

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-127

██████████
██████████ ETC/E-7

INTERPRETATION

This Interpretation is issued in response to a request submitted by the Coast Guard Judge Advocate General (JAG) pursuant to 33 C.F.R. § 52.73, “Interpretation,” of the Board’s rules and is signed by the three duly appointed members who were designated to serve as the Board. Section 52.73 states the following:

If the intent or import of the final decision is not clear to the Coast Guard, if the Coast Guard believes that executing all or part of the order in the final decision is beyond the Coast Guard's authority, or if the Coast Guard believes that the order is incomplete because of an oversight, the final decision shall be returned to the Board for clarification or technical amendment.

BACKGROUND

BCMR Docket No. 2013-127

In his original request, the applicant (plaintiff) asked the Board to void his discharge, reinstate him on active duty, and award him back pay and allowances after he was discharged on March 1, 2012, for alcohol abuse that resulted in misconduct. He submitted numerous arguments, including a claim that he had been denied due process because, in disapproving a recommendation of an Administrative Separation Board (ASB) to retain the applicant on active duty, the Final Reviewing Authority had considered information included in his Commanding Officer’s endorsement of the ASB’s report and that information had not been submitted into evidence at the ASB hearing. The Board found that the Coast Guard had followed its procedures in this regard and issued a Final Decision denying relief. None of the submissions by the applicant or the Coast Guard noted that the applicant’s enlistment would have ended on January 28, 2013, had he not been discharged in 2012. Nor did the Board’s decision mention this fact, but the applicant’s military record was among the case files available to the Board, and it included a copy of a six-year reenlistment contract dated January 29, 2007.

Court's Order

In *Rogers v. United States*, 124 Fed. Cl. 757 (2016), the United States Court of Federal Claims found that the applicant had not received due process because of the Commanding Officer's comments in the endorsement forwarded to the Final Reviewing Authority. The Court held that the applicant was "entitled to an award of back pay and allowances back to the date of his wrongful discharge"¹ and "to correction of his records and reinstatement as an incident to the award of monetary relief" and ordered the Board "to issue any orders necessary to ensure that Plaintiff receives back pay and other benefits and allowances to which he is entitled" and "make any other corrections and take any other actions that are required to carry out the Court's instructions."²

Board's Decision on Remand

In response to the Court's order, the Board issued a Decision on Remand, which incorporated the prior decisions of the Board and the Court and did not note that the applicant's enlistment had already expired. The decision included the following order:

- "His 2012 discharge from active duty shall be expunged as null and void; his separation orders and DD 214 shall be removed from his record; and his military records shall show that he was retained on active duty following the Administrative Separation Board and has continued to serve on active duty."
- "He shall be reinstated on active duty as an E-7 and assigned to a billet in accordance with the needs of the Service but after consulting him about his preferences."
- "The Coast Guard shall pay him all back pay and allowances he is owed as a result of the expungement of his discharge, subject to legal offsets."
- "The Coast Guard shall ensure that any medical and dental expenses that he incurred on behalf of himself or his legal dependents that would have been covered or reimbursed had he remained on active duty are reimbursed if he submits documentation of these bills and payments within six months of his return to active duty."

"No other relief is granted."

RCFC 52.2 Notices

Following the issuance of this decision, the Court dismissed the case after the Coast Guard and the applicant both filed Notices pursuant to RCFC 52.2.³ The Coast Guard advised

¹ *Rogers v. United States*, 124 Fed. Cl. 757, 776-77 (2016) (citing *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (en banc) (noting that the Military Pay Act entitles plaintiff to "money in the form of the pay that the plaintiff would have received but for the unlawful discharge"))).

² *Id.*

³ Rule 52.2 of the U.S. Court of Federal Claims concerns remanding cases to an administrative or executive body or official and includes the following provisions:

(f) Post-Remand Proceedings.

the Court that the Board's decision "affords a satisfactory basis for disposition of this case" and had ordered all relief mandated by the Court's order. The Coast Guard stated that to comply with the Board's order the applicant's military records "will reflect his retroactive reinstatement to active duty" and he would receive the back pay and benefits he was entitled to. The Coast Guard noted that the Personnel Service Center had begun identifying billets the applicant could be assigned to. The applicant's own Notice to the Court stated that the Board's Decision on Remand fully complied with the Court's order "providing plaintiff with the reinstatement to active duty he sought (with back pay)."

JAG's Request

After the Court dismissed the case, the JAG requested this interpretation "to clarify the meaning" of the Board's Decision on Remand. The JAG explained that in "carrying out the Board's order to pay [the applicant] the back pay and allowances he is owed, the Coast Guard learned that his counsel has a different understanding of the Board's order." While the Coast Guard believes that the court and the Board have "ordered it to pay [him] from the date of his discharge [March 1, 2012] until the date on which his term of enlistment would otherwise have expired had he not been so discharged [January 28, 2013]," the applicant's counsel believes otherwise. The JAG argued that under the Board's order, the applicant is entitled to back pay only through the end of the enlistment contract that was in effect on his date of discharge in 2012.⁴ The JAG noted that in drafting its Decision on Remand, the Board may not have been aware that the applicant's enlistment had expired in 2013.

Applicant's Response

In response to the JAG's request for a technical amendment, the applicant argued that the Board's order was "clear and unequivocal and, pursuant to 10 U.S.C. §1552(a)(4), is final and conclusive on all officers of the United States" because it was not procured by fraud.⁵ The applicant argued that the Coast Guard's request amounts to a request for reconsideration, which was not within its statutory authority to request or the authority of the BCMR to entertain⁶ and that the Board's reconsideration of its order in the Decision on Remand is untimely.⁷

(1) Notice. Within 30 days after the filing of the final decision or other action on remand, each party must file with the clerk and serve on each adverse party a notice stating:

(A) whether the final decision or other action on remand affords a satisfactory basis for disposition of the case; or

(B) whether further proceedings before the court are required and, if so, the nature of such proceedings.

(2) Issuing an Order. After service of the notice, the court will enter an order prescribing the procedure to be followed or directing any other action deemed appropriate.

⁴ *Dodson v. Department of the Army*, 988 F.2d 1199, 1208 (Fed. Cir. 1993); *Thomas v. United States*, 217 F.3d 854 (Fed. Cir. 1999) (unpublished); and *Stein v. United States*, 121 Fed. Cl. 248, 268 (2015).

⁵ "Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States." 10 U.S.C. § 1552(a)(4).

⁶ *King v. United States*, 65 Fed. Cl. 385,394 (2005) (citing *Biddle v. United States*, 186 Ct. Cl. 87, 98 (1968) (agency may reconsider a decision only "in the absence of a controlling statute or regulation to the contrary")).

⁷ *Id.* at 399 (citing *Gratehouse v. United States*, 512 F.2d 1104, 1109, 206 Ct. Cl. 288 (1975) ("What is a short and reasonable time period will vary with each case, but absent unusual circumstances, the time period would be

The applicant also argued that the JAG's request does not meet the requirements for an Interpretation under 33 C.F.R. § 52.73 because no clarification is necessary since the Board's order clearly stated that his record would ("shall") be corrected to show that he "has continued to serve on active duty" and that he would "be reinstated on active duty as an E-7 and assigned to a billet in accordance with the needs of the Service but after consulting him about his preferences." The applicant noted that this relief fell within the Board's authority under the 10 U.S.C. § 1552,⁸ and argued that this relief was also appropriate under the constructive service doctrine⁹ because "[b]ut for the wrongful discharge, [he] would have continued to serve in the Coast Guard until his retirement as there was no limitation imposed on his service or re-enlistment opportunities." He argued that because the Board ordered him "to be reinstated to active duty as if he had never been discharged, he is entitled to pay and allowances to the present under the constructive service doctrine."

The applicant also argued that the Board's order is clear and does not require interpretation. He argued that in filing its RCFC 52.2 Notice, the Coast Guard showed that it understood the order in accordance with the applicant's own interpretation because the JAG advised the Court that the Personnel Service Center was "is working on" identifying billets to which he could be assigned. The applicant noted that based on this submission and the applicant's own, the Court had dismissed the case. He argued that the JAG's attempt to use 33 C.F.R. § 52.73 to "clarify" the Board's order in the Decision on Remand is both disingenuous because there is "nothing unclear about the Order" and contrary to the previous agreement the Coast Guard reported to the United States Court of Federal Claims." The applicant argued that the Coast Guard "waived its opportunity to challenge the BCMR Order when it filed its Rule 52.2 Notice concurring with the relief ordered and *assuring* [him] and the Court that the Coast Guard was actively implementing the BCMR-directed reinstatement of [the applicant] to active duty by seeking an appropriate billet in order to induce [him] and the Court to dismiss the case."

Regarding the JAG's claim that the Board may not have been aware that the applicant's enlistment had expired when it issued the order, the applicant noted that the applicant's entire personnel file, including his six-year reenlistment contract dated January 29, 2007, was among the case files available to the Board. Therefore, the applicant argued, the Board was on notice that his enlistment had expired when it issued the Decision on Remand. The applicant concluded that there is no legal basis for the Board to reconsider its order.

measured in weeks, not years."); *Bentley v. United States*, 3 Cl. Ct. 403, 406 (1983) (eleven-month time lapse between decision and reversal held clearly unreasonable)).

⁸ *Dodson v. Dep't of the Army*, 988 F.2d 1199, 1208 (Fed. Cir 1993) (citing *Yee v. United States*, 512 F.2d 1383, 1387, 206 Ct. Cl. 388 (1975); see also *Caddington v. United States*, 178 F. Supp. 604, 607 147 Ct. Cl. 629 (1959) ("We feel that the Secretary and his boards have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief.")).

⁹ Under the constructive service doctrine, "military personnel who were illegally or improperly separated from service are deemed to have continued in active service until their legal separation." *Barnick v. United States*, 5913d 1372, 1379 (Fed. Cir. 2010).

DISCUSSION

1. The Board has jurisdiction over this matter pursuant to 10 U.S.C. § 1552 and 33 C.F.R. §52.73.

2. The record shows that this Interpretation is necessary because the applicant and the Coast Guard have disagreed on the meaning of the Board's order. Although the applicant called the Coast Guard's request disingenuous because of language in its RCFC 52.2 Notice, the record shows that the applicant is interpreting the Board's order to include relief not stated in the order, which would therefore fall under the prohibition, "No other relief is granted."

3. The record shows that in issuing the Decision on Remand, the Board intended to obey the Court's order to the letter by voiding the applicant's improper discharge dated March 1, 2012, retroactively reinstating the applicant on active duty, awarding him "all back pay and allowances he is owed as a result of the expungement of his discharge," and directing other actions that the Board thought were or might be required to carry out the Court's instructions. The Board did not include any dates in its order and did not direct payment through or to "the present." Both the Court's language relying on *Martinez* and the Military Pay Act—"money in the form of the pay that the plaintiff would have received but for the unlawful discharge"¹⁰—and the Board's order—"all back pay and allowances he is owed as a result of the expungement of his discharge" show that the applicant was awarded what he was legally entitled to receive from his date of discharge through the end of this then-current enlistment contract,¹¹ which was January 28, 2013. In this regard, the Board notes that the Court has long held that an applicant is entitled to "nothing more than placement in the same position he would have been had no error been made."¹²

4. The applicant argues that under the Court's and Board's orders, he is also entitled to retention, which would require a new reenlistment contract beginning on January 29, 2013, and to back pay and allowances up to the present day pursuant to this new reenlistment. However, neither the Court nor the Board found that the applicant was entitled to reenlistment, directed the applicant's reenlistment, or required payment of back pay and allowances pursuant to a backdated reenlistment contract.¹³ The Court stated that the applicant was entitled to "reinstatement as an incident to the award of monetary relief," which would be reinstatement on

¹⁰ *Rogers* at 776-77

¹¹ *Dodson v. Department of the Army*, 988 F.2d 1199, 1208 (Fed. Cir. 1993); *Thomas v. United States*, 217 F.3d 854 (Fed. Cir. 1999) (unpublished); and *Stein v. United States*, 121 Fed. Cl. 248, 268 (2015).

¹² *Denton v. United States*, 204 Ct. Cl. 188, 199-200, *cert. denied*, 421 U.S. 963 (1975), *cited in Bliss v. Johnson*, 279 F. Supp. 2d 29, 35 (D.D.C. 2003); *see Kimmel v. United States*, 196 Ct. Cl. 579, 591 (1971) ("The injustice was removed by placing plaintiff in the same position he would have been had no error been made. This was all that plaintiff was entitled to receive."); *Hamrick v. United States*, 120 Ct. Cl. 17, 25, 96 F. Supp. 940, 943 (1951) (holding that "full correction of the error would require plaintiff's being put in the same position he would be in had the erroneous determination not been made"), *cited in Ramsey v. United States*, 123 Ct. Cl. 504, 506 (1952), *cert. denied*, 345 U.S. 994 (1953).

¹³ *Dodson*, 988 F.2d at 1208 (finding that the decision of whether to reenlist a member is "properly for the Army, not the court"). The Board notes that making a determination of whether the applicant would have been offered a reenlistment contract in January 2013 had he not been improperly discharged in 2012 is beyond the Board's authority to interpret its prior order under 33 C.F.R. § 52.73.

active duty (constructive service credit) for the period he was owed back pay and allowances— i.e., through the end of his then-current enlistment contract. The Board can find no language in the Decision on Remand showing that the Board found that the applicant was due more relief than what was required by the Court.

5. The applicant relies on the fact that the Board included in its order the instruction to assign the applicant to a billet pursuant to his retroactive reinstatement. Assigning the applicant to a billet and reimbursing his and his dependents' medical and dental expenses (the second and fourth bullets) are parts of the order not expressly required by the Court and so are presumably ancillary actions that the Board thought were or might be "required to carry out the Court's instructions" as the Court mandated. Although the applicant argues that the direction to assign him a billet pursuant to his retroactive reinstatement after consulting him also entitles him to a new reenlistment contract, the Board disagrees. As noted above, the Court and the Board directed the Coast Guard to void his discharge and retroactively reinstate him on active duty "as an incident to the award of monetary relief" but did not require the Coast Guard to also offer the applicant a new reenlistment contract, and the Board specified that no other relief was granted.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The Coast Guard shall forthwith implement the Board's order in the Decision on Remand consistent with this Interpretation. If because of their dispute over the interpretation of the Board's order, the applicant failed to submit the medical or dental expenses he incurred on behalf of himself or his legal dependents for reimbursement within six months as provided in the Board's order, the applicant shall do so within six months of this Interpretation.

May 5, 2017

