

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-060

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FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on January 11, 2008, upon receipt of the applicant's completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 11, 2008, 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 asked the Board to award him compensation for 36 days of annual leave, which he lost when he retired from active duty in the Coast Guard on September 1, 2007, and was immediately hired by the Coast Guard as a civilian employee. The applicant alleged that when the civilian position at his unit opened up, it "required immediate, albeit uncoordinated, action [for him] to simultaneously apply [for the civilian job] and retire [from active duty] for in what I believed was the proper time frame." He alleged that the Coast Guard did not properly coordinate his retirement and hiring and so he was unable to go on terminal leave and lost 36 days of leave. He also alleged that he was never advised that government funds were low or that taking the civilian job would make him less deserving of using up his excess leave. The applicant alleged that when he left active duty in the Navy in 1988, the Navy yeomen "made sure [he] got everything [he]'d earned, but not one CG administrator seemed to have any experience with [his] predicament." In support of his allegations, the applicant submitted several email messages and other documents, which are included in the summary of the record below.

SUMMARY OF THE RECORD

In a memorandum dated June 29, 2007, the applicant submitted to the Coast Guard Personnel Command (CGPC) through the commanding officer (CO) of the Marine Safety Unit (MSU) where he was stationed a formal request to retire on September 1, 2007, to fill a civilian watchstanding vacancy in the Vessel Traffic Service (VTS) Department of the same MSU. Para-

graph 4 of his request stated, "I understand if I request to later cancel or amend this retirement, it will be considered solely on the needs of the service."

On July 3, 2007, the CO of the MSU endorsed the applicant's request to retire on September 1, 2007, noting that he had served faithfully for 22 years. The CO also noted that the applicant had served in his billet at the MSU for more than three years and so was eligible to retire. Paragraph 2 of the CO's endorsement stated that "I understand and recognize that if [the applicant's] voluntary retirement is approved, his replacement may not be immediately available. This unit readily accepts this situation and will make provisions should a replacement not arrive before his departure."

On July 5, 2007, Mr. E, the Retirements Section Team Leader at the Coast Guard Personnel Command (CGPC), advised the applicant that his request for retirement had been received but was incomplete because the applicant needed to include a statement acknowledging that if he was being evaluated for a physical disability his request for retirement could be terminated.

On July 9, 2007, the applicant replied to Mr. E and wrote that "I have emailed the statement to [YN1 R] and will copy my admin."¹

On Friday, July 27, 2007, the applicant emailed YN1 R regarding his "expedited retirement request." He stated that he needed to begin terminal leave as soon as possible to start training for a civilian position. He noted that he had almost two months of accumulated leave to use and asked which office had authority to authorize terminal leave.

On Tuesday, July 31, 2007, the applicant emailed the Personnel Services Center (PSC) and asked if there was any new information or policy change affecting a retiree moving directly from active duty to a civilian position. He noted that his start date for the civilian job was August 20 and that he might not be able to attend a pre-retirement information class. The PSC advised the applicant that he could "move right into the GS job. If you are on terminal leave you must have your CO's approval."

On Wednesday, August 1, 2007, the applicant emailed YNC L, his unit's administrative officer, and stated that his "GS package is approved and I was given start date of 20 AUG. My physical [examination] will be completed and [CGPC]-epm2 has approved my retirement. What do we need to coordinate terminal leave commencing with this date?" YNC L forwarded his email to another yeoman at the MSU, YN1 H, the same day and asked her to help him. In response, YN1 H asked the applicant if he had an approved retirement date as there was none shown in the Direct Access database. She stated that once his retirement date was approved, they could set his terminal leave.

On Friday, August 3, 2007, the applicant emailed a chief warrant officer, stating that Mr. E had advised him that there was no provision for his terminal leave in the Direct Access database and that he was told he needed an approved retirement date before his administrative office could process his request for two months of terminal leave. He asked if he needed to amend his

¹ The statement the applicant emailed to YN1 R is not in the record.

retirement request date from September 1 to November 1 to be paid for his terminal leave instead of losing it.

Also on Friday, August 3, 2007, the applicant asked the Lead Military Pay Technician at PSC for advice about the issues in his email to the chief warrant officer earlier that day.

On Monday, August 6, 2007, the Lead Military Pay Technician at PSC advised the applicant to contact the PSC's customer service branch and noted that he would have to submit an on-line request through Customer Care.

A print-out from the Direct Access database indicates that on August 6, 2007, the applicant's CO agreed to endorse his request to retire on September 1, 2007, even though his active duty billet would likely not be filled until the following assignment season (summer 2008).

On Tuesday morning, August 7, 2007, Mr. E advised the applicant that "as a result of your command's agreement ([CDR O's] e-mail of 8/6/07) to the gap [in filling his active duty billet] resulting from your retirement, your request for retirement has been approved and processed in Direct Access. Your preliminary retirement orders are now available in Direct Access. Please contact your command office and your servicing personnel office (SPO) immediately in order to start your retirement process."

On Tuesday afternoon, August 7, 2007, YN1 H emailed Mr. E, stating that the unit had received the applicant's retirement orders but that in requesting a retirement date of September 1, the applicant "did not take into consideration that he has 57 days of leave on the books." She asked if the applicant's approved retirement date could be moved to November 1 so that he would be paid for the leave.

On Wednesday, August 8, 2007, at 5:28 a.m., Mr. E replied that the applicant "has an approved retirement date based upon his own request that was submitted outside of the normal window for requesting retirement as provided for in CG policy. His request was approved based upon additional input from his command. Therefore, if he now desires not to retire on this date, he will need to submit a request, as he did with his original request, to delay or cancel his approved retirement and for what reasons. However, keep in mind that merely to use leave is not a viable reason to cancel or change an approved retirement. Article 12.C.11.c. of the Personnel Manual applies."

On Wednesday, August 8, 2007, at 7:56 a.m., the yeoman forwarded Mr. E's response to the applicant. She noted that under the Personnel Manual, members are supposed to submit retirement requests at least six months in advance of the requested retirement date, but CGPC had rushed approval upon receiving his request for an expedited retirement so that he could retire on his requested date of September 1, 2007. She advised him to review Article 12.C.11.c. of the Personnel Manual to see if he could meet the requirements for delaying an approved retirement.

On August 30, 2007, the Chief of Human Resources Operations approved the applicant's appointment as a vessel traffic management specialist as of Sunday, August 19, 2007.

The applicant's final active duty Leave and Earnings Statement (LES), dated September 24, 2007, shows that he had previously sold 60 days of leave during his career;² took 24 days of leave from August 8 to 31, 2007; had 33 days of accumulated leave as of September 1, 2007; took no leave during September; and ended September with 0 days of leave.

VIEWS OF THE COAST GUARD

On May 20, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion adopting the findings and analysis provided in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC), in which CGPC recommended that the Board deny the applicant's request.

CGPC stated that on June 29, 2007, the applicant submitted a request to retire on September 1, 2007. His request was favorably endorsed by his commanding officer on July 3, 2007. On July 27, 2007, the applicant raised the issue of his 57 days of accrued, unused annual leave with a yeoman. On August 7, 2007, CGPC approved his request for retirement on September 1, 2007, and issued his retirement orders.

CGPC noted that under Article 12.C.11.a.5. of the Personnel Manual, enlisted members may request retirement no more than two years and no less than six months ahead of the desired retirement date. However, an expedited request for retirement endorsed by the member's command may be allowed based on the needs of the Service if the command will accept the gapped billet. Once a retirement date has been approved, it may be canceled or delayed only under the criteria in Article 12.C.11.c. In addition, CGPC noted that Article 12.C.1.d. specifies that terminal leave is granted at the discretion of the normal leave-granting authority and that a member's effective retirement date will not be delayed simply to allow him to use leave.

CGPC stated that although the applicant claims that he was treated unfairly and deprived of the opportunity to take terminal leave, the "record does not reveal any error or injustice in the processing of his retirement." CGPC noted that the applicant requested to retire on September 1, 2007, about two months before that date to accept a civilian position. CGPC waived the six-month requirement and approved his request on August 7, 2007, after the applicant provided additional necessary information in that his command agreed to accept the gap that would be created in his active duty billet when he left before his replacement could arrive.

CGPC noted that the applicant has not proved that his command ever refused to grant him leave. Furthermore, CGPC argued, "given the short-fuse nature of his voluntary retirement request, it is unrealistic to expect to request retirement and immediately be placed in a terminal leave status as there are numerous administrative, medical, and other proce[dures] that correlate with a retirement. The only indication of the Applicant requesting leave is his email of July 27, 2007, to his yeoman indicating that he [had] two months of leave and would like to commence terminal leave." CGPC noted that the applicant has already sold the maximum amount of leave allowed (60 days) and that his own "leave management, short-fused voluntary retirement request, and previous sale of leave" caused his loss of 36 days of leave. CGPC stated that it does not

² Under 37 U.S.C. § 501 and Chapter 10.A.1. of the Pay Manual, each member may sell a maximum of 60 days of accrued, unused leave during his military career.

delay approved retirement dates based solely on a member's leave balance. In addition, CGPC stated that the applicant's next position as a civilian employee of the same command was "unrelated to the approval of [his] retirement request and/or leave usage."

CGPC argued that there was "no error or injustice with the applicant's retirement processing. The applicant's choice of retirement date, high leave balance, and desire to pursue non-military career opportunities resulted in his loss of leave." Therefore, CGPC recommended that no relief be granted in this case.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 15, 2008, the applicant responded to the Coast Guard's recommendation. He stated that the advisory opinion does not acknowledge that the "losing command," from which he retired, and the "gaining command," into which he was hired were the same command—the MSU. He reports to the same captain and retained his computer files and email address that he had on active duty. The applicant stated that the civilian watchstanding position he accepted in the VTS Department had gone unfilled for two years, whereas two reservists on Title 10 orders "had been assigned my E-6 duties almost a year prior to my civilian 'transfer.'" The applicant stated that YNC L, his unit's administrative officer, had applied for the same civilian position he was offered but he alleged no particular malfeasance. He denied that anyone was at fault but claimed "the unfortunate circumstance that I couldn't begin my request for retirement until the civilian side approved my hiring package." Therefore, he asked "admin" how to structure his transfer without losing leave because he had received no guidance from his command.

The applicant argued that CGPC's claim that his acceptance of a civilian position was unrelated to the approval of his retirement request does not comport with the fact that the civilian position was "classified as an in-house hiring and not advertised" and that he only requested retirement to take the long-vacant watchstanding position, which the command badly needed to fill. He argued that if he "had requested a month or two longer, the VTS watch section would have been the loser" instead of him. The applicant complained that no one looked out for his interest.

APPLICABLE REGULATIONS

Under Article 7.A.11. of the Personnel Manual, members receive 2.5 calendar days of leave per month of continuous active duty (30 days per year). Under Article 7.A.15.a., "[e]arned leave may exceed 60 days during a fiscal year, but must be reduced to 60 days on the first day of the next fiscal year except as outlined in paragraphs b. through d. below [which are unrelated to the applicant's case]. The amount so reduced is irrevocably lost without compensation."

Article 12.C.10.a.1. of the Personnel Manual states that members with more than twenty years of active service may retire "on application and at the Commandant's discretion" pursuant to 14 U.S.C. § 355. Article 12.C.4.a. states that because of the complexity of the retirement process, members should attend a one- or two-day pre-retirement seminar to learn what to do. Article 12.C.11.a., entitled "Requests for Voluntary Retirements," states the following:

1. An enlisted member's non-disability retirement occurs at the discretion of Commander (CGPC-epm). Therefore, an enlisted member's request will be considered on the basis of overall Service needs and the merits of each individual case. As a general rule, the provisions listed here govern; however, an enlisted member does not automatically accrue a vested right to retire when he or she chooses independently of Service needs merely by completing 20 years of active service.

2. An enlisted member may submit a request for voluntary 20-year retirement to Commander (CGPC-epm-1) if the member:

- a. Has completed 18 years of active service, and
- b. Requests an effective date of retirement which provides:
 - (1) Completing at least one year of duty at current duty station if assigned INCONUS. ...



5. Submit retirement requests to Commander (CGPC-epm-1) not more than two years or less than six months before the desired retirement date. Members desiring a retirement date sooner than 6 months out, may so request; however, the request must be accompanied by a command endorsement stating that the command can, and is willing to, support a vacant billet. Such requests will be approved based upon Service needs. They will be acknowledged by either approval or disapproval. Include the following statements in all requests:

<p>From: Member To: Commander, Coast Guard Personnel Command (CGPC-epm-1) Thru: Commanding Officer, [Unit] Subj: RETIREMENT REQUEST Ref: (a) Personnel Manual, COMDTINST M1000.6 (series), Article 12.C.11. 1. I request retirement on the first day of [month, year], or as soon thereafter as possible. 2. I understand if this request is approved, I will no longer be eligible for advancement ... 3. I understand if I request to cancel this retirement, Commander (CGPC-epm) will consider this request based solely on Service needs. If such cancellation is approved, it will not entitle me to reinstatement in the current Servicewide competition or on the existing eligibility list. ... 4. I further understand that if I am being processed under the Physical Disability Evaluation System, my request for retirement could be terminated. 5. The zip code of my intended home of selection is _____.</p> <p>_____</p> <p>Member's Signature</p>



7. Area, district, maintenance and logistics, and unit commanding officers will include the following comments in endorsements to all retirement requests:

- a. Specific approval or disapproval of the basic request; if disapproval, the full reason for disapproval.
- b. Whether the member meets the requirements listed in Article 12.C.11.a.2.

Article 12.C.11.b.1. states that “[f]inal approval of a retirement rests with Commander (CGPC-epm-1) who may specify an effective date later than that requested if, in the best interest of the Service, a delay is necessary to provide orderly relief or, in some cases, completion of the current or ordered tour of duty.” Article 12.C.1.b. states that “Commander (CGPC-epm) or (CGPC-opm) issues orders containing the effective retirement date, the laws governing the retirement, and travel authorization. Under 5 U.S.C. 8301, all non-disability retirements occur on the first day of a calendar month with the member usually detaching on the last day of the pre-

ceding month. If the member detaches earlier, the time between detachment and the effective retirement date is charged as annual leave.”

Article 12.C.1.d., entitled “Leave in Connection with Retirement,” states the following:

1. At their discretion leave-granting authorities may grant earned or advance leave accompanying retirement orders under Chapter 7; however, the member’s effective retirement date will not be delayed for the specific purpose of allowing him or her to use earned leave. Relief for the retired member normally coincides with the scheduled retirement date, not the date the member departs on leave.
2. If authorities grant leave in connection with retirement, complete the member’s records before he or she departs on leave, except for the final date entries, and endorse retirement orders to show the amount of leave granted. The retirement processing station subsequently completes all documents in the Service member’s official record on the effective retirement date and transmits the member’s copies of these documents to him or her.

Article 12.C.11.c., entitled “Canceling or Delaying Retirement Orders,” states the following:

1. The decision to submit a retirement memorandum is a serious one because the projected separation triggers transfer and advancement actions that, if reversed, cause hardship to other members. Therefore, Commander (CGPC-epm-1) normally will not honor a request to cancel or delay an already approved retirement date unless a specific Service need exists and only under these conditions:
 - a. A Service need exists.
 - b. A member has a hardship situation similar or equivalent to those listed in Article 12.D.3. The Service does not consider a change in civilian employment plans a hardship.
 - c. The retirement physical examination finds the member “not fit for duty” and he or she requests in writing to cancel his or her Service retirement orders and processing for a physical disability retirement; or
 - d. If during the retirement processing period, the member is diagnosed with serious diseases or suffering from serious injuries not ratable by the Physical Disability Evaluation System nor disqualifying for separation, he or she may request to delay a non-mandatory retirement for a reasonable amount of time to address the problem. ...
2. In canceling a scheduled retirement, the member must agree to remain on active duty for two years from the date the request is approved and indicate this agreement in the basic cancellation request. ...
3. Submit a request to cancel or delay a scheduled retirement at least three months before the retirement date if at all possible. State the reasons for the request and submit it through the chain of command.

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 10 U.S.C. § 1552. The application was timely.
2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The record shows that because of an opportunity for civilian employment with the Coast Guard, the applicant submitted an “Expedited Retirement Request” on June 29, 2007. Although under Article 12.C.11.a.5. of the Personnel Manual, retirement requests are supposed to be submitted at least six months before the requested date of retirement, the applicant asked to retire just two months before his requested retirement date of September 1, 2007. At the time, he had approximately two months’ worth of unused annual leave, and he had already sold the maximum of 60 days of leave that a member may sell throughout his military career under 37 U.S.C. § 501 and Chapter 10.A.1. of the Pay Manual. Therefore, unless the Coast Guard erred or committed an injustice in retiring him on September 1, 2007, the applicant is not entitled to compensation for the 36 days of annual leave he lost upon his retirement.

4. In requesting the September 1st retirement date, the applicant clearly ignored his accumulated leave total. He could have asked to be retired on October 1st or November 1st, in which case he could have begun his new civilian job and also been paid for two full months of terminal leave.³ However, there is no evidence in the record that the applicant raised the issue of his accumulated leave until July 27, 2007, almost a month after he submitted his retirement request and barely a month before his requested retirement date. The applicant has not alleged, and there is no evidence indicating, that his choice of September 1st as a retirement date was recommended by a yeoman or other administrative officer with knowledge of his leave balance and leave sold. The applicant’s email dated July 31, 2007, indicates that he had submitted his retirement request without attending one of the Coast Guard’s pre-retirement informational seminars.

5. The applicant’s email dated Friday, August 3, 2007—in which he asks if he needs to amend his requested retirement date so that he can be paid for all of his unused accrued leave—indicates that the applicant had just realized that he had made a mistake in asking to retire on September 1st instead of a month or two later. Prior to that date, the applicant appears to have illogically believed that he could take leave after retiring. On Monday, August 6, 2007, a Military Pay Technician responded to his email, stating that he should submit his request through Customer Care. There is no evidence in the record that the applicant actually submitted a request to amend his requested date of retirement before his retirement date was approved and the orders were issued on the morning of August 7, 2007. Nor is it clear that such a last-minute request would have been approved.

6. On Tuesday morning, August 7, 2007, CGPC informed the applicant that his requested retirement date of September 1st had been approved and issued his retirement orders. That afternoon, YN1 H asked Mr. E if the orders could be amended by delaying his retirement date to allow the applicant to be paid for all of his unused accrued leave. Mr. E advised YN1 H on Wednesday morning, August 8, 2007, that the applicant could seek an amendment of his retirement date and noted that, under Article 12.C.11.c. of the Personnel Manual, using up one’s accrued leave is not one of the valid reasons for delaying a retirement once a retirement date is approved. The Board also notes that Article 12.C.1.d.1. expressly states that a member’s retirement date “will not be delayed for the specific purpose of allowing him or her to use earned

³ Under 5 U.S.C. § 5534a, members of the uniformed services who are on terminal leave pending retirement from active duty and who accept civilian employment with the federal Government are entitled to receive the pay of both positions “for the unexpired portion of the terminal leave.”

leave.” YN1 H forwarded Mr. E’s response to the applicant and advised him to review Article 12.C.11.c. to see whether he could get his retirement date delayed. There is no evidence in the record that the applicant ever requested a delay of his retirement orders under Article 12.C.11.c.

7. In light of the above findings and evidence of record, the applicant has not proved by a preponderance of the evidence that the Coast Guard erred in refusing to delay his retirement date to October 1 or November 1, 2007, so that he would be entitled to compensation for the 36 days of unused leave. Instead, the record indicates that the applicant himself made a significant mistake in selecting and requesting a retirement date on June 29, 2007, without having considered his leave balance and before having consulted an administrative specialist about how to be paid for his unused leave while starting the civilian job.

8. Under 10 U.S.C. § 1552, the Board must also consider whether the September 1st retirement date constitutes an injustice. For purposes of the boards convened under 10 U.S.C. § 1552, “injustice” is “treatment by military authorities that shocks the sense of justice, but is not technically illegal,” and the Board has authority to find injustice on a case by case basis.⁴ The applicant argues in part that his inability to take all two months of his accrued annual leave constitutes an injustice because his hurry to submit a retirement request and to retire resulted from his desire to help his command by filling the vacant civilian position as soon as possible. He argued, in essence, that he did his command and, thus, the Coast Guard a great favor by rushing to submit his retirement request without consulting a yeoman to determine the best retirement date. However, the Board is not persuaded that the applicant was denied a reasonable opportunity to consult a yeoman about his excess leave situation when selecting his retirement date in June 2007.

9. The applicant also argues that he was prevented from taking all two months of his unused annual leave because he received poor advice and insufficient help from the administrative officers he consulted. However, there is no evidence that he raised the issue of his accrued unused leave balance with a yeoman until July 27, 2007, after he had already submitted his retirement request. He was allowed to begin terminal leave just 12 days later, on August 8, 2007, and took 24 days of leave from that date through August 31, 2007. He began his civilian employment while on terminal leave. The Board does not consider this to be “treatment by military authorities that shocks the sense of justice,”⁵ even though the applicant ultimately lost 36 days of unused leave because on June 29, 2007, he forgot to consider his accumulated leave balance in selecting a retirement date.

10. Accordingly, the applicant’s request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁴ *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (finding that); see Decisions of the Deputy General Counsel in BCMR Docket Nos. 2000-037, 2002-040.

⁵ *Id.*

ORDER

The application of BM1 xxxxxxxxxxxxxxxxxxxx, USCG (Retired), for correction of his military record is denied.

Philip B. Busch

Kathryn Sinniger

Dorothy J. Ulmer