


DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 1998-086

FINAL DECISION


This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14, United States Code. It was commenced on June 9, 1998, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated April 22, 1999, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a radioman third class (RM3; pay grade E-4) in 1991, asked the Board to correct his record by canceling his April 17, 1989, 11-month extension, and by showing that he reenlisted for four years on January 1, 1991, so that he would be entitled to a Zone A selective reenlistment bonus (SRB), with a multiple of .5, pursuant to ALDIST 310/50.

On July 20, 1987, the applicant enlisted in the Coast Guard for four years. On April 17, 1989, he executed an 11-month extension "to meet obligated service required for attendance of RM class "A" school." (On January 1, 1991, the SRB multiple for the RM rating became effective. The 11-month extension became operative on July 19, 1991.) As a result of the extension, his then current enlistment expired on June 19, 1992. The applicant reenlisted for four years on March 24, 1992. He reenlisted for six years on February 1, 1996.

The applicant is currently an ensign. He was commissioned on December 19, 1997.

EXCERPTS FROM THE RECORD AND SUBMISSIONS

In support of his application, the applicant stated the following:

I was not properly counseled on the effect of the 11 month extension in relation to any SRB entitlement. I became aware of the possible entitlement [to an SRB] while [at a subsequent duty station] . . . , but upon

inquiry to my administrative office, [I] was informed I had no recourse due to the extension becoming operative.

The applicant stated that he discovered the alleged error on May 28, 1998. He stated he made inquiries to his administrative officer, but he was not given any guidance on how to pursue corrective action. He stated that his current command advised him to apply to the BCMR.

The applicant attached to his application a copy of ALDIST 310/50 showing an authorized SRB multiple of .5 for the RM rating, with an effective date of January 1, 1991.

Views of the Coast Guard

On March 11, 1999, the Chief Counsel of the Coast Guard submitted an advisory opinion for the Coast Guard. He recommended that relief in this case be denied.

The Chief Counsel stated that eight years after the applicant executed the 11-month extension, he claimed that he was improperly counseled about his ability to cancel that extension before it became operative. The Chief Counsel argued that under the presumption of regularity, in the absence of proof to the contrary, the government is assumed to have provided the applicant the necessary information. The Chief Counsel stated that the applicant has not provided clear and convincing evidence to overcome the presumption of regularity.

The Chief Counsel argued that in the alternative, the applicant should be denied relief on the basis of the doctrine of laches. The Chief Counsel stated that "[w]here an applicant's unexcused delay has caused substantial prejudice to the government, the claim for relief is generally barred under the equitable doctrine of laches. See, e.g. Sargisson v. United States, 12 Cl. Ct. 539, 542 (1987)." The Chief Counsel stated that pursuant to 10 U.S.C. § 1552, the Secretary is not compelled to correct a record, but may exercise considerable discretion in determining whether such a correction is "necessary" to make the applicant whole.

The Chief Counsel stated that "underlying the laches bar is the fundamental principal that equity aids the vigilant; the doctrine prohibits applicants from delaying their BCMR applications, absent circumstances excusing the delay, while the evidence regarding their contentions becomes lost, stale, or inaccessible, or while the costs of investigating or correcting the matter accumulate."

The Chief Counsel stated that the Coast Guard's ability to reconstruct the relevant evidence on this case has been severely hampered by the absence of key unit documents that have been destroyed or disposed of per paperwork disposition regulations.

Applicant's Response to the Views of the Coast Guard

On March 23, 1999, the Board received a response from the applicant who stated that at the time he executed the enlistment extension he was told by his personnel department that he could cancel the 11-month extension at anytime prior to it becoming operative on June 19, 1991. The applicant stated that during the fall of 1991, the Commandant issued a notice that the SRB in effect at that time would be canceled within 30 days and members must reenlist by that time to receive the SRB. He stated that he contacted his personnel officer and inquired about reenlisting and he was told that the extension had become operative and the earliest he could reenlist would be March 1992. The applicant reenlisted in March 1992 for four years. He stated that if an SRB had been in effect at that time, he would have reenlisted for six years.

The applicant concluded his statement as follows:

The Coast Guard explains in its opinions that it is my responsibility to provide proof that I never received any counseling. I ask, how can I provide proof of a form documenting a counseling session that doesn't exist and never took place? Furthermore, I have been on continuous active duty since enlisting on 19 July 1987 and plan to continue this career and would not jeopardize it by fabricating this claim in order to receive an SRB.

The applicant stated that he began to pursue this claim when he became knowledgeable about a similar situation at his current command. He stated that he then became aware of the BCMR. He stated that he reported to his present unit on May 22, 1998 and submitted his BCMR application on June 9, 1998.

SELECTED EXCERPTS FROM THE SRB INSTRUCTION

According to para. 3.a.(4), COMDTINST 7220.33, one of the eligibility requirements for a Zone A SRB is that the member "[b]e serving in pay grade E-3 (with appropriate designator), or higher, on active duty in a rating that is designated as eligible for an SRB multiple."

Paras. 3.d. (4), (5), and (6) state the following:

(4) Only extensions/reenlistments of 3 years or longer may be used to establish eligibility for SRB. Specifically, two or more extensions may not be combined to establish SRB eligibility. . . . Qualified members "lock into" SRB multiples and bonus ceilings that are in effect at the time an extension agreement is executed.

(5) Under no circumstances will an individual be permitted to extend their enlistment more than 3 months early for SRB purposes alone.

However, a member who must extend for some other reason (i.e., transfer, training, advancement, or tuition assistance) may extend for a period greater than the minimum required for the purpose of gaining entitlement to an SRB.

(6) Extensions previously executed by a member may be canceled prior to their operative date for the purpose of executing a longer extension or reenlistment in accordance with Article 1-G-36 of [the Personnel Manual]. Members should be informed that their SRB entitlement will be based only on newly acquired obligated service. For example, if a member cancels a 3-year extension to reenlist for six years, the member will only be paid SRB entitlement for the additional 3 years of service. An exception to this rule is made for extensions of 2 years or less, or multiple extensions (each of which is 2 years or less in length), required of a member for transfer, training, advancement, or tuition assistance. These extensions may be canceled prior to their operative date for the purpose of immediate reenlistment or longer extension without any loss of SRB entitlement.

At the time in question, Article 1-G-36b.(2) of the Personnel Manual stated in pertinent part as follows:

Extensions of two years or less required of a member to receive PCS orders, attend training, or obligate for advancement may be canceled prior to their operative date for the purpose of immediate reenlistment or longer extension without any loss of Selective Reenlistment Bonus eligibility.

FINDINGS AND CONCLUSIONS

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

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

2. Pursuant to Paras. 3.d.(5) and (6), COMDTINST 7220.33, and Article 1-G-36b.(2) of the Personnel Manual, the applicant was eligible to cancel his 11-month extension for the purpose of an immediate reenlistment without loss of SRB entitlement.

3. The Deputy General Counsel has determined, in Docket Nos. 1993-121 and 1997-054, that the Coast Guard has a duty to counsel its members on SRB opportunities. COMDTINST 7220.33 (pertinent SRB instruction) required that service members be

advised of the SRB program and their SRB eligibility on a page 7 (administrative remarks) entry. No such SRB counseling entry exists in the applicant's military record.

4. The applicant alleged, under penalty of perjury, that he was not counseled on the SRB opportunity that became available on January 1, 1991. His statement is supported by a lack of any SRB counseling entries in his military record. The Coast Guard's presumption of regularity claim, with respect to its duty to counsel the applicant, has been rejected by the Deputy General Counsel in BCMR Docket No. 1997-054. She determined in that case that an applicant's statement, if credible, was sufficient to overcome the presumption of regularity. The Deputy General Counsel noted the Coast Guard's lack of authority for its argument that an applicant's statement was insufficient to overcome the presumption of regularity. In the instant case, the Coast Guard has not produced any evidence that the applicant's statement, that he was not counseled, should be disbelieved. Neither has the Coast Guard cited authority for the position that an applicant's statement, if believed, is insufficient evidence to overcome the presumption of regularity.

5. The Deputy General Counsel further stated in Docket No. 1997-054, that she accepted that applicant's statement that he was not counseled as true "because reenlistment [for him] at this time was consistent with his other demonstrated career decisions and because the Coast Guard has not overcome applicant's statement with sufficient evidence tending to show he should be disbelieved." *Id.* at 4. The applicant, in this case, has been on active duty continuously since 1987. Each of his reenlistments has been for a period of not less than four years. Thus his claim that, if he had been properly counseled about the January 1, 1991 SRB opportunity, he would have canceled his 11-month extension and reenlisted for four years for the purposes of obtaining an SRB, is consistent with his career history, and it is convincing to this Board.

6. The Chief Counsel argued that this application should be denied because of laches. He asserted that the Coast Guard has been hampered in its ability to reconstruct relevant evidence pertaining to this case because such evidence has been destroyed or disposed of per the paperwork disposition regulations. However, the Chief Counsel failed to identify the documents that have been destroyed that would have been relevant in establishing that the applicant was counseled about SRB opportunities in 1991. Additionally, the applicant stated that he did not discover the alleged error until 1998, when he became aware that a servicemember similarly situated had been granted relief by the BCMR. The applicant acted swiftly after discovering an avenue for relief. Thus, the Board is not persuaded that the applicant's claim should be defeated because of laches.

7. The applicant has established that he was not counseled with respect to an SRB opportunity in January 1991.

8. The Coast Guard committed an error by not counseling the applicant with respect to this January 1991 SRB opportunity.

9. Accordingly, the applicant should be granted relief.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of _____, USCG, for correction of his military record is granted. His military record shall be corrected to show that on January 1, 1991, he canceled his 11-month extension that was signed on April 17, 1989, and that he immediately reenlisted for a period of four years to obtain a Zone A SRB with appropriate multiple. His record shall be further corrected to show that on January 1, 1995 he reenlisted for a period of two years. His reenlistments on March 24, 1992 and on February 1, 1996 shall be null and void.

