


DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 1999-150

FINAL DECISION ON RECONSIDERATION

 Chairman:

This proceeding (in docket numbers 1997-149 and 1999-150) was conducted before the Board for Correction of Military Records (BCMR), pursuant to section 1552 of title 10 and section 425 of title 14, United States Code. It was commenced, upon the BCMR's receipt of the applicant's application, dated July 7, 1997.

The proceeding culminated in a final decision, dated February 25, 1999, denying the applicant's request for correction of his military record. On July 8, 1999, the applicant applied for reconsideration of this final decision pursuant to section 52.67 of title 33, Code of Federal Regulations (CFR). The basis for the applicant's reconsideration request was a June 18, 1999 decision of the United States Court of Appeals (CA) for the Federal Circuit, in Tippett v. United States, 185 F.3D 1250 (1999), <http://laws.findlaw.com/Fed/985005.html>. On November 4, 1999, the Board docketed the applicant's reconsideration request.

On February 10, 2000, a final decision on reconsideration was signed by the three duly appointed members who were designated to serve as the Board for this case.

SUMMARY OF LEGAL ARGUMENT FOR RECONSIDERATION

The Tippett decision, which was issued on June 18, 1999, was based on a claim by a former Army captain for back pay and reinstatement in the Army following his separation for "misconduct, moral or professional dereliction." On June 26, 1996, the Army Board for Correction of Military Records denied Tippett's application for correction of his military record. The claim was then filed in the Court of Federal Claims (CFC) which dismissed it on August 21, 1997. The CFC decision was appealed to the Court of Appeals (CA) for the Federal Circuit, which reversed the CFC decision and remanded the case to the CFC for further proceedings consistent with the CA decision.

The decision of the CA in Tippett was issued almost four months after the date of the final decision of the applicant's case in the current proceeding (February 25, 1999).

The applicant claimed that his current case was meritorious "in light of Tippett" and he stated that it was decided after the current case, but he does not explain why the current final decision merits reversal, except by asserting that the applicant in both cases "acted in reliance on government advice" which was incorrect.

The applicant's attorney submitted other decisions, in addition to Tippett: In Sharf v. Department of the Air Force, 710 F.2d 1572 (Fed Cir. 1983), the court reversed and granted relief after it found that the petitioner was "a reasonable man [who] in good faith justifiably relied on . . . misleading advice to his detriment." In Caddington v. United States, 178 F.Supp. 604 (Ct.Cl. 1959), the court held that the Army BCMR "reached a conclusion that falls short of complete justice" (promotion to full colonel). In Goldberg v. Weinberger, 546 F.2d 477 (2d Cir. 1976), the court affirmed the dismissal of a claim after observing that "[t]he government could scarcely function if it were bound by its employees' unauthorized representations . . . Even detrimental reliance on misinformation obtained from a seemingly authorized government agent will not excuse a failure to qualify for the benefits under the relevant statutes and regulations."

Views of the Coast Guard

The Chief Counsel of the Coast Guard, on October 8, 1999, recommended that the applicant's petition for reconsideration be denied because it "is merely a submission of a recent case law with no explanation or analysis as to its application to the case at bar." The Chief Counsel also said that the applicant "offers no explanation as to [the Tippett case's] application to the case at bar. Furthermore, the Applicant provides no explanation of how this recent case may constitute proof that the Board committed factual or legal error in its original decision."

FINDINGS AND CONCLUSIONS

The Board makes the following findings on the basis of the submissions of the applicant and the Coast Guard, the decision of the Court of Appeals for the Federal Circuit in the Tippett case, the applicant's military record, and applicable law.

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10.

2. The applicant asked the Board to change his Coast Guard record to show that he did not cancel the temporary active duty contract he entered into in 1994 to accept an SES appointment in the Federal civil service and to show that he would receive pay and allowances and annuity payments from the Coast Guard that were offset by his civilian salary. The Coast Guard interpreted applicable regulations and informed the applicant that he could receive annuity payments, but it did not inform him that to do so he must rejoin the federal civil service for at least 5 years. His move to the civil service was

based on this wrong or insufficient advice, and it cost the applicant "between \$65,000 and \$70,000" because he did not receive his annuity as a member of the civil service.

3. On February 25, 1999, the Board denied the relief requested by the applicant on the ground that "the Coast Guard's error in interpreting [the applicable regulations] did not constitute such an injustice as would justify granting the requested relief."

4. On July 8, 1999, the applicant asked the Board to reconsider its February 25, 1999 decision on the ground that the CA for the Federal Circuit had granted relief in a later but comparable case (Tippett). The Court of Appeals (CA) in the Tippett case concluded that the applicant established in the trial court that he had "non-frivolous allegations of involuntariness" and therefore should be granted relief.

5. Tippett's claim rested on the fact that he acted in reliance on government advice that the Army admitted was incorrect. His discharge was held to be involuntary because he had requested it "after receiving erroneous advice from a government-provided military lawyer."

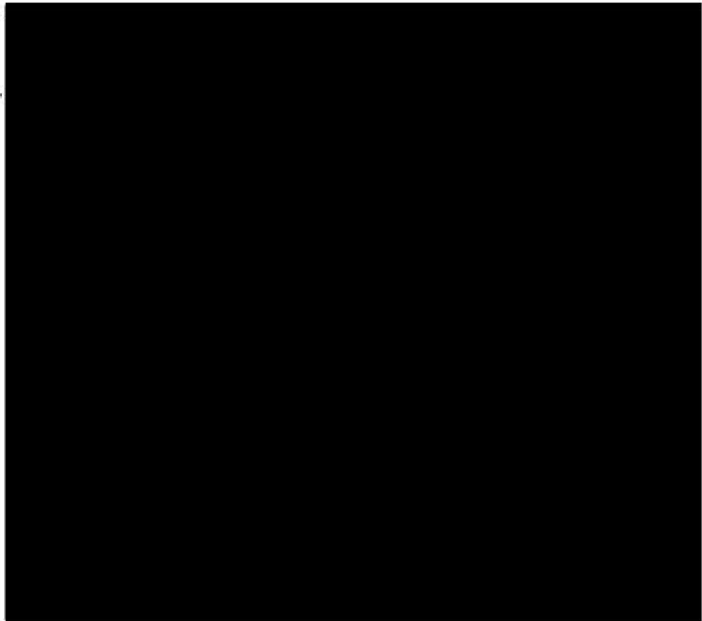
6. The two cases are readily distinguishable. Tippett was an Army officer advised by an Army lawyer about Army discharge procedures and forms. The applicant, on the other hand, asked Coast Guard personnel to interpret the regulations of another agency - the Office of Personnel Management - which they did not administer and could not authoritatively interpret. The Coast Guard should not be held liable for its employees' unsuccessful attempts to explain another agency's rules, and the applicant should not have relied on such second-hand advice.

7. The applicant has not presented evidence that the Board committed legal or factual error in the original determination that could have resulted in a determination other than that originally made. The final decision on reconsideration should not be changed from the final decision.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The reconsideration of the military record of retired [REDACTED] [REDACTED] USCG shall be granted but denied on the merits. The final decision in Docket number 1997-149 is without error or injustice.



11/11/99