

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 1999-042

**DECISION OF THE DEPUTY GENERAL COUNSEL,
ACTING UNDER DELEGATED AUTHORITY**

Applicant claims that he should have received a Zone B Selective Reenlistment Bonus (SRB) for six years of newly obligated service when he reenlisted for six years on August 4, 1998, on his tenth anniversary of service. He actually received an SRB for only two years of newly obligated service because, on July 15, 1997, he reenlisted for five years and thus had a setoff of four years obligated service remaining in August 1998.^{1/}

In support, applicant argues that Coast Guard erred by failing to counsel him, prior to his July 1997 five-year reenlistment, that he should have reenlisted for the minimum amount of time so that he later could obtain the maximum SRB.

Applicant's argument is not convincing. First, it assumes that Coast Guard has a duty to advise members to reenlist for the minimum amount of time in order to receive the maximum SRB at a future reenlistment or extension, if an SRB is offered then. Applicant has not presented any evidence that a regulation, order or directive of the Coast Guard establishes such a duty and I know of none.

Although Coast Guard has a duty to counsel applicant on his current eligibility to receive an SRB upon reenlistment or extension and although Coast Guard apparently did not do so in 1997, that duty is not at issue here.

^{1/} Applicant is apparently mistaken about the date of his 1997 reenlistment and about the length of his five-year reenlistment. In the absence of the reenlistment contract in his record and in light of applicant's not challenging the data given in the Coast Guard advisory opinion, I find that applicant reenlisted on July 15, 1997 for five years.

Rather, applicant claims a duty to advise him to reenlist or to extend for the minimum number of years for the sake of potential future SRB benefits.

The decision on how long to reenlist is not a simple one. Question 16 of the SRB Handout (Enclosure (5) of COMDINST 7220.33) gives an example of some factors to consider in determining for how long to reenlist or to extend. According to applicant's May 8, 1996, 3-month agreement to extend, applicant there states that he received a copy of this SRB Handout.^{2/}

Another facet of deciding how long to reenlist involves the risk of involuntary separation from the service. An offer of reenlistment is not guaranteed. If the Coast Guard wishes to separate a marginally performing member, it is easier to separate by not offering reenlistment than by seeking discharge for cause. The minimum proficiency marks required for reenlistment (stated in PERSMAN Article 1-G-5a) are higher than the minimum proficiency marks required for removal for cause (stated in Article 12-B-2f(1)(b)). Thus, three minimal extensions of enlistment of two years each provide three times the risk of separation for minimal performance in comparison to a single six-year extension or reenlistment.

Second, a fundamental but unstated element of applicant's claim is that, if he knew his current obligation would diminish the obligated service for which he could receive an SRB, then he would have kept to a minimum his current obligation while awaiting an SRB opportunity.

However, applicant apparently knew this fact about the SRB program because he signed an agreement to extend/reextend enlistment (Form CG3301B) on May 8, 1996, in which he stated: (a) "I have been provided with a copy [of] 'SRB Questions and Answers' based on Commandant Instruction 7220.33 (series)"; and (b) "My SRB will be computed based on [not applicable] months newly obligated service." His signature under these statements indicates that applicant knew, on July 15, 1997, that any future SRB would be diminished by the years remaining on his current enlistment.

In light of the above, I would find that Coast Guard committed no error or injustice in failing to advise applicant in July 1997 that he should have reenlisted or extended for the minimum number of years.

Nonetheless, since the Board's recommended decision was rendered more than 10 months after the Board received a completed application and in light of Congress' intentions in enacting 14 U.S.C. § 425, I choose under the circumstances of this case not to reverse the Board's grant of relief. I am issuing this separate opinion to provide the Board with guidance on how to decide similar cases and to ensure that the Board's decision in this case is given no precedential effect.

^{2/} Questions 10 and 11 of the SRB Handout discuss setoff for uncompleted service on the current enlistment or reenlistment.

ORDER

The application of _____, for correction of his military record is granted in accordance with the Board's ordering paragraph.

DATE: Feb. 16, 2000




**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1999-042

FINAL DECISION


This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The BCMR docketed this case on January 7, 1999, upon receipt of the applicant's completed application.

This final decision, dated December 9, 1999, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a radarman second class (RD2; pay grade E-5) on active duty in the Coast Guard, asked the Board to correct his military record to show that on July 16, 1996, he extended his enlistment for two years instead of reenlisting for six years. The correction would allow the applicant to receive a maximum Zone B selective reenlistment bonus (SRB) for the six-year reenlistment contract he signed on August 4, 1998, prior to his ten-year active duty anniversary date.

APPLICANT'S ALLEGATIONS

The applicant alleged that when he reenlisted for six years on July 16, 1996, the Coast Guard failed to counsel him concerning the effect of the reenlistment on his future entitlement to an SRB. He alleged that if he had been properly counseled, he would have extended his then current enlistment for only two years, rather than reenlisting for six years, to preserve his eligibility to receive a maximum Zone B SRB on the tenth anniversary of his active duty date. He alleged that because he was not properly counseled, on his tenth anniversary, he had almost four years of obligated service left to serve. Therefore, he could receive an SRB for only two years of additional service under ALDIST 046/98, instead of for all six years of the new enlistment contract he signed on August 4, 1998. The applicant alleged that this was unfair because the Coast Guard was required to counsel him properly, but did not.

The applicant submitted with his application a letter from his commanding officer, who stated that there was no administrative entry (page 7) in the applicant's record documenting SRB counseling prior to his reenlistment on July 16, 1996.

IEWS OF THE COAST GUARD

On October 6, 1999, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant's request.

The Chief Counsel argued that the Board should deny relief because the Coast Guard had no duty to counsel the applicant regarding the effect of his 1997 reenlistment¹ on a potential future SRB. The Chief Counsel alleged that Coast Guard regulations do not require that a member's SRB counseling include "a discussion of the effect of either an extension or reenlistment on a future SRB eligibility." He alleged that regulations require only that members be counseled concerning the SRB multiple currently applicable for their ratings; the number of years for which they may reenlist; and the number of months of newly obligated service upon which their SRBs will be calculated. The Chief Counsel argued that because there is no statute mandating SRB counseling, the Board should defer to the Coast Guard's determination of what constitutes proper SRB counseling. Furthermore, the Chief Counsel argued, the Coast Guard's regulations "were not intended to create any personal rights" and "neither government agents, nor the BCMR, can create entitlements or rights that are not provided for by statute. Therefore, the internal counseling procedure, based on Coast Guard policy to encourage reenlistments, is not a right that the BCMR may independently impose on the Coast Guard as it is within the discretion of the Coast Guard to decide how to manage its workforce policies."

The Chief Counsel also argued that the Board should deny relief because the applicant's record contains a page 7 entry dated March 15, 1997, which indicates that he was counseled in accordance with Article 12.B.4. of the Personnel Manual. Article 12.B.4., the Chief Counsel stated, requires members to be counseled concerning their SRB eligibility. "Hence, under the presumption of regularity afforded his military superiors, the Applicant can be presumed to have received such counseling in the absence of substantial evidence to the contrary."

The Chief Counsel stated that this case is similar to the case in BCMR Docket No. 1999-014 in which the Board denied relief. He further stated that this case involves a significant issue of Coast Guard policy. Therefore, if the Board decides relief should be granted, the decision must be reviewed by the Secretary's delegate.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 7, 1999, the BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited him to respond within 15 days. On November 3, 1999, the applicant responded, stating that the case was ready for decision.

¹ The Chief Counsel stated that the applicant was mistaken in alleging that he had reenlisted for six years on July 16, 1996, through July 15, 2002. In fact, the Chief Counsel stated, the applicant reenlisted for five years on July 15, 1997, through July 14, 2002.

SUMMARY OF THE RECORD

On August 15, 1988, the applicant enlisted in the Coast Guard for four years, through August 14, 1992. On June 16, 1992, he was discharged and immediately reenlisted for a term of three years, obligating himself to serve through June 15, 1995. On April 20, 1995, the applicant extended his enlistment for two years, through June 15, 1997. In May 1996, the applicant received PCS (permanent change of station) orders. To accept the orders, he had to obligate himself to serve for at least one full year at the new station. Therefore, on May 8, 1996, the applicant extended his enlistment for three months, through September 15, 1997. Both the June 15, 1995, and May 8, 1996, extension agreements signed by the applicant indicate that he was provided a copy of "SRB Questions and Answers" and fully understood the effect of his extensions on his current and future SRB eligibility.

On March 15, 1997, six months prior to the end of his enlistment, the applicant's command made a page 7 entry in his record stating, "reenlistment interview conducted this date per Article 12-B-4 Personnel Manual" Four months later, on July 15, 1997, the applicant reenlisted for five years, through July 14, 2002. His reenlistment contract, DD Form 4/1, did not provide any information concerning SRBs.²

On March 2, 1998, the Commandant of the Coast Guard issued ALDIST 046/98, which allowed members to receive an SRB if they reenlisted or extended their current enlistments between April 1, 1998 and September 30, 1998. ALDIST 046/98 provided that members in the RD rating who extended their enlistments or reenlisted would receive an SRB calculated with a multiple of one.

On August 4, 1998, the applicant reenlisted for six years, through August 3, 2004, for the purpose of receiving a Zone B SRB with a multiple of one. Under ALDIST 046/98, the applicant's reenlistment made him eligible to receive an SRB for any additional service to which he obligated himself. Because the applicant had already obligated himself to serve through July 14, 2002, his six-year enlistment on August 4, 1998, qualified him to receive an SRB for only 24 additional months of obligated service, from July 15, 2002, to August 3, 2004.

APPLICABLE REGULATIONS

Article 12.B.4.b.1. of the Personnel Manual requires each member to have a pre-discharge interview approximately six months before the end of his or her enlistment. Article 12.B.4.b.3. provides that during pre-discharge interview, a petty officer "must inform each potential reenlistee eligible for a Selective Reenlistment Bonus (SRB) of that eligibility and the SRB program's monetary benefits." The petty officer is required to discuss the amount of the SRB for which the member is eligible; "SRB flexibility and possible changes that might increase or decrease the bonus amount to which the member is entitled at reenlistment"; any limiting factor that could negatively affect

² No copy of this reenlistment contract was in the applicant's record received from Coast Guard headquarters. However, upon inquiry by the BCMR staff, the Coast Guard Personnel Command confirmed the date, duration, and form of the reenlistment contract.

the SRB payment; the advantages of reenlisting under the current ALDIST as opposed to waiting for new SRB multiples to be issued; and how SRBs are paid out.

Enclosure (1) to Commandant Instruction 7220.33 (Reenlistment Bonus Programs Administration), Section 2 states that "[a]ll personnel with 14 years or less active service who reenlist or extend for any period, however, brief, shall be counseled on the SRB program. They shall sign a page 7 service record entry, enclosure (3), outlining the effect that particular action has on their SRB entitlement."

Enclosure (3) to the SRB Instruction states that during the three months prior to the end of an enlistment or any time a member reenlists, he or she must be counseled concerning his or her eligibility for an SRB, and the counseling must be memorialized in the member's record with a page 7 signed by the member. The format for the required page 7 is reproduced below:

<p>(DATE): I have been provided with a copy of enclosure (5) to Commandant Instruction 7220.33 (series) entitled "SRB Questions and Answers." I have been informed that:</p>	
<p>My current Selective Reenlistment Bonus (SRB) multiple is ____ and is listed in ALDIST _____, which has been made available for my review.</p>	
<p>In accordance with article 12-B-4, CG Personnel Manual, I am eligible to reenlist/extend my enlistment for a maximum of ____ years.</p>	
<p>My SRB will be computed based on ____ months newly obligated service.</p>	
<p>The following SRB policies were unclear to me, but my SRB counselor provided me with the corresponding answers: (list specifics)</p>	
_____	_____
(signature of member/date)	(signature of counselor)

Enclosure (5) to the SRB Instruction, "SRB Questions and Answers," explains that previously obligated service reduces an applicant's SRB. It further advises members, "[w]hen coming up on your end of enlistment, carefully consider the advantages/disadvantages of reenlisting vice extending."

Section 3.d.(9) of Enclosure (1) to the SRB Instruction states that "[c]ommanding officers are authorized to effect early discharge and reenlist members within 3 months prior to their 6th, 10th, or 14th year active service anniversary dates (not to be confused with the normal expiration of enlistment), for the purpose of qualifying for a Zone A, B, or C SRB respectively. In such cases, SRB payments will be reduced by any portion of unserved service obligation."

Article 1.G.14.a. of the Personnel Manual provides that an extension of an enlistment requested by a member must normally be of at least two years' duration unless

the member is required to extend his or her enlistment for a particular purpose, such as to accept transfer orders, complete a cruise, attend school, or be promoted.

BCMR DOCKET NO. 1999-014

In BCMR Docket No. 1999-014, the applicant asked the Board to change a four-year reenlistment dated March 1997 to a two-year extension in order to maximize an SRB he received for reenlisting for six years on his tenth anniversary in July 1998. There was no page 7 in the applicant's record indicating that he had been counseled concerning SRBs prior to signing the four-year reenlistment contract. However, an extension contract signed by the applicant in March 1996 stated that he had been given the chance to review the SRB Instruction, including "SRB Questions and Answers," and that he understood the effect of his extension on his current and future SRB eligibility.

The Board denied the applicant's request, in accordance with the recommendation of the Coast Guard. The Board found that the Coast Guard had erred by failing to counsel the applicant when he reenlisted in 1997, but concluded that

the applicant's present contention amounts to a retrospective review of his military record based on a later opportunity that the applicant could not have known about in 1997. ... [S]ince there was no SRB multiple for the applicant's rate in 1997, and the applicant is not alleging this, any error that occurred at that time was harmless. ... The Board is not persuaded that if the applicant had received a page 7 entry in 1997, he would have extended for two years rather than reenlisting for four years. ... The applicant's reenlistment history suggests that he would have reenlisted for four years in 1997 (as he did) because he had previously enlisted for four years both in 1988 and 1992. ... Additionally, the required page 7 counseling entry does not mandate a discussion of the effect of either an extension or reenlistment on a future SRB.³ ... The Board notes that just a year before his 1997 reenlistment, the applicant acknowledged on his 1996 extension agreement that he had been informed about his SRB eligibility (although one was not available for him) and that he understood the effect that the extension would have on his current and future SRB eligibility. Yet, he reenlisted in 1997 without asking any questions. The Board finds that even with SRB counseling in 1997, the applicant would have probably reenlisted for four years. ... 'The Board is only obligated to grant enough relief to correct what it sees as an injustice.' *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). The Board does not find that any corrective action is necessary in this case. ... [T]he Board's job is not to perfect records but to correct harmful errors and remove injustices.

BCMR DOCKET NO. 1999-059

In BCMR Docket No. 1999-059, the applicant alleged that he had not been properly counseled concerning SRBs before he signed a four-year reenlistment contract on February 11, 1998. There was no page 7 in his record documenting the required counseling. No SRB was authorized for members in the applicant's rating in February 1998. However, the applicant alleged that, if he had been properly counseled, he would have extended his enlistment and reenlisted later when an SRB became available.

³ *But see* Section 3.d.(6) of Enclosure (1), Enclosure (3), and Enclosure (5) to the SRB Instruction, COMDT-INST 7220.33.

The Chief Counsel of the Coast Guard recommended that the Board grant the applicant's request in Docket No. 1999-059.⁴ He stated that "[a]lthough there is sufficient legal basis to deny relief in this case, the totality of the circumstances indicate that it would be proper for the Board to grant relief in this case by voiding the Applicant's 11 February 1998 reenlistment contract and replacing it with a third extension of ten (10) [sic] months." The Chief Counsel stated that the Board should grant relief because the applicant could have extended his enlistment for less than four years and because he was willing to sign a new long-term reenlistment as consideration for the SRB.

The Board granted the applicant's request because the lack of a page 7 in the applicant's record indicated that the Coast Guard had erred by failing to counsel him properly concerning SRBs. Given the applicant's statement that he would not have reenlisted for four years if he had been properly counseled, and with no evidence to the contrary, the Board found that the preponderance of the evidence indicated that he would have extended his enlistment for nine months rather than reenlisting for four years 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. The application was timely.

2. The record supports the Chief Counsel's statement that the applicant reenlisted for five years on July 15, 1997, rather than for six years on July 16, 1996, as alleged by the applicant. The applicant alleged that he was not properly counseled about SRBs and the effect of obligating service on potential future SRBs prior to this reenlistment.⁵ He alleged that, had he been properly counseled, he would have extended his enlistment for only two years, so that on his tenth anniversary on active duty,⁶ he would have had no remaining obligated service and therefore would have been eligible to receive the maximum possible SRB for his rating.

⁴ The Chief Counsel also recommended that relief be granted in BCMR Docket Nos. 1999-015 and 1999-031. The applicants in those cases, like the applicants in this case and in Docket Nos. 1999-059 and 1999-014, asked the Board to shorten the terms of previous reenlistments/extensions because they had not been properly counseled and the extra years of obligated service were reducing their SRBs.

⁵ The Board assumes that the applicant's claims concerning lack of counseling apply to his reenlistment dated July 15, 1997, although he was mistaken about the date and duration of this reenlistment.

⁶ The Board notes that the applicant alleged he would have extended his contract for two years to remain eligible for a maximum SRB on his tenth anniversary because he thought he had reenlisted in July 1996, two years before his tenth anniversary on active duty. In fact, however, the applicant reenlisted just one year before his tenth anniversary.

3. Under Section 2 of Enclosure (1) and Enclosure (3) to Commandant Instruction 7220.33, the applicant had a right to be counseled concerning SRBs within three months prior to his enlistment. Such counseling must be documented by a signed page 7 entry. There is no evidence in the record indicating that the Coast Guard counseled the applicant about SRBs within three months of his enlistment on July 15, 1997.

4. The Chief Counsel argued that the page 7 entry made in the applicant's record on March 15, 1997, proves that he received proper SRB counseling in accordance with Coast Guard policy and regulations. However, the page 7 entry made in the applicant's record on March 15, 1997, does not meet the requirements of the Coast Guard's regulations in Commandant Instruction 7220.33. It was made more than three months before his enlistment, and it was not signed by the applicant. Moreover, it did not indicate that the applicant was provided a copy of "SRB Questions and Answers" as required by Enclosure (3) of the Instruction. "SRB Questions and Answers" informs members of the effect of obligated service on potential future SRBs and advises them to consider carefully the advantages and disadvantages of extending versus reenlisting with respect to future entitlement to SRBs.

5. The page 7 entry in the applicant's record dated March 15, 1997, indicates that he had a predischage interview conducted "per Article 12-B-4 Personnel Manual" However, under Article 12.B.4.b.3., a member's predischage interview must include a discussion of SRBs only if the member is eligible for an SRB at the time of the interview. Because the applicant was not eligible for an SRB at the time of his predischage interview, it is unclear whether he was informed about SRBs. Furthermore, Article 12.B.4.b.3. does not specifically require the petty officer conducting a predischage interview to inform the member of the effect of previously obligated service. Therefore, because the requirements of Article 12.B.4.b.3. do not ensure that members receive the counseling that is required by the SRB Instruction, the Board finds that the page 7 entry made in the applicant's record on March 15, 1997, does not prove that the applicant received proper SRB counseling.

6. There is no page 7 entry meeting the requirements of Enclosure (3) to the SRB Instruction in the applicant's record. Had proper counseling occurred, such an entry should appear. Therefore, the Board finds that the applicant has proved by a preponderance of the evidence that the Coast Guard failed to counsel him properly in accordance with the terms of the SRB Instruction, COMDTINST 7220.33.

7. The Chief Counsel argued that the regulations created no right or entitlement to counseling on the part of the members. He also argued that the Board should defer to the Coast Guard's determination of what constitutes proper SRB counseling and that the Coast Guard had decided that counseling concerning the effect of a reenlistment on a potential future SRB was not required. However, the provisions for SRB counseling in COMDTINST 7220.33 are not permissive but mandatory.⁷ The Board was established by Congress in part to correct the injustices that arise when the Coast Guard

⁷ Moreover, the Deputy General Counsel, acting as the delegate of the Secretary, has determined that Coast Guard regulations require members to be "fully advised" of their SRB opportunities. See BCMR Docket Nos. 1997-123, 1997-069, 1997-062, 1997-054, and 121-93.

fails to follow its own regulations. The Board will not defer to a Coast Guard determination that it may ignore the mandatory language in its own regulations.

8. The Chief Counsel argued that the Board should deny relief for the reasons stated in its final decision in BCMR Docket No. 1999-014. Like the applicant in that case, this applicant learned when he received proper SRB counseling prior to his tenth active duty anniversary date (a) that his SRB would be reduced because of the length of his last enlistment; (b) that the last time he reenlisted, he should have been counseled concerning and in accordance with the provisions of the SRB Instruction, COMDTINST 7220.33; (c) that if he had been properly counseled the last time he reenlisted, he would have learned that reenlisting for many years of service might reduce any future SRB for which he might become eligible and that he would have an opportunity to reenlist on his tenth anniversary if an SRB was authorized for his rating. Also like the applicant in Docket No. 1999-014, this applicant alleged that if he had been properly counseled and learned the advantages of extending his enlistment until his tenth anniversary, he would not have reenlisted for so many years.

9. This applicant's case is also very similar to the cases in BCMR Docket Nos. 1999-059, 1999-031, and 1999-015. In those cases, as in Docket No. 1999-014, the applicant was not properly counseled and learned the advantages of a shorter extension after he had already enlisted for several years. However, in these other cases, unlike in Docket No. 1999-014, the Chief Counsel recommended that the Board grant relief, and the Board granted relief. The Board concludes that it is difficult if not impossible to reconcile the Chief Counsel's recommendations in this case and in Docket No. 1999-014 with his recommendations in Docket Nos. 1999-059, 1999-031, and 1999-015. Nor is it possible for the Board's decision in this case to be entirely consistent with its decision in Docket No. 1999-014 and its decisions in Docket Nos. 1999-059, 1999-031, and 1999-015.

10. Under Article 1.G.14.a. of the Personnel Manual, members who voluntarily extend their enlistments must normally extend them for at least two years. The applicant has not proved by a preponderance of the evidence that he would have been permitted in July 1997 to extend his enlistment for less than two years had he requested to do so.

11. The Coast Guard erred in failing to counsel the applicant in accordance with the requirements of COMDTINST 7220.33 when he reenlisted for five years on July 15, 1997. Had the Coast Guard properly counseled the applicant, he would have been given the SRB Instruction with Enclosure (5) to read and thereby been informed of (a) the negative effect a long reenlistment would have on possible future SRBs and (b) the fact that he could reenlist to receive an SRB the next year if one was authorized for his rating during the three months prior to his tenth anniversary, August 15, 1998. Whether the applicant would have acted on this information and chosen to extend his enlistment for only two years in hope of receiving an SRB on his tenth anniversary is necessarily a matter of speculation. However, given that SRBs involve thousands of dollars, the applicant's allegation that he would have chosen to extend only until his tenth anniversary, his history of short-term extensions, and a lack of any evidence to the contrary, the Board finds that if the Coast Guard had properly counseled the applicant, he would have extended his enlistment for two years so as to remain eligible for a maximum SRB on his tenth anniversary.

12. Accordingly, relief should be granted by correcting the applicant's five-year reenlistment dated July 15, 1997, to a two-year extension.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application for correction of the military record of _____
, USCG, is hereby granted as follows.

His record shall be corrected to show that on July 15, 1997, he extended his enlistment for two years, from September 16, 1997, through September 15, 1999. His five-year reenlistment contract dated July 15, 1997, shall be null and void.

The Coast Guard shall pay the applicant the amount due him as a result of this correction.

