DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of Coast Guard Record of:	BCMR Docket No. 1998-068

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.

[redacted]

DATE: April 19, 1999

DEPARTMENT OF TRANSPORTATION
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Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 1998-068

FINAL DECISION

[redacted]

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on March 18, 1998, upon the Board's receipt of the applicant's application for correction.

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.

The applicant, a chief machinery technician (MKC; pay grade E-7), asked the Board to correct his record to show that he extended his enlistment on February 14, 1982, so that he would be eligible to receive a Zone A selective reenlistment bonus (SRB) with a multiple of 4, in accordance with ALDIST 004/82. He claimed that he was not counseled regarding his SRB eligibility pursuant to ALDIST 004/82. The applicant stated that if he had been counseled properly, he would have extended his enlistment for six years, under ALDIST 004/82, to obtain an SRB.

SUMMARY OF RECORD AND SUBMISSIONS

The applicant stated that he did not discover the alleged error until July 1995. In an earlier statement to the Board, the applicant declared that:

> I was never advised on ALDIST 004/82 until I was informed by an MKC during a recent conversation in July 95. If I would have known of ALDIST 004/82 I would have agreed to extend my enlistment for 4 years before the 14 Feb 82 deadline. My intention to extend was evidenced by my actual extension for 4 years in Aug 83. This extension entitled me to receive [a] Zone A bonus multiple of 1.

The applicant has been on continuous active duty since his initial enlistment in the Coast Guard, for four years, on August 28, 1979. On February 28, 1983, in order to accept permanent change of station,(PCS) orders, the applicant extended this enlistment four years. He received a Zone A SRB with a multiple of one based on the authorized

multiple for his rating at that time. On May 20, 1987, the applicant reenlisted for six years. On March 12, 1993, he reenlisted for six years.

There were no administrative remarks (page 7) entries in the applicant's record counseling him with respect to SRB opportunities during his Coast Guard career.

Applicant's Performance Marks Pertinent to this Application

On February 14, 1982, the applicant's marks average a 3.45 in proficiency, a 3.5 in leadership, and a 4.0 in conduct. On August 27, 1983 (the date the applicant's enlistment would have expired, if he had not extended), the applicant's marks averaged a 3.51 in proficiency, a 3.48 in leadership, and a 3.97 in conduct.

Views of the Coast Guard

On January 21, 1999, the Board received the views of the Chief Counsel of the Coast Guard, recommending that the applicant's request be denied. The Chief Counsel stated that he was relying on the reasoning contained in the advisory opinions that he submitted in Docket Nos. 1997-062 and 1997-103. In those cases, the Chief Counsel argued that the Coast Guard was not required to counsel members who became eligible to extend early under ALDIST 004/82. The Chief Counsel stated that:

> Coast Guard members generally receive notice of such matters through the ALDIST system, command announcements, Coast Guard-wide publications, and other means, but there was no requirement to conduct personal notification or to record such information in the member's service record.

The Chief Counsel also stated that:

> [A]n applicant's conclusory allegations, implications, and opinions, asserted sixteen years after the ALDIST was issued, are not convincing evidence of error or nexus to the requested relief. . . . [E]ven if [the] applicant were to somehow show both error and nexus, he has no right to have his record changed to create a fiction indicating that he obligated himself to service when he did not. . . .

The Chief Counsel stated that any action by the Board, other than a denial would make this a matter of Coast Guard policy. Such a pronouncement by the Chief Counsel means that a recommended grant of relief by this Board is subject to review by the Deputy General Counsel of the Department of Transportation.

Coast Guard Arguments in Docket Nos. 1997-062 and 1997-103

Each of the pertinent arguments offered by the Coast Guard in its advisory opinions, in Docket Nos. 1997-062 and 1997-103,[1] have been resolved by the Deputy General Counsel, in concurring opinions in Docket Nos. 1997-054 and 1997-069.

In advisory opinions in Docket Nos. 1997-62 and 1997-103, the Chief Counsel made the arguments against relief as set out below. On each issue, the Deputy General Counsel ruled in favor of the applicant.

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 extended his enlistment in 1982.

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.

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 by the applicant is unreliable after many years. The applicant's statement about his lack of

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1 The facts in Docket No. 1997-103 are different from those in Docket No. 1997-062 and different from those in the instant case. The applicant, in Docket No. 1997-103, had received a Zone A SRB in March 1982, but he wanted his record corrected to show that he also received a Zone B SRB in 1982. He argued that the Coast Guard did not properly counsel him about his SRB eligibility in 1982. The Deputy General Counsel denied relief to the applicant in Docket No. 1997-103. In denying relief, the Deputy General Counsel stated that neither applicant nor the record shows:

> (a) that ALDIST 004/82, COMDTINST 7220.13E, any Coast Guard regulation, directive or policy statement requires Coast Guard personnel specialists or the command to inform members that they are eligible for both Zone A and Zone B SRBs in applicant's situation (i.e., when a member is within three months of expiration of his or her enlistment contract while ALDIST 004/82 is in effect);
>
> (b) that, regardless of any written directives, Coast Guard personnel specialist or the command were aware that members in applicant's situation might have been eligible for both Zone A and Zone B SRBs; or
>
> (c) that other members in applicant's situation were counseled on -- or received -- both Zone A and Zone B SRBs in 1982 and therefore applicant was treated differently than other members of the service.

memory of counseling should be "insufficient to overcome the strong presumption that military officials carried out their duties correctly, lawfully, and in good faith."

The Chief Counsel asserted 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 applicant's word and subsequent years of service, that the applicant would have, in fact, chosen to obligate himself in 1982 to serve through 1989. 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. The applicant had not done so in 1982.

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

Ruling of the Deputy General Counsel to the Coast Guard's Arguments

The Deputy General Counsel wrote concurring opinions, in Docket Nos. 1997-054 and 1997-069 that have responded, in the negative, to each of the Coast Guard's arguments. Her rulings are discussed below.

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. 1997-069, Deputy General Counsel's Concurring Decision, at 3.

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. 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 U.S.C § 308) and the BCMR statute (10 U.S.C. § 1552).

4. 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) (footnote omitted).

5. 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." BCMR Docket No. 1997-069, Deputy General Counsel's Concurring Decision, at 11.

Applicant's Response to the Views of the Coast Guard

On February 9, 1999, the Board received the applicant's response to the views of the Coast Guard. He disagreed with the Coast Guard views and argued that he should have relief. He stated that he was not aware of ALDIST 004/82 until sometime in 1995. He argued that other applicant's, similarly situated, have had their applications approved.

APPLICABLE REGULATIONS

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 MK rating was four.

ALDIST 003/82

ALDIST 003/82, issued on January 8, 1982, implemented tougher standards for members desiring to reenlist or extend. This ALDIST stated as follows:

> Effectively immediately, the standards for assignment of the reenlistment eligibility code (RE-R1), recommended for preferred reenlistment, as

> specified in [the Coast Guard Personnel Manual], are upgraded . . . to 3.6 [proficiency], 3.6 [leadership], [and] 3.9 [conduct].
>
> Members meeting these revised standard for preferred reenlistment . . . may reenlist/extend at their option for up to six (06) years. Members who do not meet the preferred reenlistment standards but who remain eligible for enlistment/extension . . . [by at least having the following marks] 3.3 [in proficiency], 3.3 [in leadership], [and] 3.8 [in conduct] . . . may be authorized to reenlist/extend for a period not to exceed 4 years as determined by their commanding officer.

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.

This ALDIST further stated that Reference E (ALDSIT 003/82) "directed that new reenlistment standards be implemented and has presented [the Commandant's] firm commitment to reward superior performance to the extent that [the Commandant] can do so. Under these new guidelines, the consistently high performer can reenlist or extend to a maximum of six (06) years. The satisfactory performer can be permitted to reenlist or extend to a maximum of four (04) years, and the substandard performer cannot reenlist or extend at all."

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10, United States Code. The application was timely pursuant to Detweiler v. Pena, 38 F. 3d. 591 (D.C. Cir. 1994).

2. The SRB statute, 37 U.S.C. § 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. 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. Larionoff, 431 U.S. 864, 878-79 (1977) (footnote omitted).

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. The Deputy General Counsel has held in BCMR Docket No. 1997-069 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. 1997-069, 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.

3. The applicant was eligible, under ALDIST 004/82, to extend his enlistment for up to four years from the end of his then current enlistment in 1983 to 1987, to obtain an SRB.

4. 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.[2] Although the Coast Guard called the applicant's memory unreliable concerning an event that might have occurred 15 years in the past, 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.

5. The applicant signed a sworn statement to the effect that, if he had been counseled about his eligibility for the SRB in 1982, he would have reenlisted or extended his enlistment to take advantage of the opportunity to receive the SRB.

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[2] 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.

Although the Coast Guard called the applicant's statement self-serving and speculative, it presented no evidence to the effect that in the winter of 1982 the applicant was in any way dissatisfied with, or had any intention to leave, the Coast Guard. Approximately one year after ALDIST 004/82 was issued, the applicant extended for four years.

6. 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, and there is nothing in the record to indicate that he would not have been retained had he taken advantage of ALDIST 004/82.

7. In light of the fact that the applicant made 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, the Board finds that the applicant would have extended for four years, in 1982, had he been properly counseled about ALDIST 004/82. (The applicant was not eligible to extend for six years. See finding 11.)

8. 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. 1997-069. 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 U.S.C. § 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.

The Cort decision does not support the Coast Guard's position either. 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 U.S.C. § 1552).

9. The Coast Guard stated that Congress intended the SRB program to benefit the Coast Guard by encouraging experienced members with critical skills to extend their service. Thus, paying the applicant retroactively would be contrary both to the statute's purpose and to the fact that the applicant did not extend 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 enlistment 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.

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

11. The applicant was not eligible to extend his enlistment for six years, in 1982, because he did not have the necessary marks (3.6 in proficiency, 3.6 in leadership, and 3.9 in conduct) to do so. His average marks were 3.45 in proficiency, 3.5 in leadership, and 4.0 in conduct. Therefore, in February 1982, the applicant could have extended his enlistment for no more than four years.

12. Accordingly, the applicant's record should be corrected to show that on February 14, 1982, he extended his enlistment for four years and thereby became entitled to receive a Zone A SRB with a multiple of four The amount the applicant received from the Zone A SRB with a multiple of 1 in 1983 shall be deducted from the amount the applicant should receive as a result of this correction.

ORDER

The application for the correction of the military record of USCG, is granted. His military record shall be corrected by showing that on 14 February 1982, he agreed to extend his enlistment for four years. His record shall also be corrected to show that he received a Zone A SRB with a multiple of four. The amount that the applicant received from the Zone A SRB with a multiple of one in 1983 shall be deducted from the amount that he receives as a result of this correction. The four-year extension signed on February 28, 1983, shall be null and void. The Coast Guard shall pay the applicant the amount that is due him as a result of this correction.