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

Application for Correction of
the Coast Guard Record of:

**BCMR Docket No. 2019-181**

[redacted]

## FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on August 6, 2019 and assigned the case to a Staff Attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated May 27, 2022, 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 Reserve Lieutenant Commander (LCDR/O-4) who was honorably discharged from the Reserve on June 30, 2017, after failing to promote twice, asked the Board to correct his record by reinstating him into the United States Coast Guard Reserve at his previous rank.

The applicant argued that his forced discharge under 14 U.S.C. § 740(a)(1) was unjust because the Coast Guard, unlike other branches of the military, did not have a continuation policy in place that would allow Reserve officers twice passed over for promotion to serve their full twenty years of service required for a Reserve retirement.[1] The applicant alleged that a Coast Guard policy passed in 2019 under ACN 036/19, two years after his discharge, established a continuation policy for the Coast Guard, which would have prevented his discharge under 14 U.S.C. § 740(a)(1). According to the applicant, given the value of his service to the Coast Guard, had this policy been in effect at the time of his discharge, he would not have been discharged, but instead would have been allowed to continue his service in the Reserve as a LCDR O-4.

To support his application, the applicant submitted roughly one hundred pages of documents, one of which was a personal letter to the Board. In his letter the applicant discussed

[1] In his application, the applicant stated that he was discharged in accordance with 10 U.S.C. § 1552. This is incorrect. The correct statute for officers being discharged due to twice failing to promote is 14 U.S.C. § 740(a)(1).

the changes to the Coast Guard's twice passed over discharge policy. The applicant stated that he is highly motivated to re-enter service. He explained that during his 17 years of service, including two years of active duty, he served in many prominent roles, both operationally in the field and at the policy level. Even in his post-service life, he remains active and energetic and believes he still has a lot to give to his beloved service.

The applicant briefly discussed his many previous job posts and activities while in the reserves. Finally, the applicant explained that at the time of his separation he was working on several high-profile command-directed projects, including documenting former commandants, and ferreting out overlooked personnel from WWII to Vietnam for consideration for retroactive awards. Since becoming a civilian he has helped run a business, taught at several colleges, and returned to government service with an active Air Force wing.

In addition to his personal letter to the Board, the applicant provided the following documents:[2]

- A copy of the ALCOAST COMMAND NOTICE (ACN) for the newly enacted Coast Guard Commander and Lieutenant Commander Continuation policy dated April 17, 2019.
- Email correspondence between the applicant and a Chief with the Reserve Personnel Management informing the applicant there was no continuation board as of the date of the email and that there was no policy that would allow an officer to revert to enlisted status.
- A copy of 10 U.S.C. sections 1552, 627, 629, 14310, 14501, 630, 14503, 631, 632, 14504, 14505, 14506, 14513, and12646.

## SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard Reserve on July 20, 2000, as an officer in training, or an E-5. He was commissioned an Ensign (O-1) in the Reserve on September 7, 2000. He continued to promote regularly until he reached O-4 on July 1, 2011, where he remained until his separation on June 30, 2017.

## VIEWS OF THE COAST GUARD

On January 29, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The JAG argued that the applicant failed to show that the Coast Guard committed an error or an injustice. Specifically, the JAG argued that the applicant's discharge was not an error and that, even if the Coast Guard had authorized a continuation board in 2016, there is no guarantee he

[2] The applicant submitted numerous documents regarding his time in the service, documents he had written and letters of recommendations for relief. However, these documents will not be summarized here because they are not dispositive of the outcome of the applicant's case.

would have been selected to continue. Therefore, the JAG argued, the applicant's arguments are speculation at best.

The JAG further argued that previous Coast Guard policies regarding the non-retention of Reserve Lieutenant Commanders not selected for promotion did not violate any statute or regulation and the ultimate impact on the applicant does not shock the sense of justice. The applicant's sweeping proposition that the Coast Guard's implementation of ACN 036/19 constitutes all former non-continuations an injustice is without merit because the previous policy was predicated upon Coast Guard specific needs and did not infringe on any statutory or regulatory rights of the applicant. The JAG also argued that the Coast Guard's decision to amend its policy based upon changing needs, serving equities, or other compelling factors does not render the previous policy unjust nor require retroactive application.

The JAG also argued that the applicant's argument that he is entitled to or has a right to reinstatement into the Coast Guard Reserve is incorrect. According to the JAG, at the date of her advisory opinion, there was no policy in effect in 2016/17, or now in effect, that requires the Coast Guard to retain Reserve members until retirement eligibility if they have less than 18 years of service. The JAG argued that 10 U.S.C. § 12646 makes it clear that sanctuary or retirement protection is only required for those who obtain 18 years of service. Since the applicant did not reach that threshold, he was not entitled to claim any legal right or entitlement to remain in the Coast Guard Reserve.

The JAG also argued that during PY17 the Coast Guard's service-based needs did not require the retention of twice passed over LCDRs. In fact, during PY17 the Coast Guard had exceeded its statutorily allowed number of LCDRs (307/249) and required the separation of 58 LCDRs. At the time of the applicant's discharge, the Reserve Policy Manual placed the responsibility on his selection board to determine whether he should be "selectively retained" if twice non-selected. However, according to the JAG the PY17 OCMP, in accounting for the current coverage, specifically stated that there would be no continuations beyond retirement eligibility in PY17 for LCDRs who had twice failed to promote. Although this policy changed in PY20 with the passing of ACN 036/19 and may have positively impacted the applicant if it had been implemented in PY17, the change in policy itself does not rise to the level of "shocking any sense of justice." The JAG argued that the determination in PY17 to not retain twice passed over LCDRs was not arbitrary, capricious, or founded on improper justifications or assumptions. The documentation included with PY17 OCMP confirms the Coast Guard Commandant approved the OCMP determination because it enabled the Coast Guard to meet the future needs of the Service, to meet fiscal targets, and to ensure optimum organizational flexibility and stability. The Coast Guard's decision not to retain twice passed over LCDRS was based on statistics, work force projections, and applicable statutes. The fact that the current needs of the Service warrant mandatory consideration before the Continuation Board does not "shock the conscience," and thus there is no merit to the applicant's argument.

The JAG also argued that the Coast Guard's decision not to make the ACN 036/19 retroactive does not "shock the conscience." According to the JAG, generally, rules and regulations are not retroactive unless explicitly stated as such. In addition, jurisprudence does not favor retroactivity. The JAG also argued that here, retroactive application of the policy changes in

ACN 036/19 would potentially create significant logistical issues for the Coast Guard and severely disrupt current workforce management procedures that overcome any allegations by Applicant (or similarly situated separated members) that failure to apply the policy retroactive is unjust.

Finally, the JAG argued that the Coast Guard is not bound by the policies and provisions of other services. In addition, the difference in policies does not render the Coast Guard's policy unjust. According to the JAG, the applicant argued that there was an injustice due to the Coast Guard's failure to implement a continuation board for reserve members, where the other military services had already implemented such boards for their members. The JAG argued that the applicant's argument is faulty because the Coast Guard is not bound by the policies of other military departments unless required by statute, regulation, or explicitly agreed to by the Coast Guard and indicated in policy. The JAG argued that the applicant has not alleged and cannot establish that the Coast Guard was in any way obligated to follow other military branches policies in regard to continuation boards. More importantly, the JAG argued that the difference in Coast Guard policies in place at the time of the applicant's discharge was predicated on the needs and mission sets of the Coast Guard that are fundamentally different those of other military branches. The JAG also argued that contrary to the applicant's argument, both ACN 036/19 and the Coast Guard's previous policies do directly comport with the policies of other military branches. Namely, the overarching recognition of service-specific needs being the dictating factor of whether or not to retain Reserve officers. According to the JAG, every military service recognizes that continuation boards, and retention of officers in general, are subject to the needs of their respective services. For example, paragraph 6-3 of Army Regulation 135-155 states, "…the SA may direct a selective continuation board to consider officers for continuation when required by the needs of the Reserve of the Army." Similarly, Secretary of the Navy Instruction 1920.7c, paragraph 6a(3) requires the submission of continuance plans for fiscal years "in which the needs of the service so require." The JAG argued that these two regulations highlight the fact that other services, similar to the Coast Guard, recognize the needs of the services change on a yearly basis. Ultimately, the JAG argued, ACN 036/19 was a product of the Coast Guard's recognition that the future needs of the service warranted a change in policy. As such, the JAG argued, there is no injustice in the fact that the Coast Guard did not mandate continuation boards prior to FY20. In conclusion, the JAG recommended the Board deny relief in this case.

## APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 6, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. No response was received.

## APPLICABLE LAW AND POLICY

Title 14 U.S.C. § 740(a)(1), as in effect in 2017, provides guidance on the Coast Guard's policy on discharged reserve officer who twice fail to promote. In relevant part:

> **(a)** The Secretary-
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> > **(1)** may remove from an active status a Reserve officer who has twice failed of selection to the next higher grade;

The Reserve Policy Manual, COMDINST M1001.28C, provides additional guidance on officers who twice fail to promote. In relevant part:

> 6. Failure of Selection. A Reserve officer, other than an officer serving in the grade of captain, who is, or is senior to, the junior officer in the promotion zone established for the officer's grade, fails of selection if not recommended for promotion by the selection board that considered the officer, or if having been selected for promotion by the board, is removed from the report of the board by the President or the Commandant, in accordance with Reference (b), Title 14 U.S.C. §740(a).
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> c. Officers who twice fail of selection are normally removed from an active status on 30 June following the approval date of the board report upon which the second failure of selection occurs, unless needs of the Service dictate otherwise.
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> d. A commander or lieutenant commander who twice fails of selection shall be retained for not more than the minimum period of time necessary to complete 20 satisfactory years for retirement, plus one additional year, if required, if so recommended by the selection board in which the second failure of selection occurs. Officers selected for retention by board action shall continue to be eligible for promotion as long as they remain in an active status. No further continuation action shall be taken. To be eligible for (selective) retention, the officer must:
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> (1) Have less than 18 years of satisfactory federal service for retirement;
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> (2) Have 75% of total commissioned service as satisfactory years for retirement;
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> (3) Have three of the last four years met requirements for satisfactory federal service for retirement;
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> (4) Have documentation of sustained active participation in performance records; and
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> (5) Have solid performance in current grade, documented in OER.

## FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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.

2. The application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

3. The applicant alleged his discharge from the Reserve was unjust because the Coast Guard Reserve, unlike other military branches, did not offer a continuation board to those twice passed over. According to the applicant, had a continuation board been offered he would not have been discharged but instead would have been allowed to continue his service until he reached retirement. 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 the military record, and the applicant bears the burden of proving by a preponderance of the

evidence that the disputed information is erroneous or unjust.[3] 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."[4]

Under 10 U.S.C. § 1552(a), the Board may "remove an injustice" from a service member's record, as well as correct an error in the record. The Board has authority to determine whether an injustice has been committed on a case-by-case basis.[5] Therefore, the Board must consider whether the applicant's discharge constitutes an injustice. For the following reasons, this Board finds that the applicant's discharge was not an injustice.

4. The applicant argued his discharge was unjust and he should be reinstated into the United State Coast Guard so that he can continue his service to his country. However, the applicant was unable to prove, by a preponderance of the evidence, that his discharge was an injustice. It is up to the Coast Guard—not the applicant nor this Board—to determine the needs of the Service, and the record shows that in 2016 and 2017, the Coast Guard determined that no Reserve LCDR continuation or retention board was needed. As argued by the JAG, at the time of his discharge, the Coast Guard had more Reserve LCDRs than permitted. Specifically, at the time of the applicant's discharge the Coast Guard was allotted 249 Reserve LCDRs, but instead had 307 Reserve LCDRs in service. As a result, the Coast Guard's Reserve Personnel Management Branch was required to reduce the number of enlisted Reserve LCDRs by approximately 58 LCDRs. The JAG's numbers indicate that at the time of the applicant's discharge, the needs of the Reserve did not require continuing twice passed over LCDRs. Although the resulting discharge of the applicant and other Reserve LCDRs must have been disheartening, this Board cannot conclude that it so shocked the sense of justice that enforcing ACN 036/19 retroactively would be reasonable.

The applicant stated he was told by the Reserve Personnel Management Branch that this Board had the authority to reinstate him. Although this Board does have the authority to retroactively reinstate service members who have been separated, exercising this authority hinges on whether or not the Coast Guard has committed an error or injustice in discharging the member. In this case, the applicant has not proven by a preponderance of the evidence that his 2017 discharge for two non-selections for promotion constituted either an error or an injustice. Therefore, his request for relief should be denied.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

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[3] 33 C.F.R. § 52.24(b).

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

## ORDER

The application of former [redacted] for correction of his military record is denied.

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May 27, 2022

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