DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 1997-149

FINAL DECISION

[redacted] Attorney-Advisor:

This proceeding was conducted according to the provisions of section 1552 of title 10 of the United States Code. It was commenced upon the BCMR's receipt of the applicant's application on July 7, 1997.

This final decision, dated February 25, 1999, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant is a retired captain (CAPT; pay grade O-6) who served more than 20 years in the federal civil service and on inactive duty in the Coast Guard Reserve, and more than six years of active duty service. In September 1994, he canceled his temporary active duty contract (almost two years remained) to accept a two-year civil service contract, because he wanted to join the Senior Executive Service (SES).

The applicant asked the Board to change his Coast Guard record to show that he did not cancel his active duty contract and that he remained on active duty until his contract ended on July 12, 1996. The change would add almost two years to the applicant's active duty service and allow him to receive back pay and allowances from the Coast Guard offset by his civilian salary. He might also receive between $60,000 and $70,000 in Civil Service Retirement System (CSRS) annuity payments, which were offset when he left active duty and rejoined the civil service from September 27, 1994, to July 12, 1996.

APPLICANT'S ALLEGATIONS

The applicant stated that in June 1989 he had been recalled to active duty after more than 20 years working in the federal civil service while on inactive duty in the Coast Guard Reserve. While serving on his active duty contract, he

received a CSRS pension of approximately $35,000 per year. While still on active duty in 1992, he applied for the SES Development Program. The applicant stated that he was then unaware that it was for civilian employees only. When selected for the program, he was advised that he would have to become a civilian employee to continue. At the time, he still had almost two years to go on his active duty contract.

The applicant alleged that on active duty he was earning about $85,000 per year plus his civil service annuity of $30,000. After joining the SES, he would earn about $80,000,[1] and the annuity would be offset. Therefore, he would receive between $30,000 and $35,000 less per year in the SES. The applicant alleged that he chose to rejoin the civil service, however, because he was advised by Coast Guard personnel that his active duty years would count toward his CSRS annuity computation. The increased annuity he thought he would receive after he re-retired from civil service, he alleged, would have made up for the short-term, two-year loss of his annuity payments in about four years.

The applicant qualified for the SES but did not receive an appointment before his temporary civil service contract ended in 1996. The applicant alleged that he has now been told by the Office of Personnel Management (OPM) that "the active duty period cannot be included in the civil service computation unless there is a 'new period of entitlement' established. Such a 'new period of entitlement' requires five additional years of civilian service." Therefore, the applicant's active duty service is not included in the computation of his CSRS annuity even though Coast Guard personnel had told him it would be.

The applicant stated that the Coast Guard's erroneous advice had induced him to leave the service almost two years early and thereby to lose between $60,000 and $70,000 in CSRS annuity payments. Since OPM will not include his active duty time in his CSRS annuity computation, he asked the Board to change his discharge date so that he would be restored to the same financial position he would have been in had he not acted on the erroneous advice of Coast Guard personnel specialists.

VIEWS OF THE COAST GUARD

On January 15, 1999, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request.

First, the Chief Counsel argued there is no error in the applicant's record for the Board to correct. The applicant's DD Form 214 reflects his true date of separation from active duty.

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[1] The Chief Counsel stated that the applicant's compensation as a civil servant was approximately $88,000. The applicant did not dispute this but stated that the exact amount of his salary is irrelevant to the main issues in his case.

Second, the Chief Counsel argued that the applicant "is estopped from asserting any reliance claim based on the inaccurate advice . . . ." The Chief Counsel admitted that both the Civilian Personnel Branch and the Office of Military Personnel had wrongly advised the applicant as to the includability of his active duty service in the computation of his civil service annuity. However, the Chief Counsel argued, in *Montilla v. United States*, 457 F.2d 978 (Ct. Cl. 1972),

> the Court of Claims held that the misrepresentations of officers of the U.S. Army to the plaintiff, leading him to believe that he had completed twenty years of active military service and was thus eligible for retirement pay upon reaching age sixty, could not alter the fact that the plaintiff had not actually completed twenty years of active service as computed under 10 U.S.C. § 1332 (1964). The Montilla court reasoned that unless a law has been repealed or declared unconstitutional by the courts, it is a part of the supreme law of the land and no officer or agency can by his actions or conduct waive its provisions or nullify its enforcement. 457 F.2d at 987.

The Chief Counsel also quoted the following passage from *Goldberg v. Weinberger*, 546 F.2d 477 (2d Cir. 1976), *cert. denied sub nom. Goldberg v. Califano*, 431 U.S. 937 (1977):

> The government could scarcely function if it were bound by its employees unauthorized representations. Where a party claims entitlement to benefits under federal statutes and lawfully promulgated regulations, that party must satisfy the requirements imposed by Congress. Even detrimental reliance on misinformation obtained from a seemingly authorized government agency will not excuse a failure to qualify for the benefits under the relevant statutes and regulations. *Id.* at 481.

Finally, the Chief Counsel argued that the applicant has failed to prove that an injustice occurred:

> Applicant is a seasoned veteran of the military and the civil service with over 30 years of combined federal service. . . . [H]e decided to voluntarily sever his [temporary active duty] contract with the Coast Guard in order to participate in an Executive Development program designed to prepare candidates for selection to SES grade.
>
> Applicant now wishes us to believe that he took this action based solely on the supposed inaccurate advice he received regarding his future CSRS benefits. What Applicant fails to point out is that no one forced him to seek this opportunity and he may very well have made the very same decision to leave active-duty even if he had received the correct information. Apparently Applicant never achieved his goal of attaining SES grade. However, had he been . . . promoted to the SES grade, the Applicant would have received substantial financial and status benefits above his then current benefits and status. His voluntary choice to seek "greener pastures" is neither an error nor injustice. This application to "correct his record" sounds more like a claim against the government for monetary damages than a request for a military record correction. . . . No error to his record has been proved.

> Moreover, the burden or risk of accuracy in determining pay entitlements between federal and military service falls appropriately on the beneficiary. . . . No matter what advice he received regarding his future CSRS benefits, he is responsible for determining his own retirement benefits.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 19, 1999, the Chairman of the BCMR sent a copy of the Chief Counsel's advisory opinion to the applicant and invited him to respond. On January 26, 1999, the applicant responded.

The applicant explained that, although he had in fact qualified for appointment in the SES, he did not enter it because there were no SES positions available within the Department of Transportation prior to the expiration of his two-year temporary civil service appointment in 1996. However, he stated that his decision to end his active duty contract with the Coast Guard was based not on his SES aspirations but on the monetary incentive shown him by the Coast Guard's erroneous advice.

The applicant stated that he has no recourse through OPM. "OPM is bound by the statute and we are unaware of any OPM forum that can "remove injustice" comparable to Congress's grant of authority to the BCMRs . . . under 10 U.S.C. § 1552." He cited *Duhon v. United States*, 461 F.2d 1278, 1281 (Ct. Cl. 1972), *Caddington v. United States*, 178 F. Supp. 604, 607 (Ct. Cl. 1959), and *Thomas v. Cheney*, 925 F.2d 1407, 1423-24 (Fed. Cir. 1991), for the proposition that the Board should restore him to where he would have been had he not relied on the Coast Guard's erroneous advice.

The applicant further stated that he has never held a "personnel" position and had no way to know that the advice he received was incorrect. "Whether or not the incorrect advice they furnished conferred on [the applicant] a right enforceable at law (and we do not contend it is enforceable under the Tucker Act), his reliance on their written representation . . . was entirely reasonable."

Regarding the Board's jurisdiction over the case, the applicant stated the following:

> The Board's jurisdiction is both broad and remedial in character, *Kalista v. Sec'y of the Navy*, 560 F. Supp. 608, 611 (D. Colo. 1983); *Oleson v. United States*, 172 Ct. Cl. 9 (1965); 40 Op. Att'y Gen. 504 (1947), and there can be no question that correction of [the applicant's] records is within its reach. . . . [The applicant] does not contend that his case falls within the "error" part of the Board's authority, but rather, that it falls within the "injustice" part. The [cases cited by the Coast Guard] stand for the proposition that a court will not enforce an incorrect representation by a government official. This case does not seek such relief, but seeks simply to put [the applicant] back where he would have been absent the incorrect information.

Regarding the Coast Guard's estoppel argument, the applicant stated as follows:

> The Coast Guard's suggestion . . . that [the applicant] is somehow "estopped from asserting" his own reliance reflects a misunderstanding of the doctrine of "estoppel." The term does not simply mean a party cannot prevail on some particular argument; it means the law will not hear the party to advance some point or other. The doctrine has no application [in this case].

SUMMARY OF THE RECORD

In June 1989, the applicant retired from the federal civil service with over 22 years of creditable service. In June 1989, the applicant agreed to be recalled to active duty and signed a 7-year temporary active duty contract.

In 1992, the applicant applied to the DOT Executive Development Program. After being accepted by the program, but prior to entering, the applicant sought advice from the Coast Guard Civilian Personnel Branch regarding how rejoining the civil service would affect his retirement pay under the Civil Service Retirement System (CSRS). According to the Chief Counsel of the Coast Guard, that branch determined that his active duty service could be included in his civil service computation but asked the Office of Military Personnel in the Personnel Management Directorate to confirm that fact. Both the Civilian Personnel Branch and the Office of Military Personnel then erroneously informed the applicant as to the includability of his active duty service in the computation of his civil service annuity.

The applicant thereafter sought and received permission to cancel his active duty contract. On September 27, 1994, the applicant became a federal civil servant again. He was employed by the Coast Guard on a two-year temporary civil service contract. On March 3, 1995, the applicant received a computation of his CSRS annuity. The computation showed over 32 years of total service, including his recent 5+ years of military service.

On October 19, 1995, the applicant qualified to enter the SES. He was certified for appointment to the SES for a period of three years from that date.

On May 31, 1996, a Coast Guard Personnel Management Specialist wrote a letter to OPM, which stated that the applicant had made a $25,515.80 deposit to have his annuity recomputed upon his separation from active duty. OPM was asked to recompute his annuity to reflect his additional service.

On July 12, 1996, the applicant left the federal civil service upon the termination of his temporary contract.

On August 27, 1996, another Personnel Management Specialist sent the applicant a letter stating that OPM would calculate his supplemental annuity.

On July 8, 1997, an OPM Benefits Specialist wrote a letter informing the applicant that his active duty service could not be included in his civil service computation unless he became "reemployed and acquire[d] a new retirement right." The $25,515.80 was refunded to him.

On July 23, 1997, the Commander of the Coast Guard Personnel Command wrote to the Chairman of the BCMR on the applicant's behalf. He stated as follows:

> [The applicant's] transition to the Coast Guard civilian work force on 9/27/94 was voluntary; however, he made this transition after receiving incorrect information provided to him by the Coast Guard regarding potential retirement benefits. I ask that you take this into account when reviewing this case.

FEDERAL STATUTE (BCMR)

According to 10 U.S.C. § 1552(a)(1), "[t]he Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice."

FEDERAL CASE LAW

Montilla v. United States, 457 F.2d 978 (Ct. Cl. 1972).

Montilla was a World War II veteran who served in the Army Reserve after the war. Because he was negligent in informing the Army of a change of address, he did not learn for many years that between 1949 and 1952, he had been transferred to the Inactive Reserve. In 1952, he accepted an indefinite Active Reserve appointment. In 1953, Montilla received a letter telling him that he had completed 20 years of service creditable in the computation of basic pay and that therefore he should inform the Army about whether he wanted to elect a certain annuity benefit. The letter did not state that he had 20 years of service creditable in the computation of retirement pay, but Montilla assumed this was true. In 1955, Montilla was notified that he was to be assigned to an Inactive Reserve unit. He was concerned about the effect of this change on his retirement eligibility and sought the advice of a Senior Army Advisor. He alleged that the advisor reviewed his record and told him that he did not need to be concerned because he had already completed 20 years in the Active Reserve. Upon reaching the age of 60, Montilla applied for retirement pay, but it was denied because he had never completed 20 years service in the Active Reserve. In 1966, he applied to the Army BCMR, which denied relief.

The U.S. Claims Court upheld the BCMR's decision. It concluded that, even if it assumed that Montilla's allegations concerning his conversation with the Army advisor were true, no relief was due. The Court quoted the following passage from Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947):

> Whatever the form in which government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority my be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rulemaking power. . . . Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents. *Id.* at 384-85.

***Goldberg v. Weinberger*, 546 F.2d 477 (2d Cir. 1976), *cert. denied sub nom. Goldberg v. Califano*, 431 U.S. 937 (1977).**

Goldberg was a widow receiving Social Security survivor's benefits when she considered remarrying and sought advice at a local Social Security office on how remarrying could affect her benefits. She was advised that the benefits would be reduced but not stop altogether. However, because Ms. Goldberg was under the age of 60 when she remarried, her survivor's benefits were stopped.

The Second Circuit upheld the Social Security Administration's refusal to pay the survivor benefits. It found that "[i]t is well established that 'estoppel cannot be set up against the Government on the basis of an unauthorized representation or act of an officer or employee who is without authority in his individual capacity to bind the Government.'" *Id.* at 481 (citations omitted).

***Kalista v. Secretary of the Navy*, 560 F. Supp. 608 (D. Colo. 1983).**

Kalista received an "undesirable" discharge following civilian convictions and incarceration on several counts of breaking and entering. His application to the Navy BCMR was denied. In describing the BCMR's statute, the District Court stated that the "legislation was remedial in nature and should be liberally construed." *Id.* at 611.

***Caddington v. United States*, 178 F. Supp. 604 (Ct. Cl. 1959).**

Caddington was a retired lieutenant colonel who had been recommended for promotion during World War II. Before the promotion could be administratively processed, however, Caddington was injured in the Pacific. Because his records were lost, he was not promoted before being retired. The Army BCMR ordered him promoted to colonel but denied him any increase in retirement pay.

The Claims Court found that Caddington was due the retirement pay of a colonel as well as the promotion. In describing the role of the BCMR, is stated, "We feel that the Secretary and his boards have an abiding moral sanction to determine insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief." *Id.* at 607.

Duhon v. United States, 461 F.2d 1278 (Ct. Cl. 1972).

Duhon was a major in the Air Force Reserve. The Air Force gave him a commission as a major in the regular Air Force after having wrongly calculated his promotion list service date and date of rank. When the error was discovered, his regular commission was summarily revoked. The Air Force failed to advise Duhon of the various ways he might proceed to reestablish his career. Because his Reserve commission had expired, he was forced to serve as an enlisted man for several years in order to receive retired pay. The Air Force BCMR denied Duhon request to promote him to major and grant him a major's retired pay.

The Claims Court found that the BCMR had acted arbitrarily and capriciously in denying Duhon's request. In doing so, it quoted its own statement in the Caddington decision (see above) regarding the "abiding moral sanction" of the BCMRs. *Id.* at 1281.

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 CFR 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant was serving on an active duty contract when he sought to join the SES. After he was told that he would have to cancel his active duty contract to join the SES, he sought the advice of Coast Guard personnel specialists regarding the monetary consequences of such a move. The Coast Guard informed the applicant that if he rejoined the civil service, the time served on his active duty contract would count in the computation of his CSRS annuity. The Coast Guard failed to inform the applicant that this would only be true if he established a new period of entitlement by rejoining the federal civil service for at least five years.

4. Based on the Coast Guard's advice, the applicant determined that the income he would lose by rejoining the civil service and having his annuity payments offset until he retired again would be recouped within a few years of retirement because of the increase in his annuity caused by the inclusion of his years on active duty. Therefore, the applicant canceled his active duty contract with the Coast Guard and accepted a two-year temporary civil service appointment. The applicant qualified to be appointed to an SES position as of October 19, 1995. However, he was not appointed prior to the end of his temporary two-year contract in 1996. Therefore, the applicant retired from the civil service

before completing the five years that would have constituted a new period of entitlement under OPM rules and permitted his active duty years to count in the computation of his CSRS annuity.

5. If the applicant had stayed on active duty, he would have continued to receive his Coast Guard salary plus his CSRS annuity of approximately $35,000 annually for the next two years. As a member of the civil service, his salary was similar to what he had received on active duty, but he did not receive his annuity. Therefore, the move to the civil service apparently cost the applicant between $60,000 and $70,000.

6. The applicant stated that OPM will not include his active duty years in the computation of his CSRS annuity even though Coast Guard personnel specialists had informed him that it would and he had relied on their advice. He submitted a copy of a letter from an OPM Benefits Specialist dated July 8, 1997, that confirms his assertion. Therefore, the applicant asked to be restored to the same financial position he would have been in had he never canceled his active duty contract. If his records were changed to show that he remained on active duty until the expiration of his contract, he would receive back pay and allowances minus any civil service salary he had received during that period. In addition, although the BCMR has no control over OPM records and CSRS annuity payments, the applicant apparently believes that OPM would then pay him the annuity payments he would have received had he actually continued on active duty through the end of his contract.

7. The Chief Counsel of the Coast Guard suggested that the BCMR has no jurisdiction over this case because the applicant's request is "more like a claim against the government for monetary damages than a request for a military record correction." However, the applicant has stated that he believes the date of discharge shown in his records is unjust. The BCMR statute expressly authorizes the Board to "remove an injustice" from a military record. 10 U.S.C. § 1552(a)(1). Therefore, the Board finds that it does have jurisdiction over this case.

8. The government—whether in its Coast Guard or OPM manifestation—is not estopped from repudiating the wrong or insufficient advice of Coast Guard benefit specialists. Goldberg v. Weinberger, 546 F.2d 477, 481 (2d Cir. 1976), cert. denied sub nom. Goldberg v. Califano, 431 U.S. 937 (1977); Montilla v. United States, 457 F.2d 978, 987 (Ct. Cl. 1972). However, the BCMR has "an abiding moral sanction to determine insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief." Caddington v. United States, 178 F. Supp. 604, 607 (Ct. Cl. 1959). Therefore, the Board must determine whether the Coast Guard, in wrongly advising the applicant, has committed such an injustice as to warrant the Board's exercise of its "abiding moral sanction" to remove injustices in military records.

9. The applicant voluntarily sought to rejoin the federal civil service, from which he was already receiving a CSRS annuity through OPM. In asking a specialist from the Coast Guard Civilian Personnel Branch to determine what effect such a move would have on his annuity, he was asking the Coast Guard to

interpret OPM regulations for him. The Supreme Court has held that "[w]hatever the form in which government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947). Therefore, the Board finds that the Coast Guard's error in interpreting OPM's CSRS regulations did not constitute such an injustice as would justify granting the requested relief.

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

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application for correction of the military record of retired [redacted] USCG, is hereby denied.

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