DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of Coast Guard Record of:	BCMR Docket **No. 1997-062**

DECISION OF THE DEPUTY GENERAL COUNSEL

_✓_ I approve the recommended Order of the Board.

____ I disapprove the recommended Order of the Board.

____ I concur in the relief recommended by the Board.

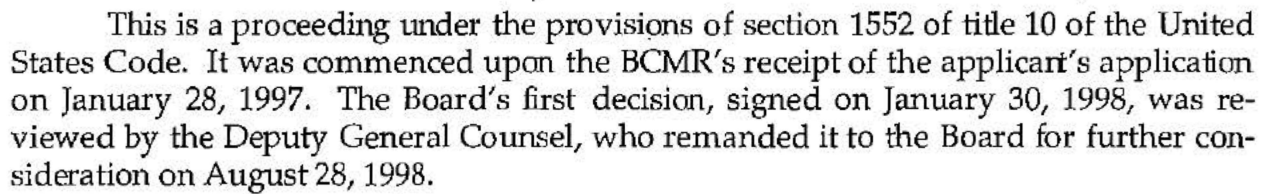
DATE: Jan. 22, 1999

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1997-062

FINAL DECISION ON REMAND



This is a proceeding under 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 January 28, 1997. The Board's first decision, signed on January 30, 1998, was reviewed by the Deputy General Counsel, who remanded it to the Board for further consideration on August 28, 1998.

This final decision on remand, dated September 23, 1998, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a chief storekeeper (SKC) in the United States Coast Guard, asked the Board to correct his military record to show that he had extended his enlistment or reenlisted in 1982 so that he could receive a Selective Reenlistment Bonus (SRB) pursuant to ALDIST 340/81. The applicant stated that he did not discover his eligibility for this SRB until January 22, 1997.

APPLICANT'S ALLEGATIONS

In his application to the BCMR, the applicant alleged that he was never counseled about his eligibility to receive an SRB under ALDIST 340/81 in 1982. He alleged that, if he had been told he was eligible to receive an SRB at that time, he would have reenlisted to receive the bonus. Aside from providing the date of his discovery of the alleged injustice, the applicant did not explain under what circumstances he discovered his alleged eligibility for an SRB.

SUMMARY OF RECORD

The applicant enlisted in the Coast Guard on January 7, 1980, for a term of four years. His rating and pay grade at the time the ALDISTs discussed herein were issued were SK3 and E-4.

On October 1, 1981, the Commandant of the Coast Guard issued ALDIST 340/81, which allowed members within 30 days of the end of their enlistment periods to receive an SRB if they reenlisted or extended their current enlistments for at least three years. The Zone A SRBs authorized for SK3s who extended their enlistments or reenlisted under ALDIST 340/81 were calculated with a multiple of one. On January 12, 1982, ALDIST 004/82 temporarily locked in the multiples issued under ALDIST 340/81 and waived the requirement that members be within 30 days of the end of their enlistment periods in order to be eligible to receive the SRB for extending their enlistments. To take advantage of ALDIST 004/82, members had to extend their enlistments before February 15, 1982.

The applicant did not extend his enlistment or reenlist during the period when ALDIST 004/82 was in effect. There is nothing in his military record to indicate that he was ever counseled about the terms of ALDIST 340/81 or ALDIST 004/82.

The applicant remains on active duty with the Coast Guard. Subsequent to his four-year enlistment on January 7, 1980, the applicant's military record shows that he either reenlisted or agreed to extend his enlistment on the following dates for the periods indicated:

January 6, 1984 .... 18 months[1]
July 5, 1985 .... 1 year
June 25, 1986 .... 12 months
July 5, 1987 .... 3 years[2]
November 9, 1989 .... 3 years
April 6, 1993 .... 6 years

Two of the records for the above listed extensions and reenlistments are missing from the applicant's military record. Two indicate that the extensions were made at the "member's request." The 3-year extension dated November 9, 1989, indicates that the reason for the extension was "to have obligated service for PCS transfer."

[1] Although there is no record of this extension in the applicant's military record, the extension dated July 5, 1985, indicates that it is the second extension of his first enlistment.

[2] Although there is no record of this enlistment in the applicant's military record, the extension dated November 9, 1989, indicates that it is the first extension of a 3-year enlistment dated July 5, 1987.

VIEWS OF THE COAST GUARD

On December 17, 1997, the Chief Counsel of the Coast Guard recommended denial of the applicant's request for relief.

The Chief Counsel urged the Board to deny the applicant's request for lack of proof because the applicant had failed to establish a prima facie case by proving that (1) the Coast Guard owed him a duty to counsel him regarding his eligibility for an SRB under ALDIST 004/82, (2) the Coast Guard did not so counsel him, and (3) had he been so counseled, the applicant would have been willing, in 1982, to extend his service from 1984 through 1990.

Regarding these issues, the Chief Counsel argued first that, under ALDIST 004/82, the Coast Guard had no duty to inform potential extendees of their eligibility. COMDTINST 7220.13E required the Coast Guard to inform only potential reenlistees, and the applicant was not a potential reenlistee in February 1982 because he was not within three months of the end of his existing enlistment.

Second, the Chief Counsel argued that, even if the Board were to find that the Coast Guard had a duty to counsel the applicant, a lack of memory of counseling is particularly unreliable after so many years, and the applicant's statement about his lack of memory of counseling should be "insufficient to overcome the strong presumption that military officials carried out their duties correctly, lawfully, and in good faith."

Third, the Chief Counsel argued that, even if the Board were to find that the Coast Guard had a duty, but failed, to counsel the applicant, the Board could not presume, based on the member's word and subsequent years of service, that the applicant would have, in fact, chosen to obligate himself to serve through 1990. The Chief Counsel cited the applicant's two[3] short-term extensions of his enlistment in the mid 1980s as evidence that the applicant had not committed himself to a career in the Coast Guard. The Chief Counsel urged the Board to require the applicant "to articulate specific, fact-based reasons for his conclusion" that he would have extended his enlistment had he been counseled about ALDIST 004/82, rather than accepting the applicant's "speculation" and "self serving opinion" that he would have extended.

The Chief Counsel also argued that, even if the Board found that the Coast Guard had erred and that the applicant would have extended his service if he had been counseled, the Board should still deny relief because, under the Supreme Court's decisions in United States v. Caceres, 440 U.S. 741 (1979), and Cort v. Ash, 422 U.S. 66, 78 (1975), violations of agency procedural regulations do not create private rights of action and because Congress intended the SRB program to reward members who obligated themselves to future service, and the applicant had not done so in 1982.

[3] Although there are records for only two extensions prior to the applicant's reenlistment on July 5, 1987, the applicant must have extended his first enlistment three times.

Finally, the Chief Counsel argued that Congress intended the SRB program to benefit the Coast Guard and the United States by encouraging experienced members with critical skills to extend their service. Therefore, paying the applicant retroactively would be contrary to the statute's purpose (because it would not benefit the Coast Guard), and the applicant did not in fact obligate himself to serve for another six years when ALDIST 004/82 was in effect.

APPLICABLE REGULATIONS

SRB Regulations

Commandant Instruction 7220.13E (Administration of the Reenlistment Bonus Program) was released on May 4, 1979, and was in effect when ALDIST 340/81 and ALDIST 004/82 were distributed. Section 1.c.(4) of Enclosure (1) to the Instruction stated that "[e]ntitlement to an SRB vests only on the date the member reenlists or makes operative an extension of enlistment . . . ." Section 1.c.(6) of Enclosure (1) stated that early separation could only occur "within three months of [the end of] activated obligated service, in accordance with Article 12-B-7 [of the] Personnel Manual . . . ." Section 1.d.(1) of Enclosure (1) provided the criteria for SRB eligibility in Zone A.[4] It stated the following, in part:

> (1) Zone A Eligibility. [To be eligible, a member must meet all of the following criteria:]
>
> (a) Be serving on active duty in pay grade E-3 or higher in a military specialty designated [in the SRB announcement].
>
> (b) Must have completed at least 21 months of continuous active duty, other than active duty for training, but not more than six years of total active duty, immediately preceding the date of reenlistment or operative date of extension of enlistment. . . .
>
> (c) The extension of enlistment or reenlistment must be at least three years and, when combined with prior active duty, must yield a total of at least six years of active duty. [Emphasis in original]

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[4] SRBs vary according to the length of each member's active duty service, the length of the period of reenlistment or extension of enlistment, and the need of the Coast Guard for personnel with the member's particular skills. Coast Guard members who have more than 21 months but less than 6 years of active duty service are in "Zone A," while those who have more than 6 but less than 10 years of active duty service are in "Zone B." At the time ALDIST 340/81 and ALDIST 004/82 were issued, the applicant was in Zone A. Members may not receive more than one bonus per zone.

> (d) Has not previously received a Zone A SRB, nor previously enlisted, reenlisted, or extended (extensions that have become effective) beyond six years of active duty. . . .

Section 1.g. of Enclosure (1) stated that in order to "attain the objectives of the SRB program, each potential reenlistee who would be eligible for SRB must be informed of their eligibility and the monetary benefits of the SRB program. It is expected that the reenlistment interview, held approximately six months before expiration of enlistment, will provide the potential reenlistee with complete information on SRB."

ALDIST 340/81

ALDIST 340/81, issued on October 2, 1981, changed the existing multiples of the SRBs that members could receive to reflect the degree to which the Coast Guard needed to retain personnel in each skill rating. The multiple to be used for calculating SRBs for reenlisting or extending members in the SK rating was one.

ALDIST 004/82

ALDIST 004/82, issued on January 12, 1982, locked in the multiples used for calculating SRBs under ALDIST 340/81 until February 15, 1982. Thereafter, the multiples were to change to reflect the degree to which the Coast Guard needed to retain personnel in each skill rating. ALDIST 004/82 also suspended the provisions of Article 1-G-83 of the Personnel Manual (Execution of Agreement to Extend Enlistment) until February 15, 1982, and therefore allowed members to extend enlistments that were not within 30 days of termination.

Article 1-G-83 of the Coast Guard Personnel Manual (COMDTINST M1000.6A) stated the following, in part:

> (b) Generally, an individual should not be permitted to agree to extend his/her enlistment until approximately 30 days prior to the date of expiration of the then existing enlistment. For certain purposes, however, such as qualifying for assignment to a service school, duty outside CONUS, assignment to active duty in the case of a Reservist, or for other duty requiring additional obligated service, it is permissible to permit an individual to agree to extend his/her enlistment a considerable time in advance.

FEDERAL COURT CASES CITED

United States v. Caceres, 440 U.S. 741 (1979).

In Caceres, the Supreme Court held that a criminal defendant was not entitled to the benefit of the exclusion rule even though the IRS had violated its own regulations when an IRS agent tape recorded the defendant offering him a bribe. The Court reasoned that neither the Constitution nor a federal statute (or even defendant's reasonable reliance on IRS regulations) required the IRS agent to obtain advance approval from his superiors before tape recording the conversation.

Cort v. Ash, 422 U.S. 66 (1975).

In Cort, the Supreme Court held that a stockholder does not have a private cause of action (i.e., stockholder's derivative suit for damages and an injunction) against corporate directors for violating a federal statute prohibiting corporate expenditures in a Presidential election campaign. The Court listed four factors that should be considered in determining whether a statute creates a private cause of action and private remedy: (a) whether the stockholder was one of the class for whose special benefit the statute was enacted; (b) whether Congress intended, implicitly or explicitly, to create or to deny such a remedy; (c) whether the private remedy is consistent with the underlying purposes of the legislative scheme; and (d) whether the cause of action is traditionally relegated to state law and is basically the concern of the states.

APPLICABLE BCMR DECISIONS

Precedent Decision in BCMR Docket No. 121-93.

In BCMR Docket No. 121-93, the applicant asked the Board to reconsider its denial of his request (in the final decision in BCMR Docket No. 237-91) to correct his military record to show that he had extended his service on February 14, 1982, and was therefore due an SRB. Although the Board again denied the requested relief, the Deputy General Counsel granted relief, finding in part that

1. because the Coast Guard had presented no evidence as to how the applicant could or should have learned of ALDIST 004/82 any earlier than he claimed, the applicant's sworn statement that he learned of it in 1991 would be accepted at face value, especially since "[a]llegations that the first knowledge members have had of the provisions of ALDIST 004/82 came from contact with [the 'C' school] are common, and have often been accepted without challenge in the past";[5]

[5] The Deputy General Counsel cited in support BCMR Docket No. 151-91.

2. "Coast Guard regulations require that members be 'fully advised' of SRB opportunities";[6] and

3. the Board had "commonly afforded relief under similar circumstances in the past, and . . . reversal of such precedents without a firm basis in the record would be clearly unreasonable here."

Precedent Decision in BCMR Docket No. 69-97

In BCMR Docket No. 69-97, the applicant had reenlisted on May 2, 1980, for a six-year term, after completing his first, four-year enlistment. Subsequently, the applicant extended his enlistment three times for periods of two years or less before reenlisting for three years on March 1, 1991, and for another six years on January 6, 1994. The applicant asked the BCMR to correct his record to show that he had requested an extension of his enlistment for a period of six years on February 14, 1982, in order to receive a Zone B SRB. He stated that if he had been properly counseled and made aware of the provisions of ALDIST 004/82, he "would have taken the necessary steps to secure [a] zone 'B' bonus." There was no documentation in the applicant's record to indicate that he was ever advised of the provisions of ALDIST 004/82 while it was in effect.

The Board recommended that the requested relief be granted. That recommendation was based in part on (1) the applicant's sworn statement that he had not been properly counseled about ALDIST 004/82 when it was in effect and had not learned of it until 1997; (2) the applicant's statement that he would have extended his enlistment to receive the SRB had he known of the opportunity; (3) the applicant's previous enlistments and subsequent years of service, which provided a reasonable basis to believe that he would have extended his service obligation had he been properly counseled about ALDIST 004/82; and (4) the Coast Guard's failure to reveal if and how information about ALDIST 004/82 had been disseminated to the members.

The Deputy General Counsel wrote a concurring decision which responded to several of the Coast Guard's arguments that were not mentioned in the Board's decision but are pertinent to the case in hand:

1. In response to the argument that the Coast Guard was only required to counsel potential reenlistees, not potential extendees, she found that Congress had intended both groups to benefit from the SRB program and that the Coast Guard had presented no rational basis for counseling one group but not the other. She concluded that the "Coast Guard erred in drafting COMDTINST 7220.13E when it failed to require mandatory counseling for potential extendees . . . ." BCMR Docket No. 69-97, Deputy General Counsel's Concurring Decision, at 3.

[6] The Deputy General Counsel cited BCMR Nos. 224-87, 263-87, 268-87, 285-87 for this position.

2. In response to the argument that the applicant's statements were insufficient to overcome the presumption of regularity in administrative matters such as counseling, she stated that the applicant's history of service and his statements concerning the lack of proper counseling and what he would have done had he been properly counseled were sufficient to nullify the presumption in this case.

3. The Deputy General Counsel found unpersuasive the argument that the applicant's short extensions show that he was not, in fact, committed to a career in the Coast Guard and therefore was not likely to seek a maximum SRB. She reasoned that short extensions for particular purposes, such as enrollment in school or transfer to a different station, are made frequently for the convenience of the government and do not necessarily reflect negatively on a member's career commitment to the Coast Guard.

4. In response to the Coast Guard's claim that the applicant had no private right of action under its regulations, she found that Congress had created a private right of action in the SRB statute (37 USC § 308) and the BCMR statute (10 USC § 1552).

5. In response to the argument that paying SRBs many years after ALDIST was inconsistent with the purpose of the statute, which was to benefit the Coast Guard, she cited the decision in Larinoff, which held that "[t]he intention of Congress in enacting the [reenlistment bonus statute] was specifically to promise [members] who extended their enlistments that a [reenlistment bonus] award would be paid to them at the expiration of their original enlistment in return for their commitment to lengthen their period of service." United States v. Larinoff, 431 U.S. 864, 878-79 (1977).

6. Finally, the Deputy General Counsel cited several "Comptroller General cases that authorize government agencies to correct errors of wrongful advice or failure to advise when an employee otherwise meets the statutory criteria for obtaining a benefit."[7] BCMR Docket No. 69-97, Deputy General Counsel's Concurring Decision, at 11.

HISTORY OF THIS CASE

The Board's first decision in this case was issued on January 30, 1998. Based on the applicant's allegations, his military record, and the views of the Coast Guard presented above, the Board made the following findings: (1) the application was timely; (2) the applicant was not eligible for an SRB under ALDIST 340/81 but may have been eligible under ALDIST 004/82; (3) the Coast Guard had a duty to counsel the applicant concerning his eligibility under ALDIST 004/82; (4) the Coast Guard erred by failing to advise the applicant of his SRB opportunities; and (5) the applicant's request should be granted. The Board ordered that the applicant's record be corrected to show that he had extended his enlistment for six years under ALDIST 004/82.

[7] The Deputy General Counsel cited Matter of Hanley, B-202112, November 16, 1981; Matter of Anthony M. Ragunas, 68 Comp. Gen. 97 (1988); and Matter of Dale Ziegler and Joseph Rebo, B-199774, November 12, 1980.

On August 28, 1998, the Deputy General Counsel, acting as the Secretary's delegate, remanded the decision to the Board for further consideration. The Deputy General Counsel stated that the Board had not addressed some of the Coast Guard's arguments against granting the applicant's requested relief. She asked the Board to address each of the Coast Guard's arguments in its decision on remand and to include a finding as to whether the applicant would have extended his enlistment in 1982 if he had been properly counseled.

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, United States Code.

2. The applicant has made a sworn statement that he discovered the alleged error which he has asked the Board to correct on January 22, 1997. The Coast Guard did not present any evidence indicating that the applicant knew or might have learned of his eligibility to receive an SRB in 1982 any earlier than the date of discovery alleged by the applicant. Therefore, the Board finds that the application was timely as it was filed within three years of the date of discovery of the alleged error.

3. The SRB statute, 37 USC § 308(a), expressly includes members who "voluntarily extend[] [their] enlistment[s]" among those who may be eligible for SRBs. To achieve Congress's goals for the SRB program, the Coast Guard must inform members who are eligible to receive a bonus of their eligibility. In Larinoff, the Supreme Court held that "[t]he intention of Congress in enacting the [reenlistment bonus statute] was specifically to promise [members] who extended their enlistments that [an SRB] would be paid to them at the expiration of their original enlistment in return for their commitment to lengthen their period of service." United States v. Larinoff, 431 U.S. 864, 878-79 (1977).

Thus, the Coast Guard's argument that it was required to inform only potential reenlistees and not potential extendees because its regulation specified only the means by which potential reenlistees would be informed of their eligibility must be rejected. The fact that the Coast Guard neglected to specify in its regulations how potential extendees should be informed of their eligibility under ALDIST 004/82 does not mean potential extendees had less right to be informed than did the potential reenlistees. Moreover, the Deputy General Counsel has held in BCMR Docket No. 69-97 that the "Coast Guard erred in drafting COMDTINST 7220.13E when it failed to require mandatory counseling for potential extendees on an equal basis with potential reenlistees."

BCMR Docket No. 69-97, Deputy General Counsel's Concurring Decision, at 3. Thus, the Board finds that the Coast Guard did have a duty to counsel the applicant about his eligibility under ALDIST 004/82.

4. The applicant was not eligible for an SRB under ALDIST 340/81. Under ALDIST 004/82, however, he was eligible to extend his enlistment for up to six years, from the end of his then-current enlistment in 1984 to 1990. Although the applicant did not mention ALDIST 004/82 and is clearly unsure of the legal grounds for his request, his allegation that he was eligible for an SRB under ALDIST 340/81 in 1982 convinces the Board that he is requesting that his record be changed to show that he took full advantage of ALDIST 004/82 by extending his enlistment on February 14, 1982, for the maximum number of years allowed: six. The Board will not withhold justice from an applicant merely because he is confused about the basis of his rights.

5. As the Coast Guard stated, the lack of evidence of counseling in the applicant's record is not proof that he was never counseled because the regulations at the time did not expressly require members to sign documents stating that they had been properly counseled about SRBs. However, the applicant made a sworn statement on his DD Form 149 that he had not been counseled on the provisions of ALDIST 340/81 or on his eligibility for an SRB under that ALDIST in 1982.[8] Although the Coast Guard called the applicant's memory concerning an event that might have occurred 15 years in the past unreliable, the Board finds the assertion unpersuasive.

Moreover, the Coast Guard has made no statement and submitted no evidence to rebut the applicant's claim that he was not informed of his eligibility for the SRB. The Coast Guard has not presented any evidence as to how potential extendees were informed of the opportunity. Therefore, the Board finds that the presumption that military officials have carried out their duties correctly is overcome with respect to the Coast Guard's informing potential extendees of their eligibility for an SRB under ALDIST 004/82. With a credible, sworn statement by the applicant and no contrary evidence presented by the Coast Guard, the Board finds that the preponderance of the evidence indicates that the applicant was not properly counseled in 1982 about his eligibility for an SRB.

6. The applicant signed a sworn statement to the effect that, if he had been counseled about his eligibility for an SRB in 1982, he would have reenlisted or extended his enlistment to take advantage of the opportunity to receive the SRB. Although the Coast Guard called the applicant's statement self-serving and speculative, it presented no evidence indicating that in the winter of 1982 the applicant was in any way dissatisfied with, or had any intention to leave, the Coast Guard.

[8] The BCMR application, DD Form 149, contains a warning for applicants regarding the penalties for willfully making a false statement or claim, pursuant to 18 USC §§ 287 and 1001.

7. The applicant's three short-term extensions subsequent to the expiration of his first, four-year enlistment do not necessarily reflect a lack of commitment to continue to serve in the Coast Guard. First, the Personnel Manual (CG 207) in effect at the time permitted one-year extensions. Short-term extensions of enlistments are common and are made for a variety of reasons, such as personnel specialists' avoiding the extra administrative work and arrangement of medical appointments required to process a reenlistment or a member's attending school or being transferred to a new station. As two of the records for the applicant's extensions and reenlistments are missing, their purpose cannot be determined. In the records that are not missing, none of the purposes recorded suggests that the applicant was considering leaving the Coast Guard or did not want to pursue a career in the Coast Guard.

The Board also notes that the applicant had no break in service whatsoever during this six-year period even though Article 1-G-7A of the Personnel Manual permits a three-month break in service with no loss of eligibility for an SRB or loss of time in pay grade in rating for advancement. The lack of any break in service during this period—as well as the applicant's approximately 20 years of continuous service to date without an SRB—demonstrates his commitment to the Coast Guard.

In addition, according to Article 1-G-19 of the Personnel Manual, once an enlistment becomes operative, it cannot be canceled by either the member or the Coast Guard. Therefore, if the applicant had executed a long-term extension in the mid-1980s, he could not have canceled it to reenlist and obtain an SRB if one had become available. (The SRB instruction is clear that entitlement to an SRB is established on the date of reenlistment or the date that an extension agreement is executed.) Likewise, if an SRB had become available to the applicant in the mid-1980s and he executed a further extension to receive the SRB, the bonus payment would have been reduced by the amount of obligated service remaining on the original extension agreement. Even if the applicant executed the short-term extensions with the hope obtaining a future SRB payment, the Board would not find, particularly in light of the SRB regulations with respect to entitlement, such an option to be indicative of the applicant's lack of a commitment to the Coast Guard, but rather an indication of his desire to obtain an SRB.

In short, there are so many reasons why a member might request or be directed toward short-term extensions in lieu of reenlistments that the Board will not consider such extensions to be proof of a lack of commitment to the Coast Guard without more evidence.

Finally, the facts in this case are not dissimilar to those in BCMR Docket No. 69-97, wherein the Deputy General Counsel found that two two-year extensions and one ten-month extension did not establish that the applicant would not have extended for six years if he had been counseled on ALDIST 004/82. In support of that finding, the Deputy General Counsel looked to the purpose of the extensions and found that each one was for a particular purpose and was for the convenience of the Coast Guard. In

the Board's view, the difference between that applicant's extensions and this applicant's three short-term extensions is not so significant as to require the Board to reach a different result in this case.

8. Nor does the Board find compelling the Coast Guard's argument that the applicant might have procrastinated or hesitated because of his youth and thereby lost the opportunity to receive the bonus. Likewise, the applicant's youth does not persuade the Board that he would have rejected the bonus.

9. The Coast Guard's argument that, even if the applicant had chosen to extend his service in 1982, the Coast Guard did not have to retain him is true but irrelevant since it did retain the applicant on active duty from 1984 to 1990, and there is nothing in the record to indicate that he would not have been retained had he taken advantage of ALDIST 004/82.

10. In light of the fact that the applicant did make a career in the Coast Guard, his sworn statement that he would have participated in the SRB program had he been properly counseled about it, and Findings 6, 7, 8, and 9, above, the Board finds that the applicant would have extended for six years had he been properly counseled about ALDIST 004/82.

11. In regard to whether the applicant has a private cause of action, the Deputy General Counsel has already decided that issue in her concurring opinion in BCMR Docket No. 69-97. In that opinion, she found that Caceres does not support the Coast Guard's position, because the applicant's claim to an SRB is not based solely on the Coast Guard's regulations but on the SRB statute (37 USC § 308) that authorized payment. In Caceres, there was no underlying federal statute to support the criminal defendant's claim of being deprived of a right.

Nor does Cort support the Coast Guard's position. All four factors that the Court stated should be considered weigh in the applicant's favor here: (a) Congress specifically intended Coast Guard members to benefit under the SRB statute; (b) the Deputy General Counsel has found that Congress implicitly created a private remedy; (c) a member's suit for a wrongfully withheld SRB would be consistent with the underlying legislative scheme; and (d) disputes over SRBs are clearly not within the province of the states. Furthermore, the Board finds that the applicant has a private right of action to seek relief from the alleged error of the Coast Guard under the BCMR statute (10 USC § 1552).

12. The Coast Guard stated that Congress intended the SRB program to benefit the Coast Guard and the United States by encouraging experienced members with critical skills to extend their service, and that paying the applicant retroactively would be contrary both to the statute's purpose and to the fact that applicant did not in fact extend for six years when ALDIST 004/82 was in effect. However, the Deputy General

Counsel has held that Congress intended to benefit experienced members with critical skills who would agree to extend their years of service. In Larinoff, the Supreme Court held that "[t]he intention of Congress in enacting the [reenlistment bonus statute] was specifically to promise [members] who extended their enlistments that a [reenlistment bonus] award would be paid to them at the expiration of their original enlistment in return for their commitment to lengthen their period of service." 431 U.S. at 878-79 (footnote omitted). Furthermore, although the applicant did not extend his during the month when ALDIST 004/82 was in effect, he did serve continuously for more than six years after the end of his original four-year enlistment.

13. The Coast Guard erred in 1982 by failing to counsel the applicant of his eligibility to receive an SRB by extending his enlistment.

14. Accordingly, the applicant's record should be corrected to show that on February 14, 1982, he extended his enlistment for six years and thereby became entitled to receive a Zone A SRB with a multiple of one.

[ORDER AND SIGNATURES APPEAR ON THE NEXT PAGE]

ORDER

The application for correction of the military record of ___, shall be granted as follows: The military record shall be corrected to indicate that the applicant agreed to extend his enlistment for six years on February 14, 1982, and he thus became entitled to receive a Zone A Selective Reenlistment Bonus with a multiple of one. The applicant's extensions and reenlistments dated between December 1984 and December 1990 shall be canceled. These shall be null and void and shall have no effect on his SRB entitlement. The applicant's record shall be corrected to show that, at the end of the six-year extension of his enlistment on January 6, 1990, the applicant reenlisted for three years and three months. All other extensions and reenlistments shall remain as they now appear in the record, with no break in service shown.

The Coast Guard shall pay the applicant the amount due him as a result of these corrections to his record.