

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 72-97

FINAL DECISION

Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on February 19, 1997, upon the Board's receipt of the applicant's application for correction.¹

The final decision, dated February 26, 1998, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a [REDACTED] pay grade E-6), asked the Board to correct his record to show that he was eligible to receive sea pay for the period from April 1993 through August 1996, while serving on the USCGC [REDACTED] a 65-foot cutter.

EXCERPTS FROM THE RECORD AND SUBMISSIONS

The applicant stated that he was entitled to sea pay pursuant to section 305a of title 37, United States Code, while serving on the Coast Guard cutter [REDACTED]. He stated that on October 30, 1996, the Commandant determined that members serving on 65-foot cutters met the requirements for sea pay as well as credit toward sea time. The applicant argued that since the pertinent legislation has been the same since before his assignment to the [REDACTED] it stands to reason that he was eligible for sea pay during that assignment.

The applicant also stated the following:

While I am certainly pleased that the Coast Guard now gives the eligible members of all Coast Guard cutters sea pay, I believe that it was a mistake that it was not done earlier. Many times I have heard the argument that the Coast Guard was forbidden to give sea pay to the crews on WYTL's, as they did not have a government operated messing facility. This was not the case, and I believe that if the Coast Guard had

¹ The final decision was due in this case on February 18, 1998.

known that 37 USC 305a permitted the payment of sea pay, they would have authorized it many years ago.

Views of the Coast Guard

The Coast Guard recommended that the Board deny relief to the applicant for either of two reasons: (1) the lack of jurisdiction in the Board to grant the relief; or (2) the applicant has not suffered an error or injustice.

With respect to the Board's lack of jurisdiction in this case, the Coast Guard stated that the applicant has not alleged that his record is erroneous. Instead he has asked for his record to be corrected to show that he was eligible for sea pay. The Service stated that pursuant to 31 U.S.C. § 3702, "the Comptroller General shall settle all claims for or against the United States."² The Coast Guard stated that the Comptroller General has held that the BCMR statute does not grant the Secretary authority to grant or withhold monetary benefits; such entitlements "depend solely on a proper application of the statutes to the facts" The Service stated that even if the applicant were to prove that he was entitled to additional sea pay, any remedy would be a matter for the claims process.

The Coast Guard stated that section 305a of title 37 U.S.C. provides that the members of the uniformed services are entitled to career sea pay if they have performed at least 36 months of sea duty, and that such pay is provided "under regulations prescribed by the President." The statute defines sea duty, in part, as duty performed by a member assigned to a ship or a ship-based aviation unit, the primary mission of which is accomplished while underway. 37 U.S.C. § 305(d)(1). The President has delegated his authority under this statute to the Secretary who delegated the authority to the Commandant. Executive Order 11157 § 203 as amended, (37 U.S.C. 301 note), and 49 C.F.R. § 1.45.

The Coast Guard stated that prior to October 30, 1996, the Commandant defined "ships" for purposes of career sea pay, as vessels equipped with "Government operated or contractor furnished berthing and messing facilities which are regularly used for the intended purpose." Pay Manual, COMDTINST M7220.29, Art. 4B (enclosure (1)). The vessel to which the applicant was assigned was not equipped with "Government operated or contractor furnished berthing and messing facilities" and, therefore the applicant was not entitled to sea pay. The Service argued that the pertinent regulation comported with the intent of career sea pay, which was to provide incentives for the long-term separation from home, family and community, caused by sea going careers.

² Section 3702 of title 31 United States Code has been amended to read in pertinent as follows: "(a) Except as provided in this chapter or another law, all claims of or against the United States Government shall be settled as follows: (1) The Secretary of Defense shall settle--(A) claims involving uniformed service member's pay, allowances, travel, transportation, retired pay, and survivor benefits:"

The Coast Guard argued that the Board is bound by the Commandant's regulation. The Service further stated that the Board must give due deference to the Coast Guard's interpretation of laws that it is entrusted to administer. See Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc. 467 U.S. 837, 842-4 (1984) (Deference must be paid to implementing agency's rules and interpretations).

The Coast Guard further stated:

On 30 October, 1996, the Commandant released an ALDIST message issuing new regulations to provide continuous career sea pay for 65 foot cutters This discretionary decision expressly provided a future benefit from its effective date. The Commandant stated[:] "This determination is effective on 30 October 96 and is not retroactive before that date for administrative purposes or for the purpose of pay and accumulated sea time." Such new regulations, particularly when they are explicitly made non-retroactive, do not render previous interpretations or regulations erroneous or unjust. . . . [P]roviding career sea pay credit to [the applicant] (and to the many other members assigned to similar vessels prior to the change) would grant them an expensive windfall from funds appropriated for Coast Guard missions.

Applicant's Rebuttal to the Views of the Coast Guard

The applicant stated that the Commandant's regulation with respect to sea pay prior to 1996 was not consistent with the law. He further argued that it is contradictory for the Service to grant sea duty credit for service on a 65-foot cutter toward meeting the requirements for the servicewide examination for advancement, but not granting it for any other purpose.

The applicant also noted that the Commandant provided no explanation for the change in regulations, which currently grants sea pay to members serving on 65-foot cutters.

APPLICABLE LAW AND REGULATION

Section 305a. of title 37, United States Code states in pertinent part, as follows:

"(a) Under regulations prescribed by the President, a member of a uniformed service who is entitled to basic pay is also entitled, while on sea duty, to special pay at the applicable rate under subsection (b).

* * * *

"(d)(1) In this section, the term "sea duty" means duty performed by a member --

"(A) while permanently or temporarily assigned to a ship, ship-based staff, or ship-based aviation unit and --

"(i) while serving on a ship the primary mission of which is accomplished while under way; . . .

"(iii) while serving as a member of a tender-class ship (with the hull classification of submarine or destroyer); or

"(B) while permanently or temporarily assigned to a ship or ship-based staff and while serving on a ship the primary mission of which is normally accomplished while in port, but only during a period that the ship is away from its homeport."

ALDIST 249/96, issued in November 1996, stated the following in pertinent part:

"1. On 30 Oct 96, the Commandant determined that members serving on 65-foot cutters met the provisions of current legislation and executive orders and are therefore eligible for continuous career sea pay/time.

"2. This determination is effective on 30 Oct 96 and is not retroactive before that date for administrative purposes or for the purpose of pay or accumulated sea time."

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 application was timely.

2. The Board disagrees with the Coast Guard and finds that it has jurisdiction to consider the merits of this application. This is not a claim solely for money, but the applicant is also asking that his military record be corrected to show that the time he served on the [REDACTED] be reflected as sea duty for all purposes, including pay. The Board notes that sea duty credit is documented on CG Form 1072 (Statement of Creditable Sea Service). This form could be corrected if the Board determined that the applicant's claim had merit. The Board notes that in *Oleson v. United States*, 172 Ct. Cl. 9 (1965), the court stated that "[s]o long as the records contain a mistake or an omission bearing on pay -- whether factual or legal -- we think that the Boards [for Correction of Military Records] have authority to consider the matter and then order payment if they make a correction calling for a monetary award." Thus if the Board were to determine that the applicant's tour of duty on the [REDACTED] satisfied the statute, it could order his record corrected to reflect that finding and the applicant would then be entitled to sea pay.

2. Having determined that the BCMR has jurisdiction to consider this matter, the Board now considers the merits of the applicant's claim. Section 305a. of title 37, United States Code, authorizes sea pay for members of the military while on sea duty. It does so under regulations prescribed by the President.

3. The President has delegated his authority under 305a to the Secretary of Transportation. See Executive Order 11157, 37 U.S.C. § 301 note. The Secretary has delegated his authority over Coast Guard personnel to the Commandant. 33 CFR § 1.01-5 and 49 CFR 1.45 & 1.46. The Commandant determined, prior to October 1996, that members, such as the applicant, who were serving on 65-foot cutters that were not equipped with berthing or messing facilities, were not eligible for sea pay or credit. Unless this determination by the Commandant has been shown to be in violation of the law or is otherwise an abuse of authority, it must be respected by the Board. The applicant has failed to show that the then regulation was in violation of the law or that the Commandant abused his authority by implementing the regulation as he did prior to 1996.

4. The fact that the Commandant amended the regulation in 1996 to grant sea pay and credit to servicemembers presently serving on 65 foot cutters, such as the applicant had, does not entitle the applicant to retroactive sea pay or sea credit. This amended regulation does not apply to the applicant's prior service because it has no retroactive effect. The 1996 ALDIST stated clearly that the granting of sea pay and sea credit is "effective on 30 Oct 96 and is not retroactive before that date for administrative purposes or for the purpose of pay or accumulated sea time." The applicant has not shown that he was treated any differently than other servicemembers situated similarly at that time.

5. The Board notes the applicant's argument that the regulation appears to be inconsistent, granting sea credit for certain purposes but not for others. This is a matter within the discretion of the Commandant, and the applicant has not shown an abuse of that discretion.

6. The applicant has not proven that he has suffered an error or injustice in this case. Accordingly, the applicant's request should be denied.

ORDER

The application of
of his military record is denied.

USCG, for correction

