard.³ Article 12.A.3. of the Personnel Manual, which was cited by the applicant, governs the release of Coast Guard officers to other services by inter-service transfer. It does not govern the accession of other services' officers by the Coast Guard. It states that an officer transferring out of the Coast Guard will receive a grade, date of rank, and position on the gaining service's active duty promotion list in accordance with the officer's grade, date of rank, and position on the Coast Guard's promotion list.

Laws Concerning the Transfer of Accrued Leave

Title 37 U.S.C. § 501(b) provides the following:

- (1) A member of the ... Coast Guard ... who has accrued leave to his credit at the time of his discharge, is entitled to be paid in cash or by a check on the Treasurer of the United States for such leave on the basis of the basic pay to which he was entitled on the date of discharge.

³ The lack of written provisions was verified by the BCMR in a telephone call to the officer in charge of processing inter-service transfer requests in the Officer Personnel Management Division of the Coast Guard Personnel Command. The officer also stated that the Coast Guard receives and approves very few inter-service transfer requests from officers of other services.

(2) Payment may not be made under this subsection to a member who is discharged for the purpose of accepting an appointment or a warrant in any uniformed service.

(3) Payment may not be made to a member for any leave he elects to have carried over to a new enlistment in any uniformed service on the day after the date of his discharge; but payment may be made to a member for any leave he elects not to carry over to a new enlistment. ...

(4) A member to whom a payment may not be made under this subsection ... carries the accrued leave standing to his credit from the one status to the other within any uniformed service.

Laws Concerning Payment of Dislocation Allowances

Title 37 U.S.C. § 407, which governs the payment of dislocation allowances to military members, provides the following:

(a) Eligibility for primary dislocation allowance.

(1) Under regulations prescribed by the Secretary concerned, a member of a uniformed service described in paragraph (2) is entitled to a primary dislocation allowance at the rate determined under subsection (c) for the member's pay grade and dependency status.

(2) A member of the uniformed services referred to in paragraph (1) is any of the following:

(A) A member who makes a change of permanent station and the member's dependents actually make an authorized move in connection with the change, ...

(D) A member who is without dependents and--

(i) actually moves to a new permanent station where the member is not assigned to quarters of the United States; or

(ii) actually moves from a place of residence under circumstances described in section 406a of this title.

• • •

(e) First or last duty. A member is not entitled to payment of a dislocation allowance under this section when the member is ordered from the member's home to the member's first duty station or from the member's last duty station to the member's home.

(f) Rule of construction. For purposes of this section, a member whose dependents may not make an authorized move in connection with a change of permanent station is considered a member without dependents.

Chapter 5 of the Joint Federal Travel Regulations (JFTR) governs travel allowances for permanent duty travel, which is defined as travel from one duty station to another or travel from home or the place from which ordered to active duty to the member's first duty station. JFTR, U5000(B). Part G of Chapter 5 governs payment of a dislocation allowance "to partially reimburse a member for the expenses incurred in relocating the member's household." Members with dependents (such as the applicant) are normally entitled to a dislocation allowance when relocating in connection with a PCS. JFTR, U5610(A). However, members with PCS orders from home or the "place from which ordered to active duty" to the member's "first duty station" are not entitled to a dislocation allow-

ance. JFTR, U5630(C). In addition, a member who moves from the last duty station of one period of service to the first duty station of another period of service is not entitled to a dislocation allowance if the member did not receive PCS orders for the move. JFTR, U5630(C). A member "transferred with no break in service from one Service to another under the authority of 10 U.S.C. § 716 or any similar statutory provision ... is entitled to [a dislocation allowance] when the household is relocated incident to an ordered PCS resulting from a change of service." JFTR, U5630(B).

Laws Concerning the Direct Commission of Maritime Academy Graduates

Commandant Instruction 1131.23 contains the regulations for the Coast Guard's direct commission program for maritime academy graduates (MAR-GRAD).⁴ Paragraph 4.e. of the instruction contains the following provisions:

- (1) All selectees who currently hold regular or reserve commissions and are serving on active duty must be discharged from the losing service at least two calendar days before being administered the oath for commissioning in the Coast Guard Reserve. ... This is necessary to ensure that active duty entitlements and service precedence begin anew upon commissioning in the Coast Guard Reserve.
- (2) Applicants on active duty in another service may not apply unless such application includes a statement from the losing service to the extent that the applicant has an approved release date, or has no service obligation remaining and is eligible to resign, or that any remaining service obligation would be waived to allow resignation in time for an appointment to the Coast Guard. A statement that the member will be released upon appointment is not adequate for meeting this prerequisite. Clearance from the losing service, and provision of proof of such clearance, is the sole responsibility of the selectee. Selectee will not be appointed until such proof is provided.

Paragraph 6 of the instruction concerns the direct commissioning of state and federal maritime academy graduates. Paragraph 6.a. states that the officer's "date of rank shall be the date of appointment to commissioned status in the Coast Guard Reserve." Paragraph 6.c.(3)(b) states that to be appointed at the rank of lieutenant junior grade, rather than ensign, an applicant "must have served 1 or more years, as of commissioning date, on board vessels of the United States in the capacity of a licensed officer. Credit for up to 1 year may be given for service on board vessels considered equivalent to merchant vessels"

Laws Concerning Service Precedence and Date of Rank

Article 2.A.4.a. of the Personnel Manual states that "[u]pon original appointment in the Coast Guard, the date of rank of a commissioned officer or

⁴ The Coast Guard also has a direct commission program for officers of the U.S. Merchant Marine. Licensed second mates, first class pilots, and second assistant engineers with at least two years of sea service may be appointed to the rank of lieutenant junior grade. Personnel Manual, Article 1.A.5.c. With just one year of sea service and a license as a third mate, the applicant did not qualify for this program. Moreover, officers on active duty in other military services may not apply under this program.

chief warrant officer shall be the date specified in the appointment letter, or if there be no specified date, then the date the oath of office is taken."

Article 5-A-2.d. of the Coast Guard Personnel Manual provides "[a] Reserve officer ... shall, when entering on extended active duty, be placed on the active duty promotion list in accordance with grade and seniority."

Title 14 U.S.C. § 727 provides that "[u]nder regulations prescribed by the Secretary, a person, appointed as a Reserve officer, may be assigned a date of rank and precedence which reflects that person's experience, education, or other qualifications."

Title 14 U.S.C. § 744 provides that a "former officer of the Regular Navy or Coast Guard who applies for a Reserve commission within one year of resigning the officer's Regular commission, and who is appointed in the same grade previously held in the Regular Navy or Coast Guard, shall be given the same date of rank in that grade as that previously assigned to the officer while a member of the Regular Navy or Coast Guard."

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. Upon the advice of Coast Guard recruiters, the applicant sought a commission with the Coast Guard Reserve through the Direct Commission MARGRAD program as well as by inter-service transfer. Although the applicant may have been qualified for an inter-service transfer, he has not proved that his recruiters committed any error or injustice or acted in bad faith when they advised him that he had a better chance of being accepted through the MARGRAD program. The sworn statement of the officer in charge of inter-service transfers at the time indicates that the Coast Guard accepts very few inter-service transfers. In addition, the applicant has not proved by a preponderance of the evidence that his recruiters improperly advised him with respect to the advantages and disadvantages of the two avenues to a commission in the Coast Guard Reserve.
4. The applicant submitted his MARGRAD application on January 7, 1998. His request for an inter-service transfer did not reach the Coast Guard until after February 26, 1998, when it was approved by the Navy. A copy of that

request was apparently included in his MARGRAD application when it was considered by the direct commission selection board on March 16, 1998. The applicant has not proved by a preponderance of the evidence that the Coast Guard committed any error or injustice with respect to his acceptance through the MARGRAD program. There is no evidence in the record that the Coast Guard erred or acted in bad faith in the processing of his inter-service transfer request.

5. The applicant alleged that the Coast Guard actually accessed him by inter-service transfer. However, all of the Coast Guard's communications with the applicant submitted for the record—including his notification letter, his PCS orders, his oath of office, and his active duty agreement—indicate that he was offered and he accepted a direct commission in the Coast Guard Reserve as an ensign through the MARGRAD program. There is no evidence that the Coast Guard ever promised him that he would be accessed by inter-service transfer or that he would retain his prior rank and service precedence.

6. The applicant alleged that, despite his acceptance of a direct commission as an ensign, his accession by the Coast Guard Reserve must be considered an inter-service transfer because (a) there was no break in service; (b) his unused leave balance was transferred from the Navy to the Coast Guard; (c) the Coast Guard issued him orders on May 4, 1998, characterizing his transfer as a PCS and paid him a dislocation allowance; (d) his MARGRAD application did not contain a statement from the Navy indicating a definite release date as required by Paragraph 4.e.(2) of COMDTINST 1131.23; (e) his resignation from the Navy was contingent upon the final approval of his inter-service transfer request; (f) the Coast Guard's letter to the Chief of Naval Personnel dated April 20, 1998, mentioned that there was an "approved inter-service transfer request" in his MARGRAD application; and (g) the separation orders and DD 214 issued by the Navy indicate that the Navy thought the Coast Guard Reserve was accessing him by inter-service transfer. For the reasons stated below, the applicant's argument that these facts—considered either singly or cumulatively—prove that he was accessed by inter-service transfer is rejected by the Board:

(a) Paragraph 4.e.(1) of COMDTINST 1131.23 clearly requires selectees for a direct commission serving on active duty in another service to be discharged from the losing service at least two days before taking the oath of office in the Coast Guard Reserve. The applicant was discharged from the Naval Reserve the day before he took the oath of office for the Coast Guard Reserve. The regulation indicates that the lack of a break in service may entitle an officer entering under the MARGRAD program to the continuation of active duty entitlements, such as annual leave, and service precedence. It does not state that the lack of a break in service causes the officer's accession to become an inter-service transfer under 10 U.S.C. § 716. The Board finds that the lack of a break in service between the applicant's discharge by the Naval Reserve and appointment by the Coast Guard Reserve proves only that the Coast Guard failed to comply with Paragraph 4.e.(1) of COMDTINST 1131.23. The error did not harm the applicant and is not evidence that the Coast Guard ever approved the applicant's request for an inter-service transfer.

(b) Under 37 U.S.C. § 501(b), the applicant was entitled to carry over his accrued leave from the Naval Reserve to the Coast Guard Reserve whether his accession was through inter-service transfer or through the MARGRAD program. Therefore, the transfer of his unused leave balance from one service to the other is not evidence of the nature of his accession.

(c) All members ordered to travel to a new permanent duty station receive PCS orders, whether they are required to travel from a previous duty station, from home, or from "the place from which ordered to active duty." Therefore, the characterization of the applicant's orders as PCS orders is not determinative of the nature of his accession.

On May 4, 1998, the Coast Guard issued the applicant PCS orders "from the place from which ordered to active duty to Seattle, WA." Members with PCS orders requiring travel "from the place from which called to active duty" to a "first duty station" are not entitled to a dislocation allowance. JFTR, U5630(C). The term "first duty station" is not defined in the JFTR, and it is unclear whether the applicant's first duty station in the Coast Guard Reserve constituted a "first duty station" for the purposes of this regulation. In addition, the same regulation provides that a member who moves from the last duty station of one period of service to the first duty station of another period of service is not entitled to a dislocation allowance if the member did not receive PCS orders for the move. This statement strongly implies that a member in this situation who does receive PCS orders may be entitled to a dislocation allowance. Thus, it is not clear to the Board that the applicant could only have been entitled to a dislocation allowance if he were being accessed by inter-service transfer under 10 U.S.C. § 716 and JFTR, U5630(B). The Board is therefore not convinced that the payment of the dislocation allowance constitutes evidence that the applicant was accessed by the Coast Guard Reserve by inter-service transfer rather than through the MARGRAD program.

(d) The Board finds that the February 26, 1998, approval of the applicant's request for an inter-service transfer by the Assistant Secretary of the Navy for Manpower and Reserve Affairs, which the applicant's recruiters included in his MARGRAD application, met the requirement of Paragraph 4.e.(2) of COMDTINST 1131.23 that each application contain "a statement from the losing service to the extent that ... any remaining service obligation would be waived to allow resignation in time for an appointment to the Coast Guard."

(e) Although the applicant's resignation in his request for inter-service transfer was contingent upon the approval of his request, the applicant had in fact been discharged from the Naval Reserve when he took the oath of office for the Coast Guard Reserve. The Coast Guard did not err or commit any injustice in administering the oath of office to the applicant after he had been discharged from the Naval Reserve.

(f) The April 20, 1998, letter from the Director of the Coast Guard Recruiting Center to the Chief of U.S. Naval Personnel clearly states that the applicant had been selected for commissioning under the Direct Commission

MARGRAD program. In the context of the letter, the reference to an "approved inter-service transfer request" clearly means "approved" by the Navy, not the Coast Guard, and does not imply that the Coast Guard had approved the request.

(g) The Board does not agree with the Chief Counsel that the Navy's apparent misunderstanding of the nature of the applicant's accession by the Coast Guard is "of no legal moment" because the Navy "was never a party to any contract between Applicant and the Coast Guard." Every service has an inherent interest in ensuring that its officers are treated fairly and accorded proper respect by other services. Part 1 of Chapter 25 of the Navy Military Personnel Manual clearly indicates that the Navy expects officers transferred to other services to be commissioned in the same rank they held in the Navy. To characterize the Navy's release of the applicant as "merely a condition precedent" to a "contract" is overly dismissive of the Navy's legitimate interest in the continuing service of its officers.

There is no evidence, however, that the Coast Guard caused the Navy's misunderstanding. The April 20, 1998, letter clearly indicates the Coast Guard's intention to commission the applicant as an ensign through the MARGRAD program. The Coast Guard did fail to notice or question the Navy's characterization of the accession as an inter-service transfer on the applicant's DD 214 prior to administering the oath of office. But this failure is insufficient to prove any bad faith on the part of or injustice committed by the Coast Guard that would render his oath of office and active duty agreement void. Moreover, there is no evidence that the Navy would have refused to release the applicant if it had understood that he was being accessed through the MARGRAD program. Therefore, the Board concludes that the Navy's misunderstanding of the Coast Guard's intention should not determine the nature of his accession.

7. In light of findings 5 and 6 above, the Board finds that the applicant was accessed by the Coast Guard through the Direct Commission MARGRAD program rather than through inter-service transfer. Therefore, the provisions of 10 U.S.C. § 716, Department of Defense Directive 1300.4, and Part 1 of Chapter 25 of the Navy Military Personnel Manual regarding the retention of rank, service precedence, and position on a promotion list do not apply to his accession by the Coast Guard.

8. The Chief Counsel alleged that the applicant was not entitled to direct commissioning as a lieutenant junior grade under the MARGRAD program because he had completed only nine months of sea duty when his application was considered by the selection board. However, Paragraph 6.c.(3)(b) of COMDTINST 1131.23 clearly states that applicants must have one year of sea duty as of the date of commissioning to qualify for a direct commission as a lieutenant junior grade. On the date he was commissioned in the Coast Guard Reserve, the applicant had over one year of sea duty in the Navy, as shown on his DD 214. Therefore, the Board finds that the Coast Guard committed error and injustice when it appointed the applicant in the rank of ensign, rather than lieutenant junior grade. Because many officers are directly commissioned at

ranks above ensign and enjoy long careers despite their lack of OERs at the lowest rank, the Board is not persuaded by the Chief Counsel's argument that commissioning the applicant as an ensign was in his best interest.

9. Title 14 U.S.C. § 744, which requires the transfer of dates of rank and service precedence from one service to another when an officer is commissioned in the same grade, narrowly misses applying to the applicant because he was an officer on active duty in the Naval Reserve rather than an officer in the regular Navy. Title 14 U.S.C. § 727 states that the Secretary may assign a Reserve officer a "date of rank and precedence which reflects that person's experience, education, or other qualifications." However, Paragraph 6.a. of COMDTINST 1131.23, which governs direct commissions under the MARGRAD program, states that an officer's "date of rank shall be the date of appointment to commissioned status in the Coast Guard Reserve." Therefore, the Board finds that the applicant's date of rank as a lieutenant junior grade in the Coast Guard Reserve should be the date of his appointment, July 31, 1998.

10. Accordingly, partial relief should be granted by correcting the applicant's oath of office to show that he was appointed in the rank of lieutenant junior grade and by correcting his date of rank as a lieutenant junior grade to July 31, 1998.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of [REDACTED] [REDACTED] USCGR, for correction of his military record is hereby granted as follows:

His records shall be corrected to show that he took the oath of office and was commissioned at the rank of lieutenant junior grade (O-2) on July 31, 1998. His date of rank shall be July 31, 1998.

The Coast Guard shall pay the applicant any back pay and allowances he may be due as a result of this correction.

