

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

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2003-003

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. It was docketed on October 21, 2002, upon the BCMR's receipt of the applicant's complete application for correction of his military record.

This final decision dated September 25, 2003, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a Reserve officer, asked the Board to correct his record to show that he was entitled to one-half separation pay under DOD (Department of Defense) Financial Management regulation, Vol. 7A, CH 35,¹ upon his release from active duty on March 30, 2001.

The applicant, a prior enlisted member, was appointed a lieutenant junior grade (LTJG) in the Coast Guard Reserve. On March 31, 199X, he was called to extended active duty for a period of four years. In furtherance of his call to active duty, he and the Coast Guard entered into an active duty agreement covering the four-year period, which included the following pertinent terms:

¹ According to Vol. 7A, CH 35 of the DOD Financial Management Regulation, in order for a member of the Army, Air Force, Navy or Marine Corps to be entitled to one-half separation pay, the member must have been involuntarily separated from active duty; must have served on active duty for either five or six years, depending on the commencement date of active duty; must have been separated with an honorable or general discharge; must not have been discharged at his own request, and must have been separated involuntarily through either denial of reenlistment or denial of continuation on active duty or full-time National Guard Duty.

Section 350202B of this instruction states that a member separated from active duty during an initial term of enlistment or an initial period of obligated service is not eligible for separation pay. It further states that "[t]his limitation also applies to a member who desires to reenlist or continue at the conclusion of the initial term of enlistment or an initial period of obligation and is denied by the Military Service concerned."

2. INVOLUNTARY RELEASE FROM ACTIVE DUTY

(a) Contractor (the applicant) shall not be released from active duty involuntarily during the period herein specified:

(i) By reason of a reduction in numerical strength of the military personnel of the Armed Forces of the United States concerned unless his release is in accordance with the recommendation of a board of officers appointed by competent authority to determine the numbers to be released from active duty; or

(ii) for release other than [upon the expiration of the contract term] without an opportunity to be heard by a board of officers prior to such release, unless from active duty pursuant to sentence of a court-martial, unexplained absence without leave of three months, final conviction and sentence to confinement in a Federal or State penitentiary or correctional institution, or twice failing selection for promotion to the next higher grade.

(b) If [the applicant] is involuntarily released from active duty prior to the expiration of the period of service under this agreement (except when such release is pursuant to sentence of court martial, or unexplained absence without leave of three months duration, or final conviction and sentence to confinement in a Federal or State penitentiary or correctional institution, or when such release is due to a physical disability resulting from [the applicant's] intentional misconduct or willful neglect, or when [the applicant] is eligible for retirement pay or severance pay under any other provision of law, or when he is placed on a temporary disability retired list, or when he is released for the purpose of accepting an appointment or enlisting in a Regular component) he shall be entitled to receive an amount equal to one month's pay and allowance which he may otherwise be entitled to receive. Computation of amounts payable by reason of such termination of this agreement shall be based on the basic pay, special pay, and allowances to which the [applicant] is entitled at the time of his release from active duty. Fractions of a month less than fifteen days shall be disregarded and fifteen days or more shall be counted as one month.

The applicant's record indicates that he was honorably released from active duty into the Reserve on March 30, XXXX, by reason of completion of required service. He

alleged, however, that he was released from active duty on April 3, XXXX, after a medical board determined that he was not fit for duty due to a physical disability². He further alleged that his active duty contract was not eligible for extension because of the medical board finding that he was unfit for continued active duty.

An initial medical board (IMB) met in the applicant's case on February 22, XXXX, and found the applicant not fit for duty due to bilateral knee and patellar degenerative joint disease. The medical board indicated that the applicant's case should be referred to the Central Physical Evaluation Board (CPEB).

A CPEB was never convened in the applicant's case. A representative of the Commander, Coast Guard Personnel Command (CGPC), stated that the applicant was fit for separation in accordance with Article 2.C.2.b. of the Physical Disability Evaluation Manual (PDES). This provision states, in part, the following:

[The disability law] and this disability evaluation system [PDES] are not to be misused to bestow compensation benefits on those who are voluntarily or mandatorily retiring or separating [from the Coast Guard] and have theretofore drawn pay and allowances, received promotions, and continued on unlimited active duty status while tolerating physical impairments that have not actually precluded Coast Guard service.

Views of the Coast Guard

On March 31, 2003, the Board received an advisory opinion from the Chief Counsel of the Coast Guard recommending that the Board deny the applicant's request for relief.

The Chief Counsel stated that the applicant alleged that due to the "not fit for duty" finding by the IMB he was not eligible to remain on active duty, and that he should have been separated from the Coast Guard at the expiration of his active duty contract due to physical disability and given severance pay. He stated that the applicant's voluntary release from active duty was proper and made without error. In this regard, the Chief Counsel stated the following:

(1) . . . The sole basis for a physical disability determination in the Coast Guard is unfitness to perform duty . . . Article 2.C.2.a [of the PDES Manual]; 10 U.S.C. § 1201 . . . Coast Guard regulations interpret these statutes to prohibit use of this authority to bestow compensation benefits on those who are retiring or separating and have continued on unlimited active duty while tolerating impairments that have not actually precluded

² The advisory opinion explained that CGPC had ordered the applicant, who was on terminal leave at the time, discharged on April 3, 2001, but he was actually discharged by his unit on March 30, 2001, the expiration date of his active duty contract.

Coast Guard service. PDES Manual, Article 2.C.2.b. Continued performance of duty until a service member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty . . . Furthermore, this presumption may only be overcome if it is established by a preponderance of the evidence that : 1) the service member, because of disability, was physically unable to perform adequately in his assigned duties; or 2) acute, grave illness or injury, or other deterioration of the member's physical condition occurred immediately prior to or coincident with processing for separation or retirement for reasons other than physical disability which rendered the service member unfit for further duty. *Id.*, Article 2.C.2.b(1).

(2) Furthermore, service members being processed for separation or retirement for reason other than physical disability shall not be referred for disability evaluation unless their physical condition reasonably prompts doubt that they are fit to continue to perform adequately in their assigned duties. PDES Manual, Article 2.C.2.b(2). . .

(3) In the instant case, the applicant has not proved by a preponderance of the evidence that he was unable to fulfill his duties while on active duty prior to and coincident with his voluntary release from active duty. The record in the instant case shows that the Applicant performed his duties in a highly satisfactory manner during his active duty contract up to and including the time of his release from active duty. Therefore, there was no basis to evaluate Applicant under PDES for physical disability separation nor was there any legal basis to grant the applicant severance pay.

The Chief Counsel stated that absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith. *Arens v. United States*, 969 F.2d 1034, 1037 (D.C. Cir. 1992). He argued that the applicant has failed to rebut the presumption of regularity in this case.

A memorandum from the Commander, CGPC was attached to the advisory opinion as Enclosure (1). GCPC stated the following:

[T]he applicant was correctly separated due to his scheduled voluntary release from active service, which created a presumption of fitness for duty. The record indicates that at some point during his period of active duty, the applicant began to experience pain in his right knee when exercising. When seen by medical personnel, he was prescribed Motrin and other therapy, advised to take it easy, and returned to full duty status. There is no indication that the applicant was unable to perform his normal duties due to this condition. Approaching the termination of his active duty agreement, the applicant voluntarily requested an 18-month

extension in late December XXXX, which was approved on January 22, XXXX. In January he also returned to the [medical] clinic with complaints of recurring knee pain and requested an evaluation by orthopedic specialists. After being diagnosed with degenerative joint disease in his right knee on February 7, [XXXX] the applicant voluntarily requested that the authorization to extend for an 18-month period be cancelled. On February 13, his request [to cancel the 18-month extension] was granted .

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Applicant's Response to the Views of the Coast Guard

A copy of the views of the Coast Guard was mailed to the applicant on April 7, 2003, for a reply. The applicant did not submit a response to the views of the Coast Guard.

APPLICATION LAW AND REGULATION

Section 1174(c) of Title 10 of the United States Code states that a member of an armed force, other than a regular officer, and who has completed six or more, but less than 20 years of service immediately before release, is entitled to separation pay, as determined by the Secretary concerned, provided that the member was involuntarily released from active duty or not accepted for an additional tour of duty for which the member volunteered.

Article 10-I-3 of the Coast Guard Pay Manual (COMDTINST M7220.29A) states the following: "Involuntarily Released Defined. A Reservist is considered to be involuntarily released when a tour of AD (active duty) is completed, volunteers for an additional tour of duty, and the Coast Guard does not extend or accept the volunteer request for the additional tour of duty. This includes a Reserve member who is released upon reaching the mandatory age limitation of 60 years. A member whose request is denied for a period of additional duty of shorter duration than that permitted under applicable regulations is not to be regarded as having been involuntarily released. "

Article 10-J-1. of the Coast Guard Pay Manual states that active duty enlisted members and Reserve officers may be entitled to a lump sum of separation pay provided: "a. The member is involuntarily . . . discharged, separated, or released; or b. The member was not accepted for an additional tour of [active duty] for which the member volunteered."

Article 10-J-2 provides in part that members are not eligible for separation pay if "[t]he Reserve officer declines a regular appointment." In addition, Article 10-J-2.j. states that a reserve officer on the active duty list when discharged must have

completed six years of active duty prior to discharge, and an officer not on the active duty list must have had at least six years of continuous active duty prior to discharge to be eligible for separation pay.

FINDINGS AND CONCLUSIONS

The Board makes the following findings of fact and conclusions of law on the basis of the applicant's record and 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.

2. The applicant requested an oral hearing. The Chair, under section 52.31 of title 33, Code of Federal Regulations, recommended disposition on the merits without a hearing. The Board concurred in that recommendation.

3. The applicant is seeking one-half separation pay due to an alleged involuntary release from active duty rather than severance pay due to physical disability. The Board is persuaded in this finding by the fact that the applicant never mentions COMDTINST M1850.2C (Physical Disability and Evaluation Systems (PDES) Manual), which is the controlling regulation for such discharges from the Coast Guard. In addition, to obtain severance pay by reason of physical disability, the applicant must prove that he was unfit to perform the duties of his grade at the time of his release from active duty and either request to be discharged or retired from the Coast Guard by reason of that physical disability. He has requested neither a finding of unfitness for duty nor a physical disability discharge or retirement from the Coast Guard.

4. For the reasons discussed below, the applicant's assertion that he is entitled to "one-half separation pay per DOD Financial Management Regulation, Vol A, CH 35," because his active duty contract was not eligible for an extension due to a finding by a medical board that he was unfit for duty is without merit.

5. The DOD instruction is not binding in this case because the Coast Guard is not a part of the Department of Defense. Chapter 10 of the Coast Guard Pay Manual implements section 1174 of title 10 of the United States Code and therefore governs separation pay for Coast Guard members. Article 10-J-1 of the Pay Manual states that a Reserve officer may be entitled to separation pay if he is involuntarily released from active duty and was not accepted for an additional tour of duty for which the member volunteered. Further, Article 10-I-3 of the Pay Manual states that a Reservist is involuntarily released when a tour of active duty is completed and the Reservist volunteered for an additional tour of duty, which the Coast Guard declined to accept. The applicant, a Reserve officer, was not eligible for separation pay under the Coast Guard Pay Manual because he has not shown by a preponderance of the evidence that

his release from active duty was involuntary. The evidence in this case shows that the applicant had completed his active duty contract to term and he did not volunteer for an additional tour of duty, which the Coast Guard declined to accept.

6. In this regard, CGPC stated that in December XXXX the applicant requested an 18-month extension of his active duty contract, which was approved in January XXXX. According to CGPC, after the applicant was diagnosed with degenerative joint disease in February XXXX, the applicant voluntarily requested cancellation of the 18-month extension, which CGPC approved on February 18, XXXX. The applicant has not rebutted this assertion and has presented nothing to show that his request for cancellation of the 18-month extension was anything other than a voluntary act. Therefore, under the Coast Guard Pay Manual, the applicant's release from active duty was voluntary and separation pay is not authorized. The Board will not speculate about any actions the Coast Guard may have taken if the applicant had not requested the cancellation of the approved 18-month extension.

7. The applicant cannot use the fact that a medical board determined that he was unfit for active duty to establish entitlement to non-disability separation pay. The eligibility requirements for disability severance and non-disability separation pay are separate and distinct and governed by different regulations.

8. Chapter 61 of title 10 of the United States Code and COMDTINST M1850.2C are the bases for obtaining a discharge or retirement from the Coast Guard due to physical disability. If the applicant's contention is that he was unfit for duty at the time of his release from active duty and should have been processed through the Physical Disability Evaluation System, he should file a new application with the Board presenting those allegations. As stated above, we do not interpret his current request as one for a physical disability discharge or retirement from the Coast Guard.

9. Under the circumstances presented here, we find that the applicant is not entitled to separation pay because his release from the active duty Coast Guard was voluntary. He has not established an error or injustice on the part of the Coast Guard in releasing him from active duty without separation pay.

10. Accordingly, the applicant's request for relief should be denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxx, USCGR, for the correction of his military record is denied.

