

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2010-015**

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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 after receiving the applicant's completed application on November 1, 2009, 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 July 29, 2010, 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, an aviation survival technician, second class (AST2), asked the Board to correct his record to show that he sold 60 days of leave<sup>1</sup> when he signed an indefinite<sup>2</sup> reenlistment contract on November 20, 2008. The applicant stated that when he signed the contract he was away from his unit on temporary assigned duty (TAD) and "was not given the chance to sell leave. I was informed my enlistment was about to expire and I had 24 hours to get the paperwork done. I was TAD in Washington, D.C., at the time. I had no chance to think about my options." The applicant stated that he discovered the injustice on October 1, 2009.<sup>3</sup>

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<sup>1</sup> Under Article 7.A.11.a. of the Personnel Manual, members earn 2.5 days of leave per month of continuous active duty. Under 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. Leave may be sold on any date the member is being separated from active duty even if the member is immediately reenlisting on active duty.

<sup>2</sup> Under Article 1.G.2.a.2. of the Personnel Manual in effect in 2008, members with more than 10 years of active duty could not reenlist for a definite term of years and instead had to reenlist indefinitely. Therefore, a member's indefinite reenlistment was the penultimate occasion upon which a member could sell leave—the ultimate occasion being the member's final discharge or retirement.

<sup>3</sup> Article 7.A.15.a. of the Personnel Manual states that "[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. The amount so reduced is irrevocably lost without compensation." Paragraphs b. through d. concern situations that might prevent members from using leave, such as national emergencies and long deployments at sea.

In support of his allegations, the applicant submitted a copy of the reenlistment contract, which includes the following comment in the remarks block on the first page, which the applicant initialed: "Selective Reenlistment Bonus (SRB) multiple is 0.0 and is listed in ALCOAST 286/08. Member is not selling leave."

### **VIEWS OF THE COAST GUARD**

On March 30, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief only "if the Board determines the applicant suffered an injustice based on the circumstances of [his] situation." The JAG stated that the recommendation is based on the particular circumstances of the applicant's reenlistment "and is not indicative of a shift in policy or a purported change from precedent."

The JAG stated that it appears that the applicant was notified while away from his unit serving on TAD that his prior enlistment contract was expiring within 24 hours. Therefore, it appears that he "was not counseled or given the opportunity to weigh his options prior to making his decision to enter into his indefinite reenlistment."

The JAG noted that under ALCOAST 307/08,<sup>4</sup> as of September 1, 2008, "members currently serving on indefinite reenlistment contracts are authorized to enter into new indefinite reenlistment contracts for the purpose of selling leave." The JAG stated that although the applicant should have asked to sell leave when he reenlisted on November 20, 2008, "based on the exigent nature in which [he] had to act, it is believable that had [he] the opportunity to discuss his options or given more leeway to act, he could have made a more informed decision."

The JAG submitted with his advisory opinion a memorandum prepared by the Personnel Service Center (PSC), which the JAG adopted only in part. The PSC argued that the applicant's request should be denied because his initials in the remarks section show that he knew that he could sell leave and opted not to do so. The PSC stated that "[h]ad the applicant been exposed to faulty administrative processing, miscounseling on benefits/entitlements, or under undue duress to enter into this contract, then an appropriate remedy would be recommended. However, no

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<sup>4</sup> ALCOAST 307/08 states the following in pertinent part:

1. In order to afford our members serving on indefinite reenlistment contracts the opportunity to sell leave prior to separation or retirement, the following change is effective immediately and will be reflected in a future change to [the Personnel Manual].
2. Effective 1 September 2008, members who are currently serving on an indefinite reenlistment contract are authorized to enter into a new indefinite reenlistment, one time, during a career for the purpose of selling leave. Those members who desire to enter into a new indefinite contract should contact their unit YN and submit a Career Intentions Worksheet (CG-PSC-2045) indicating their desire to reenlist and the number of days of leave they desire to sell.  
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6. Effective 1 SEP 2008, members who have 10 or more years of active service will be allowed to reenlist for periods of three years, four years, five years, six years or for an indefinite period up to their 30-year active duty anniversary date. Members reenlisting for an indefinite period on or after 1 SEP 2008 cannot reenlist again later in their career for the purpose of selling leave. Paragraph 2 (above) applies to members who entered into indefinite reenlistment contracts prior to 1 SEP 2008.

such evidence exists to justify any of these reasons to not honor the applicant's standing contract." The PSC argued that the terms of the contract should stand because the applicant reenlisted after ALCOAST 307/08 went into effect.

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

On April 8, 2010, the applicant responded to the views of the Coast Guard, stating that one morning when he was TAD in D.C. to attend an awards ceremony and other events, he was at the hotel

preparing to load onto a bus for a full day of events. I received a call from a YN stationed [at] ISC San Pedro; he stated that I had to come down to San Pedro immediately to fill out reenlistment papers because my enlistment would expire in 24 hours. I explained to him that I was currently TAD in Washington, D.C. for the Secretary of Homeland Security Awards and that I couldn't make it down to the ISC. I also explained to him that [I] was about to load onto a bus in a few minutes and that I wouldn't be available for almost the entire day.

The YN then told me to give him the fax number of the hotel that I was currently staying at and he would fax the paperwork. I was instructed to fill out the paperwork, have someone swear me in and then fax the paperwork back to him that evening when I was done with the day's events. He stated that I needed to have the paperwork faxed back to him by that evening. I was given NO instruction on how to fill out the paperwork.

After the many events of the day, my wife and I finally got back to the hotel at around 8 p.m. I had asked a Coast Guard officer (I don't remember his name) to wait for me in the lobby so I could fill out the paperwork and then have him swear me in (I have pictures of the swearing in if necessary). After the swearing in, I faxed the paperwork to the number the YN had given me.

I was given no proper counseling on how to fill out the reenlistment paperwork. I was also under duress during this time because of the scheduling placed upon me and I was very concerned about my enlistment expiring.

## **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 alleged that he was not given the chance to sell leave when he signed an indefinite reenlistment contract on November 20, 2008. Because he did not sell leave, he apparently lost leave at the beginning of the next fiscal year on October 1, 2009. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>5</sup> Absent

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<sup>5</sup> 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

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.”<sup>6</sup>

3. The applicant’s initials in the remarks section of his reenlistment contract show that when he reenlisted on November 20, 2008, he knew that no sale of leave was included in the contract. The contract does not show, however, that he knew he was eligible to sell leave or that he had a reasonable opportunity to consider whether to sell leave and to have the contract modified to reflect his desire. The Board finds the applicant’s account of the events of the day to be completely credible. In this regard, the Board notes that the applicant personally received a xxxxxxxxxxxxxxxx on November 20, 2008.<sup>7</sup> In light of the events of the day, the Board finds that the applicant did not have a reasonable opportunity on November 20, 2008, to consider whether to sell leave.

4. The Board is persuaded that the unique circumstances of the applicant’s reenlistment on November 20, 2008, render his failure to sell leave on that date a clear injustice<sup>8</sup> in his record. The applicant alleged that if he had had time to consider the matter, he would have sold 60 days of accrued, unused leave on that date. However, neither the applicant nor the Coast Guard submitted copies of the applicant’s leave statements. Therefore, the Board does not know for certain (a) whether the applicant actually had 60 days of accrued, unused leave to sell on November 20, 2008; (b) whether the applicant had ever sold leave before, in which case he could not sell 60 days of leave in 2008 because 60 days is the statutory career-long maximum;<sup>9</sup> or (c) whether correcting his record to show that he sold 60 days of leave in 2008 would, after his leave records are adjusted, leave him with a current negative leave balance.

5. Accordingly, the requested relief should be granted provided that the applicant actually had accrued, unused leave to sell on November 20, 2008, that the sale of leave does not exceed the career-long limit of 60 days, and that the sale of leave does not leave the applicant with a current negative leave balance.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

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<sup>6</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

<sup>7</sup> See <http://dhsconnect.dhs.gov/org/comp/mgmt/dhshr/emp/Pages/2008Awards.aspx>.

<sup>8</sup> For the purposes of the BCMRs, “[i]njustice’, when not also ‘error’, is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal.” *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). The Board has authority to determine whether an injustice exists on a “case-by-case basis.” Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

<sup>9</sup> Coast Guard Pay Manual, Chapter 10.A.1.

