

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2000-018

FINAL DECISION ON RECONSIDERATION

Attorney Advisor:

This proceeding for reconsideration has been conducted under the provisions of 33 C.F.R. § 52.67. The original proceeding in this case, BCMR Docket No. 1998-103, was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. A final decision in the original proceeding, which denied relief, was issued by the Board on May 6, 1999. The application for reconsideration was docketed on July 11, 2000.

This final decision on reconsideration, dated May 3, 2001, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a former xxxxxxxxx in the Coast Guard, asked the Board to reconsider his request to be paid for his two last weeks as an officer in the Coast Guard, xxxxxxx, 1996. The applicant stated that, although he could understand why the Board denied his request for retirement in the original proceeding, he could not understand why he would be denied pay and allowances for his two last weeks on active duty. He alleged that he was not actually processed for discharge until Monday, xxxxxxxx, 1996.

SUMMARY OF ORIGINAL PROCEEDING

In BCMR Docket No. 1998-103, the applicant alleged that in June 1996, when his discharge was pending due to his failures of selection for promotion, he requested an evaluation of his back injury by a medical board. As a result, his

discharge was delayed while he was referred for a physical examination and underwent surgery. On August 22, 1996, his command received orders stating that his separation date was postponed to October 1, 1996. However, on August 29, 1996, he was found fit for duty (and therefore fit for separation) even though, he alleged, he was still disabled by his back condition. The applicant alleged that after his discharge, the Department of Veterans' Affairs (DVA) awarded him a 30 percent disability rating as of his date of discharge.

At 2:00 p.m., EDT, on Friday, xxxxxxxx, 1996, the Coast Guard Personnel Command (CGPC) issued orders to the applicant's command canceling the August 22, 1996, orders and retroactively discharging him as of xxxxxxxx, 1996. The applicant alleged that these retroactive orders were illegal and unjust. He alleged that he was administratively processed for discharge on Monday, xxxxxx, 1996, but his discharge was backdated as ordered by CGPC, so he was not paid for his final two weeks on active duty. His DD 214 indicates that he was discharged on xxxxxxxx, 1996. It also states that he refused to sign it. He alleged that if he had served on active duty until October 1, 1996, his 18th active duty anniversary, as provided by the extension orders issued on August 22, 1996, he would have been entitled to remain on active duty until he could retire upon completion of 20 years of military service. He also alleged that he should have been retired under the Temporary Early Retirement Act (TERA) since he met all the qualifications.

The applicant alleged that the Coast Guard had treated him unjustly by (a) refusing to process him for a medical retirement due to his disability; (b) discharging him before October 1, 1996, while his medical condition was still unstable and thereby denying him the chance to continue serving until he could earn a 20-year retirement; and (c) issuing retroactive discharge orders that denied him pay and allowances for his last two weeks on active duty.

The applicant asked the Board to correct his record by (a) returning him to active duty (with all back pay and allowances) so that he could be evaluated by a medical board and medically retired if found physically disqualified for active duty and, if not, retained on active duty until he could retire upon completing 20 years of active duty; (b) directly awarding him a medical retirement with a 30 percent disability rating as of xxxxxxxx, and back pay and allowances; or (c) retiring him under TERA as of xxxxxxxx, 1996, with back pay and allowances.

On March 19, 1999, the Chief Counsel recommended that the Board deny the applicant's original application. He alleged that the Coast Guard committed no errors in processing the applicant for discharge. He alleged that the applicant was not entitled to military pay between xxxxxxxx, 1996, because he had begun working for the Coast Guard as a civilian on xxxxxxxx, 1996, and was not in a

terminal leave status as a military member of the Coast Guard.¹ Therefore, he alleged, the applicant's xxxxxxxxx, 1996, date of discharge is correct, and under 5 U.S.C. § 5533, he could not receive both military and civilian pay for those two weeks.

The Chief Counsel also argued that the applicant was not entitled to evaluation by a medical board prior to his discharge because he was found fit for duty on August 29, 1996, and he has presented no evidence indicating that he was unfit to perform his duties at the time of his discharge. He argued that the DVA's disability rating is immaterial because the Coast Guard's physical disability system "is designed to compensate members whose military service is terminated due to a service connected disability." *See Lord v. United States*, 2 Ct. Cl. 749, 754 (1983). Because the applicant was fit for duty and was being discharged for failure of selection rather than for any medical reason, the Chief Counsel alleged, he was not entitled to evaluation by a medical board under Article 2.C.2.a. of the Physical Disability Evaluation System (PDES) Manual.

Finally, the Chief Counsel argued that the applicant was not entitled to retirement under TERA. He stated that TERA was a downsizing tool Congress provided the military services to separate members who would otherwise be retained on active duty for 20 years. He stated that absolutely nobody was entitled to a TERA separation because the statute left it to the discretion of the military services to determine whether and whom to offer early retirement. Because the applicant was already slated for discharge due to his failures of selection, the Chief Counsel argued, early retirement under TERA would have been contrary to the purpose of the act.

The applicant responded to the Chief Counsel's recommendation on April 5, 1999. He pointed out that the Chief Counsel admitted that the Coast Guard had issued retroactive discharge orders but cited no authority permitting such action. He repeated his allegation that the Coast Guard cannot issue retroactive discharge orders and that therefore his status from xxxx to xxxx, 1996, must either have been active duty or terminal leave. He argued that regardless of whether he was considered to be on active duty or on terminal leave, he is owed pay and allowances for that period. Furthermore, he argued that his actual status was terminal leave because he filled out the paperwork for it on XXXXX, 1996, at Coast Guard Headquarters. On terminal leave, he alleged, he was entitled to accept pay as a civilian government employee under 5 U.S.C. § 5534a.

In addition, the applicant argued that the Secretary was required to implement TERA and that 14 U.S.C. § 283 requires an officer who has failed of

¹ Terminal leave is leave taken immediately prior to official separation from the service.

selection twice to be retired if retirement is available under any existing law. Therefore, he argued, because he was qualified for retirement under TERA, the Coast Guard was required to grant him a TERA retirement. The applicant also repeated his allegations that he should have been evaluated by a medical board.

On May 6, 1999, the Board denied the applicant's request based on the following three substantive findings:

5. The Coast Guard followed all proper procedures for processing this applicant for discharge. The Chief Counsel concluded that applicant was not entitled to a medical board under the physical disability evaluation system. The applicant failed to present any medical evidence to demonstrate that his separation physical was incorrect. The Chief Counsel stated that the applicant has failed to provide evidence that he was not fit for duty at the time of separation.

6. The applicant is not entitled to any back pay for the period xxxxxx, 1996 because he was not working as a member of the active duty military during that period.

7. The applicant was not entitled to TERA retirement. The TERA statutes did not create individual entitlements or mandate procedures; no person in the CG was entitled to be retired under TERA merely by meeting TERA's minimum criteria. The decision as to who was entitled to TERA was entirely within the CG's discretion to determine eligibility for TERA retirement. Since this discretion was properly exercised, the applicant has no cause for relief.

APPLICANT'S NEW ALLEGATIONS

The applicant alleged that the Board committed a legal error in its final decision for the original proceeding. He alleged that the Board ignored the fact that he was on terminal leave from xxxxx to xxxxxx, 1996, and that the law allows members on terminal leave to receive pay for both time spent on terminal leave and civilian government work. 5 U.S.C. § 5534a. He alleged that he completed the paperwork for taking terminal leave and began his civilian job as soon as he heard that he had been found fit for duty. He alleged that he did not receive the retroactive discharge orders from his command until Monday, xxxxxxx, 1996.

The applicant further alleged that because he had disagreed with the retroactive discharge orders and refused to sign his DD 214, he was denied transition benefits: three months of medical benefits and two years' use of military facilities. He asked the Board to reconsider its decision and award him back pay

and allowances, including the transition benefits he was denied because he would not accept the illegally retroactive discharge orders.

VIEWS OF THE COAST GUARD

On January 11, 2001, the Chief Counsel of the Coast Guard recommended that the Board grant relief “based on the equities presented in the case.” He recommended that the Board correct the applicant’s record to show that he was discharged on xxxxxxxxxx, 1996; that he served 17 years, 11 months, and 18 days on active duty; and that he is entitled to back pay and transition benefits.

The Chief Counsel alleged that the applicant failed to prove that the Coast Guard committed error by discharging him retroactively. However, he admitted that the Coast Guard committed an injustice by retroactively discharging the applicant after his command had already authorized him to begin terminal leave pending his expected discharge on September 30, 1996. *See generally* 14 U.S.C. § 283. He argued that “[n]otwithstanding the Coast Guard’s authority to discharge Applicant effective xxxxxxxx 1996, the record shows Applicant believed he was scheduled for separation effective 30 September 1996 and had managed his terminal leave accordingly.” He alleged that while members are not necessarily entitled to use the terminal leave in lieu of a lump sum payment, “it was entirely reasonable for Applicant to manage his annual leave as he did.”

The Chief Counsel agreed with the applicant that under 5 U.S.C. § 5534a, a military officer in a terminal leave status may receive compensation both as a military officer and as a civilian employee of the Coast Guard. Therefore, he argued, since the applicant was in an approved terminal leave status from xxxxxxxx through xx, 1996, while performing his civilian job for the Coast Guard, he was entitled to receive the dual compensation.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 12, 2001, the Chairman sent the applicant a copy of the Chief Counsel’s advisory opinion and invited him to respond within 15 days. On February 28, 2001, the Board received his response. He stated that “[i]f their intent is for me to receive pay and allowances for the time in question, and that the transition benefits available in 1996 be granted to myself and my dependents, I have no objections.” He also asked the Board to consider using “constant dollars” or current pay scales in determining any monetary award.

APPLICABLE LAWS

Under 14 U.S.C. § 283, each lieutenant on active duty who fails of selection for promotion to lieutenant commander twice shall:

- (1) be honorably discharged on June 30 of the promotion year in which his second failure of selection occurs; or ...
- (3) if, on the date specified for his discharge in this section, he has completed at least 20 years of active service or is eligible for retirement under any law, be retired on that date; or
- (4) if, on the date specified for his discharge in clause (1), he has completed at least eighteen years of active service, be retained on active duty and retired on the last day of the month in which he completes twenty years of active service, unless earlier removed under another provision of law.

Under 10 U.S.C. § 1168, a “member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative.” Under 10 U.S.C. § 101, the Coast Guard is included in the term “armed force.” A member of an armed force who has not been discharged is still on active duty. *Garrett v. United States*, 625 F.2d 712 (La. Ct. App.), *cert. denied*, 450 U.S. 918 (1980).

Various electronic searches for words and phrases such as “retroactive” and “discharge orders” in all of the Coast Guard’s manuals and instructions revealed no regulation authorizing or prohibiting retroactive discharge orders. However, Chapter 2.F. of the Coast Guard Pay Manual (COMDTINST 7220.29) provides the following:

F. Termination of Active Duty Pay. Active duty pay is terminated upon separation or change in status. Credit active duty pay and allowances through the appropriate date as indicated below:

• • •

3. Resignation, Discharge, or Dismissal. The date shown as official date of separation in official notice or date officer receives official notice if no official date of separation is shown except:

a. Discharge orders do not of themselves relieve the Government of its obligation to an officer. The officer must have received actual or constructive notice by the effective date, unless the officer willfully avoids notice of separation. If an officer is kept in service without fault, in ignorance of an order of dismissal, entitlement to all salaries and benefits of the office continue (27 Comp Dec 13).

b. If held in service under orders after the date shown in separation orders, an officer is entitled to pay if there is nothing in the record showing nonentitlement (27 Comp Dec 15).

Under 5 U.S.C. § 5534a, an officer "who is on terminal leave pending separation from, or release from active duty in, that service under honorable conditions may accept a civilian office or position in the Government of the United States, ... and he is entitled to receive the pay of that office or position in addition to pay and allowances from the uniformed service for the unexpired portion of the terminal leave."

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 over this matter pursuant to 10 U.S.C. § 1552 and 33 C.F.R. § 52.67. The application for reconsideration was timely.

2. The applicant has proved by a preponderance of the evidence that on xxxxxx, 1996, the Coast Guard issued illegal and unjust orders retroactively discharging him as of xxxxxxxxxx, 1996. Under 10 U.S.C. § 1168, he could not be retroactively discharged as of xxxxxxxx, 1996, because his discharge papers were not ready for delivery on that date. *See Desjardins v. Department of the Navy*, 815 F. Supp. 96, 98 (E.D.N.Y. 1993); *Garrett v. United States*, 625 F.2d 712, 713 (5th Cir. 1980), *cert. denied*, 450 U.S. 918 (1981) (holding that under 10 U.S.C. § 1168, the plaintiffs remained on active duty until their discharge papers were ready for delivery). However, the applicant has not proved that the Coast Guard erred in canceling the remainder of the extension granted on August 22, 1996, since he had been found fit for duty.

3. The applicant signed a sworn statement alleging that, although the order to cancel his extension and discharge him was issued by CGPC on Friday, xxxxxxxxxx, 1996, he was not processed for discharge until Monday, xxxxxxxx, 1996. The Coast Guard did not deny this allegation or offer any contrary evidence, and the orders indicate that they were issued at 2:00 p.m. on the Friday. Therefore, the Board finds that the applicant has proved by a preponderance of the evidence that his discharge papers were not ready for delivery to him until Monday, xxxxxxxx, 1996.

4. The applicant has proved by a preponderance of the evidence that his DD 214 is in error because it states that he was discharged on xxxxxxxx, 1996,

having performed a total of 17 years, 11 months, and 5 days on active duty. In fact, under 10 U.S.C. § 1168, he was discharged on xxxxxxxxxx, 1996, having performed 17 years, 11 months, and 21 days on active duty, because that was the day his discharge papers were ready for delivery.

5. The applicant alleged and the Chief Counsel admitted that the applicant's command had approved his request for terminal leave during the period in question. Therefore, even though he was paid as a civilian for his work during that period, he was entitled to military pay and allowances for the same period under 5 U.S.C. § 5534a.

6. Even if retroactive discharges were legal, the applicant would be owed pay and allowances for the two weeks in question because he was given no notice of his discharge prior to receiving the orders sometime after they were issued on Friday, xxxxxxxxxx, 1996. Coast Guard Pay Manual (COMDTINST 7220.29), Chapter 2.F.3.; cf. *Willingham v. United States*, 35 Fed. Cl. 633, 647 (1996) (citing a previous holding in *Wilkinson v. United States*, 27 Fed. Cl. 180, 181 (1992), that a service member is not entitled to additional pay simply because he has not yet received a discharge certificate if he was aware of and on notice of discharge). There is no evidence in the record indicating that he had notice of his discharge prior to xxxxxxxxxx, 1996.

7. Given the illegally retroactive discharge awarded him on xxxxxx, 1996, the Board finds that the applicant reasonably refused to sign the DD 214 as presented. As a result of his refusal, he was not issued a transition benefits card and did not receive those benefits. The Board finds that the applicant has proved by a preponderance of the evidence that he was unjustly denied transition benefits. In addition, the Board believes that the notation on his DD 214 indicating that he refused to sign it may be prejudicial and should be corrected.

8. It is not clear to the Board that the applicant would have been entitled to remain on active duty until he qualified for a 20-year retirement even if he had served on active duty until October 1, 1996. Under 14 U.S.C. § 283 (a)(1) and (a)(4), he would have to have completed 18 years of active service by June 30, 1996, to be entitled to remain on active duty for 20 years. On June 30, 1996, the applicant had served approximately 17 years and 9 months on active duty.

9. Accordingly, relief should be granted.

ORDER

The application of former XXXXXXXXXXXX, USCG, for correction of his military record is granted as follows:

- His DD 214 and any other applicable military records shall be corrected to show that he was discharged on xxxxxxxxxxxx, 1996.
- Specifically, the separation date shown in block 12.b. of his DD 214 shall be xxxxxxxxx, 1996. The net active service shown in block 12.c. and the total prior active service shown in block 12.d. on his DD 214 shall be adjusted accordingly.
- His records shall be corrected to show that he was on approved terminal leave after xxxxxxxxxxx, 1996. The number of days of “accrued leave paid” shown in block 16 of his DD 214 shall be adjusted in accordance with this correction as necessary.
- The notation “MBR REFUSED TO SIGN.” in block 21 of his DD 214 shall be corrected to show that he did not refuse but was unavailable to sign the DD 214.
- The Coast Guard shall pay the applicant any back pay and allowances he is due as a result of this correction. In addition, the Coast Guard shall issue the applicant a transition benefits card so that he and his family may receive, beginning as of the date he receives the card, the same benefits he would have received had he signed his DD 214 when it was first issued.

