

DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of  
Coast Guard Record of:

BCMR Docket  
No. 37-97

FINAL DECISION ON REMAND

██████████ Deputy Chairman:

The instant case was remanded to the Board for Correction of Military Records of the Coast Guard (BCMR) by the United States Court of Federal Claims ██████████ for a decision on the merits. The issues to be decided on remand are not specified in the court's order. In view of this omission and in light of the applicant's letter, dated June 9, 1997, setting forth the understanding between the parties with respect to the remand, the BCMR will consider on remand only the issue of the separation pay. The case on remand is docketed as BCMR No. 37-97.

On June 30, 1993, the applicant filed her correction application with the BCMR, which was docketed as No. 139-93. In that application, she asked that several corrections be made to her record, including the "[a]llowance of severance pay unjustly denied and ignored by the Coast Guard, with appropriate interest."

On August 30, 1993, the applicant asked the BCMR to expedite that portion of her application requesting separation pay.

On June 30, 1994, the Board denied Docket No. 139-93 on the ground that it was untimely under § 1552(b) of title 10, United States Code. The Board found that the alleged error or injustice in this case was discovered by the applicant on or about April 27, 1990, the date when the Coast Guard told her she would not receive severance pay. The Board stated that the applicant's original application was filed on June 30, 1993, and that her amended application was filed on August 30, 1993. Both were untimely, under the three-year statute of limitations (10 U.S.C. 1552(b)).

In refusing to waive the three-year statute of limitations, the Board stated that the applicant had not given any reason for her delay in filing her application for correction. The Board also conducted a cursory review of the potential merits of the application and concluded that it was unlikely that the applicant would obtain severance pay.

On June 24, 1996, the applicant appealed the Board's final decision in Docket No. 139-93, to the United States Court of Federal Claims. On ██████████ the

Court remanded the case to the Board. The order from the Court stated in pertinent part:

Based upon a review of defendant's November 1, 1996, motion to remand and plaintiff's response thereto, and upon consideration of the representations made by defendant's counsel by telephone to the court on November 13, 1996, it is hereby ORDERED:

1. This action is remanded to the Department of Transportation Board for the Correction of Military Records. . . .

In letter to the Board dated June 9, 1997, the applicant stated the following in a footnote with regard to the remand:

The remand is to determine the "merits" of the separation pay issue, not any civil rights issue that [the applicant] may later assert to the CGBCMR [Coast Guard Board for Correction of Military Records]. In exchange for [the applicant's] agreement not to contest the United States' motion to remand the separation pay issue back to the CGBCMR, the United States agreed, on behalf of the Coast Guard, that [the applicant] would be entitled to present her civil rights claims to the CGBCMR, and the CGBCMR would hear those claims on the merits despite the passage of time. However, [the applicant] has not yet presented her civil rights claims to the CGBCMR. This issue is neither before the CGBCMR nor the United States Court of Claims.

The government's unopposed motion for remand supports this position.

#### EXCERPTS FROM THE RECORD AND SUBMISSIONS

##### Circumstances Giving Rise to the Applicant's Claim for Separation Pay

On December 27, 1989, the applicant requested an extension of her active duty agreement "for a period to cover another tour." She also stated that she was willing to accept the minimum duration provided for a tour of duty under applicable regulations. The applicant was scheduled to be discharged on June 30, 1990.

The applicant's commanding officer (CO) recommended that the applicant's request be approved for a one year extension. The CO stated that the applicant had already failed once for selection for promotion to lieutenant commander (LCDR), and a one-year extension would permit her the opportunity to remain on active duty until she could be considered for promotion to LCDR a second time.

A Reserve Officer Extension Board, which convened on January 29, 1990, approved the applicant's request for an extension on active duty, but only for one additional year, until June 30, 1991.

On March 26, 1990, the applicant advised the Commandant that the one-year extension that she had been granted was not the "tour of duty" for which she had volunteered. She therefore considered the terms of her approved extension to amount to an involuntary discharge. She requested that she be discharged as of June 30, 1990, with separation or severance pay.

On April 4, 1990, the applicant's commanding officer (CO) recommended that her request for separation pay due to alleged constructive involuntary discharge be denied. The CO stated that section 679 of title 10, United States Code gives the Commandant the authority to extend a reserve officer's active duty for a period of one to five years. The CO also stated that Article 1-B-2d(4) of the Personnel Manual states that reserve officers who have once failed of selection for promotion can be granted an extension that "will terminate no later than the end of the promotion year in which the officer will be considered a second time for promotion." The CO stated that this policy had been discussed with the applicant at the time of the command's endorsement on her extension request.

On April 4, 1990, the applicant prepared a written statement in which she stated that the command's interpretation of the law and regulation was erroneous. She stated that neither the law nor the regulation prohibits an individual from volunteering for another tour of duty.

On April 27, 1990, the Commandant released the applicant from active duty effective June 30, 1990. He further advised the applicant that she would not receive separation pay because she was offered an extension on active duty, which she voluntarily declined.

On June 25, 1990, the applicant appealed the denial of separation pay to the Comptroller General of the United States. She argued that the Coast Guard had wrongfully denied her separation pay. She stated that section 1174(c), of title 10, United States Code entitled her to separation pay. Section 1174(c), at the time the applicant filed her claim, stated the following:

(c) **Other members.** --(1) Except as provided in paragraphs (2) and (3), a member of an armed force other than a regular member who after September 14, 1981, is discharged or released from active duty and who has completed five or more, but fewer than 20 years of active service immediately before that discharge or release is entitled to separation pay computed under subsection (d)(1) or (d)(2), as determined by the Secretary concerned, if--

(A) the member's discharge or release from active duty is involuntary; or

(B) the member was not accepted for an additional tour of active duty for which he volunteered. [Emphasis in Original]

(2) If the Secretary concerned determines that the conditions under which a member described in paragraph (1) is discharged or separated do not warrant separation pay under this section, that member is not entitled to that pay.

The applicant also stated in her appeal that the Coast Guard Pay Manual provides for lump sum separation pay for those members who are involuntarily discharged, separated, or released, or who were not accepted for an additional tour of active duty for which the member volunteered.

Section 10-I-3 of the Pay Manual states that a reservist is considered to be involuntarily released when a tour of active duty is completed, volunteers for an additional tour of duty, and the Coast Guard does not extend or accept the volunteer request for the additional tour of duty. This provision also states that a member whose request is denied for a period of additional duty of shorter duration than that permitted under applicable regulations is not to be regarded as having been involuntarily released.

The applicant argued that the Coast Guard has failed, in its regulations, to define "tour of duty." According to the applicant, Article 4-A-19 of the Personnel Manual, a tour is a period of time from two to four years in duration.

The applicant argued that any ambiguity concerning the definition of "tour of duty" must be construed against the Coast Guard. She stated that the Service must not be allowed to change the meaning of "tour" at every turn so as to avoid its statutory obligations.

On July 11, 1990, the Comptroller General did not rule on the applicant's appeal and returned it to her because the appeal package failed to contain the required administrative report. On July 30, 1990, the applicant requested that her former command reconsider her claim for separation pay and that it prepare the required administrative report. (The General Accounting Office did rule on the applicant's resubmitted claim. That ruling is discussed later in this decision.)

On August 30, 1993, the applicant asked the BCMR to review her claim, determine that she was involuntarily discharged, correct her military record appropriately, and order the Coast Guard to pay her separation pay plus interest.

#### **Views of the Coast Guard with Respect to No. 139-93**

On October 7, 1993, the BCMR received comments from the Coast Guard with respect to the issue of separation pay. The Service stated that the General Accounting Office (GAO), not the BCMR, was the proper agency to resolve this

matter. The Service also stated that there was no error or injustice in the applicant's military record that needed to be corrected.

The Coast Guard stated that the applicant's claim for separation pay had been disallowed by the GAO. The letter from the GAO denying the applicant's claim for separation pay was attached as an enclosure to the Coast Guard's comments. The GAO stated that "[f]rom the evidence presented, there was no indication that [the applicant was] either discharged or released from active duty involuntarily or that [she was] denied an additional tour of active duty. The GAO continued:

Title 10 U.S.C., Section 679(a), provides definite terms of active duty for Reserves with their consent. The Secretary concerned may make a standard written agreement with any member of a reserve component under his jurisdiction requiring the member to serve for a period of active duty of not more than five years. When such an agreement expires, a new one may be made. Title 10 U.S.C., Section 679(b), states that an agreement may not be made unless the specified period of duty is at least 12 months longer than any period of active duty that the member is otherwise required to perform.

According to your application for retention on active duty, dated December 27, 1989, you desired and [were] willing to accept the minimum duration provided under the applicable regulation . . . . You were approved [for] a one-year extension but for reasons unknown, you declined to accept the extension and requested to be separated at the end of your active duty agreement (June 30, 1990). Title 10 U.S.C., Section 1174(c), approves entitlement to separation pay if (1) a member's discharge or release from active duty is involuntary; or (2) a member was not accepted for an additional tour of active duty for which he/she volunteered.

The GAO concluded by stating that "the Comptroller General has no authority to authorize reimbursement of amounts greater than those provided for by the applicable statutory and regulatory authorities."

#### **Applicant's Rebuttal in Docket No. 139-93**

On November 29, 1993, the BCMR received the applicant's rebuttal to the views of the Coast Guard. She stated that before she could submit a response she needed to know the basis for the Coast Guard's contention that the matter of her claim for separation pay was not within the jurisdiction of the Board.

The applicant stated that she was not aware of the GAO's decision in her case until she received the Coast Guard's comments. She asked that the BCMR instruct the Coast Guard to provide her with a copy of any agency report filed with the GAO.

### Supplemental Views of the Coast Guard in Docket No. 139-93

On January 19, 1994, the BCMR received additional comments from the Coast Guard. The Service stated that the separation pay issue was not within the jurisdiction of the Board because there was no record to correct. The Coast Guard stated that the applicant's claim for separation pay was not denied by the Coast Guard, but by the General Accounting Office.

The Coast Guard also argued that the applicant had not exhausted her administrative remedies in this case because she had not sought review by the Comptroller General pursuant to 4 CFR § 32.

The Coast Guard attached the agency report to its additional comments. It stated the following:

[The applicant] has concluded that her separation was involuntary and that she is entitled to separation pay under the provisions of 10 U.S.C. 1174. Among other things, this conclusion is based on her Coast Guard Personnel Manual which lists standard tours for certain assignments. The Coast Guard's position is that her release was voluntary since she declined to accept the extension that was offered. Furthermore, tour length standards are management tools for total force planning. They have little to do with the length of a reservist's extension on active duty which must be determined by the needs of the service at that particular time.

Active duty agreements for reserve members are authorized by 10 U.S.C. 679 to provide definite terms of active duty from one to five years. Furthermore, in certain instances, current agreement may be voluntarily extended for periods of up to one year. . . . Nothing indicates that there is a specific number of years or even months necessary to be termed as a "tour" for the purposes of the statute. . . . I do not believe that tour length is an issue in this case. I feel that the case hinges upon whether or not the release was voluntary. [The applicant] was tendered a one-year active duty agreement. For whatever reason, she declined to accept it and chose to be released from active duty. In my opinion, by definition, the separation was voluntary on her part and payment of separation pay is precluded.

On January 26, 1994, a copy of the Coast Guard's supplemental views with the agency report was mailed to the applicant. She did not submit a response. On June 30, 1994, the Board issued a final decision in Docket No. 139-93, denying the applicant's case.

**Views of the Coast Guard with Respect to the Case on Remand (Docket No. 37-97)**

The Coast Guard recommended that the applicant's request be denied. The Service stated that it agreed with the Board's determination in Docket No. 139-93 that the request for separation pay was not supported by any proof.

The Coast Guard argued that the applicant's request for separation pay is beyond the jurisdiction of the BCMR. The Service stated that the agency with jurisdiction of the separation pay issue has determined that the applicant is not entitled to severance pay.

**Applicant's Rebuttal to the Views of the Coast Guard**

On June 9, 1997, the BCMR received the applicant rebuttal to the views of the Coast Guard with regard to the issue presented in this remand. The applicant stated the following:

[The remand to the BCMR on the pay issue] appears to be a colossal waste of time and resources in light of the fact of the Coast Guard's position that: (1) [the CGBCMR] is not the agency with the authority to determine [the applicant's] entitlement to severance pay, and (2) it has already been established the [the applicant] has no 10 U.S.C. § 1552 remedy, and she has exhausted all potential administrative remedies with the Coast Guard. Consequently, the purpose of the litigation in the United States Court of Federal Claims is to review the action of the General Accounting Office, pursuant to the Administrative Procedures Act, not the action of the Department of Transportation.

The applicant also stated:

To the extent that the CGBCMR will now review the issue of whether [the applicant] should have received severance pay due to actions by the Coast Guard, despite the fact that it has no authority to grant relief, [the applicant] submits . . . [h]er 25 June 1990 memorandum, with attachments, to the Comptroller General. [Footnote deleted]. In this memorandum, [the applicant] explains the legal basis for her claim that she was entitled to severance pay pursuant to 10 U.S.C. §1174(c)(1)(B) because she was not accepted for an additional tour of active duty for which she volunteered. . . .<sup>1</sup>

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<sup>1</sup> The documentation submitted by the applicant was already a part of the BCMR file.

### APPLICABLE LAW AND REGULATION

Section 679 of title 10, United States Code states as follows:

(a) To provide definite terms of active duty . . . for Reserves with their consent, the Secretary concerned may make a standard written agreement with any member of a reserve component under his jurisdiction requiring the member to serve for a period of active duty . . . of not more than five years. When such an agreement expires, a new one may be made. . . .

(b) An agreement may not be made under subsection (a) unless the specified period of duty is at least 12 months longer than any period of active duty that the member is otherwise required to perform.

(c) Agreements made under subsection (a) shall be uniform so far as practicable, and are subject to such standards and policies as may be prescribed by the Secretary of Defense for the armed forces under his jurisdiction by the Secretary of Transportation for the Coast Guard when the Coast Guard is not operating as a service in the Navy.

Section 680(b) of title 10, United States Code states in relevant part:

A member who is released from active duty without his consent before the end of his agreement made under section 679(a) of this title is entitled to an amount computed by multiplying the number of years and fractions of a year of his unexpired period of service under the agreement by the sum of one month's basic pay, special pay, and allowances to which he is entitled on the day of release. . . .

Section 1174(c) of title 10, United States Code, at the time of the applicant's claim, stated as follows:

[A] member of an armed force other than a regular member who after September 14, 1981, is discharged or released from active duty and who has completed five or more, but fewer than 20 years of active service immediately before that discharge or release is entitled to separation pay computed under subsection (d)(1) or (d)(2), as determined by the Secretary concerned, if--

(A) the member's discharge or release from active duty is involuntary;  
or

(B) the member was not accepted for an additional tour of active duty for which he volunteered.



Article 1-B-2d.(4) and (5) of the Personnel Manual provides:

Reserve officers who have once failed of selection for promotion may request an extension on active duty. If granted, an extension under this circumstance will terminate no later than the end of the promotion year in which the officer will be considered a second time for promotion.

Reserve officers with less than 18 years active duty service who twice fail of selection for promotion to a given grade are ineligible for further promotion or retention on active duty. These officers will be discharged or released from active duty at the end of the promotion year in which the second failure occurs or upon completion of their current Active Duty Agreement, if that date is earlier. Such separations are considered involuntary. . . .

#### FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's record and submissions, the Coast Guard's submission, and applicable law:

1. The Board has jurisdiction of this matter pursuant to section 1552(b) of title 10, United States Code. The matter was remanded to the Board by the United States Court of Federal Claims.
2. In accordance with Detweiler v. Pena, 38 F.3rd 591 (D.C. Cir. 1994), the application was timely.
3. The Chairman has recommended that the case be determined without a hearing. 33 CFR 52.31 (1996). The Board concurs in that recommendation.
4. The Board accepts the representations made by the applicant and the government as to the scope of this remand. The Board considers only the issue of separation pay.
5. The applicant has not alleged an actual error in her military record. She argues that she is entitled to separation pay because she volunteered for "another tour of duty," which was not accepted by the Commandant. The applicant, accordingly, asked the Board to find that she was involuntarily discharged and to correct her record.
6. This Board cannot simply order a member to be paid, but it can order any payment the member is due to receive as a result of a correction to the military record. See 10 U.S.C. 1552(c).

7. Since the applicant has set forth, in great detail, the facts surrounding her request for an extension of her active duty agreement and since her claim for separation pay arises out of that set of circumstances, the Board will examine the processing of the extension request for error and injustice.

8. The applicant has not established that the Commandant's action regarding her request for an extension of her active duty agreement was not in accordance with law and regulation. Section 679 of title 10, United States Code grants the Secretary the authority to enter into an agreement requiring a member to serve a period of active duty of not more than five years. (The Secretary has delegated this authority to the Commandant. 49 CFR § 1.45).

9. The applicant argued that she requested another "tour of duty" and that the one year extension granted by the Commandant did not amount to a "tour of duty." However, what the applicant, in fact, requested was an extension of her active duty agreement for a period of time that would amount to another tour of duty. Since she requested an extension of her active duty agreement, 10 U.S.C. § 679 is the controlling statute. This provision does not speak in terms of tours, but it gives the Secretary the authority to require a member "to serve a period of active duty (other than for training) of not more than five years." Any active duty agreement must cover a period of at least 12 months. 10 U.S.C. § 679(b). The applicant has presented no evidence that the Commandant must grant the period of active duty requested by the member. The applicant also has not presented any evidence that the Commandant exceeded his authority by granting her an extension for the minimum period of time required by law.

10. Section 679(c) states that active duty agreements are "subject to such standards and policies as may be prescribed by the . . . Secretary of Transportation." In regulations prescribed by the Commandant an officer who has once failed of selection for promotion will be permitted to extend or remain on active duty until the end of the promotion year in which the officer will be considered a second time for promotion. Article 1-B-2d., Personnel Manual. The Commandant acted in accordance with his own regulation by granting the applicant an extension that would permit her to remain on active duty long enough to be considered by the next LCDR selection Board.

11. The Board notes that the applicant exercised her right to decline the Commandant's offer of a year's extension and asked to be released from active duty rather than accept the one year extension. She did not explain why she could not accept the approved extension. The Commandant released the applicant from active duty in accordance with her request.

12. The applicant has failed to show that the Coast Guard committed an error or injustice by approving an extension of her active duty agreement for a period of one year rather than another "tour of duty" as requested by the applicant. Since the

Board finds no error with regard to this process, there is nothing in the record for the Board to correct.

13. The Board notes that 10 U.S.C. 680 provides for separation pay for members who are released from active duty, without their consent prior to the end of the active duty agreement. This is not what occurred in the applicant's case, because she was released, at her request, at the end of her current active duty agreement. (However, as noted below, under these circumstances, the Board does not have jurisdiction to determine whether the applicant is entitled to separation pay.)

14. Whether the applicant's release from active duty, under the circumstances discussed above, amounted to an involuntary separation that would entitle her to separation pay pursuant to 10 U.S.C. § 1174(c) is a matter beyond the jurisdiction of the Board. This is a claim for money, and section 3702 of title 31, United States Code, at the time the applicant filed her claim, provided that "the Comptroller General shall settle all claims of or against the United States Government."

15. Accordingly, the applicant's request is denied.

ORDER

The application of former [REDACTED]  
of her military record is denied.

[REDACTED] USCG, for correction

DATE: JUN 27 1997

