

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2000-32

FINAL DECISION

██████████ Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14, United States Code. It was docketed on December 13, 1999, upon receipt of the applicant's complete application for correction of his military record.

This final decision in this case, dated November 30, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant is an ██████████ pay grade E-6) in the Coast Guard Reserve currently serving a period of temporary active duty (TEMAC). On January 15, 1998, the applicant began a two-year period of active duty pursuant to an active duty agreement (EAD). The Coast Guard terminated the active duty agreement on March 11, 1998. Subsequently, on March 12, 1998, the applicant began one of several periods of TEMAC. He has served on active duty since that time without a break in service.

The applicant asks the Board to reinstate the active duty contract and return him to active duty so that he can complete the 1 year, 10 months, and 7 days of service time remaining on that contract, to begin when his current period of TEMAC ends on April 1, 2001.

SUMMARY OF RECORD AND SUBMISSIONS

Background

In July 1997, the Commandant issued ALDIST 163/97 soliciting volunteers from the Ready Reserve to serve on extended active duty (EAD) for a period of one to three years to fill billets as ██████████. The applicant applied for such a contract.

In August 1997, the Commander of the Coast Guard Personnel Command (CGPC), released a message authorizing a two year EAD contract for the applicant. On November 15, 1997, the applicant entered into an active duty agreement with the Coast Guard to serve a two year period of active duty from January 15, 1998 to January 14,

2000. The message directed that, upon acceptance, the applicant be transferred to [REDACTED]

The applicant stated that he was unfairly released from "[Extended Active Duty on March 11, 1998] because [he] had a family registered with the Coast Guard Special Needs Program." The applicant stated that pursuant to COMDTINST 1754.7A, Para. 4, it was mandatory that he enroll his family in the program. This provision of the Instruction states that "[e]nrollment in this program is required for all active duty members with family members with special needs." He alleged that his command violated para. 6.c. of COMDTINST 1754.7A when it insisted that his EAD contract be terminated because he was registered in the special needs program. Para. 6.c. states that "[a]ctive duty member shall not be adversely affected in their selection for promotion, schools or assignment due to their enrollment in this program."

The applicant stated that in a conversation with the regimental commander, LCDR B., in February 1998, he was allegedly told that any service member who had a family with special needs could not work for her because that member could not provide her with the 125% effort she required of her personnel. He stated that the LCDR told him that she was personally canceling his EAD contract and that he would be released from active duty as soon as possible.

The applicant stated that his commanding officer (CO) did not know why he was being released from active duty. Later the CO endorsed the applicant's request to remain on active duty as an instructor. This request was not approved by CGPC. The applicant stated that after his conversations with the LCDR and the CO, a message was issued ordering his release from active duty. There was no explanation for his release in the message, but it stated as follows: "In view of information provided this office by [telephone conversation between LCDR B. and LCDR O. on 5 Feb 98] release [the applicant] to inactive duty in COGARD Reserve on 7 Mar 1998."

On July 29, 1998, the applicant wrote CGPC complaining that the Coast Guard had involuntarily released him from active duty without an opportunity to be heard by a board of officers and without being paid severance pay pursuant to his EAD. He informed CGPC that it was probably too late for the board of officers, but he would like to have the severance pay. The EAD contract stated in pertinent part, as follows:

(a) The member may be released from active duty involuntarily during the period specified herein;

(i) If the member is involuntarily released by reason of a reduction in numerical strength of the military personnel of the United States Coast Guard, the member's release shall be in accordance with the recommendation of a board of officers appointed by competent authority to determine the numbers to be released from active duty.

(ii) For a release other than that described in paragraph (i) above, the member shall not be involuntarily released without an opportunity to be heard by a board of officers prior to such release unless being released

from active duty pursuant to sentencing of a court-martial, unexplained absence without leave for at least three months, final conviction and sentence to confinement in a Federal or State Penitentiary or correctional institution.

(b) If a member is involuntarily released from active duty prior to the expiration of the period of service under this Agreement . . . [t]he member shall be entitled to receive an amount equal to one month's pay and allowances multiplied by the number of years (including any pro rata part thereof) remaining as the unexpired period of this Agreement for active duty, such amount to be in addition to any pay and allowance he/she may otherwise be entitled to receive.

On December 9, 1998, LCDR O. responded to the applicant's letter on behalf of CGPC. She informed the applicant that his request for the severance pay was denied. She told the applicant that it had been determined that due to his personal circumstances he could not fulfill the demands required of a recruit company commander and he was released from active duty on March 11, 1998. She further informed the applicant that on "12 March 1998, you reported to temporary active duty (TEMAC) at Maintenance and Logistics Command Atlantic . . . As such, you have remained on active duty without a break from active duty service."

Views of the Coast Guard

On June 27, 2000, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. The Chief Counsel recommended that the Board grant alternative relief by ordering that the applicant receive the severance pay as described in the EAD contract because he was involuntarily removed from active duty prior to the expiration of the agreement. In recommending alternative relief, the Chief Counsel stated the following:

Applicant has failed to prove he was disenrolled from [REDACTED] and released from his EAD contract in violation of the Coast Guard Special Needs program. Nor has he proved it was an abuse of discretion to disenroll him from [REDACTED]. However, the record reflects it was error to involuntarily release Applicant from EAD contract without first being afforded a hearing in front of a board of officers. While the record reflects applicant was manifestly not qualified to serve as a [REDACTED] it nevertheless cannot be said with certainty he would have been involuntarily released from his EAD contract by a properly constituted board of officers. In this particular case, the Coast Guard violated its contract with Applicant. The Coast Guard presently does not have need of Applicant's rating, thus his request that his EAD contract be reinstated should be denied. The common law remedy in cases of contract violation is normally money damages. Applicant's request, specific performance, is not applicable in this case. Therefore, he should be granted alternative

relief, to wit, he should be granted liquidated damages in accordance with ... his EAD contract.

The Chief Counsel stated that the applicant presented virtually no evidence in support of his allegation that he was disenrolled from [REDACTED] because he enrolled his family in the special needs program. The Chief Counsel stated that to the contrary, the applicant's military record suggests that his superiors were concerned with his potential physical limitations, his military appearance and bearing, and his adherence to integrity standards.¹ The Chief Counsel stated that while LCDR B. (the applicant's regimental commander) "listed Applicant's three special needs children as a 'concern' about Applicant's ability to serve as a [REDACTED] there is no evidence he was disenrolled and released from his EAD contract simply because he enrolled them in the Special Needs Program."

The Chief Counsel stated that the Coast Guard does not have to disprove the applicant's allegations, but that the applicant has the burden of proving his claim. He further 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). According to the Chief Counsel, the evidence in this case indicates that the applicant was physically not ready to assume the duties of a [REDACTED]

In recommending alternative relief for the applicant, the Chief Counsel stated that the Coast Guard, in involuntarily discharging the applicant without a board of officers, violated its EAD contract with the applicant. Therefore, the applicant is entitled to the monetary relief called for in the contract. The Chief Counsel further stated that compelling the Coast Guard to reinstate the contract would work a hardship on the service, as there is presently no need for Applicant's particular rating or expertise.

Applicant's Response

On September 18, 2000, the Board received the applicant's response to the views of the Coast Guard.

The applicant stated that the Coast Guard apparently relied on the following administrative remarks (page 7) entry, (that the applicant acknowledged and signed) to reach the conclusion that he was "manifestly not qualified to serve as a Recruit Company Commander: "

16Jan98: On this date, you were weighed and you are in compliance with your maximum allowable weight/body fat standard. Your measurements are: Height: 75", Wrist Size: 7", and 221 lbs. Your age is 41 and your percent body fat is: 25%. In accordance with COMDTINST M1020.8c, you are assigned a maximum allowable weight for screening

¹ The applicant's military record does not contain any entries expressing concern about his physical limitations or integrity standards.

² Id.

purposes of 221 lbs. Should you exceed this maximum allowable weight in the future, you will be required to complete a body fat determination. By signature below, you acknowledge both this entry and that you have been afforded the opportunity to review COMDTINST M1020.8c.

The applicant claimed that this page 7 entry is the type that would be entered into a record by the commanding officer (CO) for any enlisted man who exceeds the maximum allowable weight. COMDTINST M1020.8c. He further stated that he was weighed by two female YNs who refused to allow him to be weighed in his underwear as permitted for by note 2. in the instruction. He also stated that his height and wrist size were rounded down, despite chapter 3, paragraph A of the instruction that states that "wrist measurements taken at the beginning of a service member's career is to be used unless a weight screening is failed." The applicant stated that he has always been in compliance with weight standards. He asked that the alleged erroneous page 7 entry be removed from his record.

The applicant offered entries from his medical record to rebut the Chief Counsel's assertion that the regimental commander was concerned with the applicant's potential physical limitation to perform the duty of [REDACTED]. The entries stated that the applicant was fit for full duty.

The applicant stated that he received a mark of 4 in military bearing in January 1997 and March 1999, which is the standard to be qualified for promotion to E-7. He argued that the CO, [REDACTED] must have been satisfied that he was in compliance with weight standards and with his military bearing because the CO recommended that the applicant continue on his EAD contract as an instructor. The applicant stated that later the CO recommended him for TEMAC after CGPC's refusal to continue his EAD contract.

The applicant stated that, contrary to the Chief Counsel's argument that the active duty Coast Guard does not have a current need for [REDACTED] the Commandant, in the Fall of 1997, projected a shortfall of [REDACTED] due to a rate structure change that was due to become effective January 1, 1998. He further argued that the Coast Guard has not been able to maintain enough [REDACTED] personnel to meet its need as evidenced by listing the [REDACTED] rating for a selective reenlistment bonus (SRB) on ALDISTS 206/98 and 290/98. He stated, moreover, that the [REDACTED] rating is included on the current open rates list.

In response to the Chief Counsel's statement that there were concerns about his integrity, the applicant asked why he was not informed or counseled about them. He stated that there are no negative page 7 entries in his record on this subject and he has a secret security clearance.

Regarding the Coast Guard's statement that "[a]pplicant's superiors did not know he had enrolled in the Special Needs Program prior to his removal from his EAD contract," the applicant offered documents from the Special Needs Program showing contact between that unit and LCDR B., the applicant's regimental commander, on January 27, 1998.

On the issue of whether the applicant had proved an abuse of discretion or error by the Coast Guard in canceling his EAD contract, the applicant provided the following:

The U. S. Supreme Court made it easier to prove discrimination in its recent decision in Reeves v. Anderson Plumbing Product, Inc., No. 99-536, June 12, 2000. Justice O'Connor, writing for a unanimous Court, states, "once the employer's justification (for adverse action) has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision."

The applicant also asked to have a DD Form 214 issued for the period of active duty he served under the EAD contract. He stated that the yeoman told him that a DD Form 214 was not necessary since he had been on active duty less than 90 days.

APPLICABLE REGULATIONS

Para. B. of Chapter 5 of COMDTINST M1020.8C (Allowable Weight Standards for the Health and Well-Being of Coast Guard Military Personnel) provides the following:

The unit commanding officer shall prepare the following administrative Remarks (CG-3307), with a copy of this entry maintained in the member's unit PDR, for each officer and enlisted who exceed the maximum allowable weight of enclosure (2), but who is in compliance with the body fat standards of enclosure (3). Commanding officers and officers in charge of units below the Group level will provide the necessary information to the Group who will prepare CG-3307s for subordinate units.

Date: On this date, you were weighed and you are in compliance with your maximum allowable weight/body fat standard. Your measurements are: Height: ____ (inches), Wrist Size: ____ (inches), Weight ____ (pounds). Your age is ____ and your percent body fat is: _____. In accordance with COMDTINST M1020.8c, you are assigned a maximum allowable weight for screening purposes of ____ pounds. Should you exceed this maximum allowable weight in the future, you will be required to complete a body fat determination. By signature below, you acknowledge both this entry and that you have been afforded the opportunity to review COMDTINST M1020.8c

Enclosure (2) to COMDTINST M1020.8C lists the maximum allowable weight for a male, like the applicant, who is 75 inches tall with a 7 inch wrist at 218 pounds. Note 2 to the enclosure states: "Maximum allowable weight of member wearing only underwear/undergarments." Enclosure (3) lists the maximum body fat percentages for a male age 40 or more at 25%.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction over this matter pursuant to section 1552 of title 10, United States Code. The application is timely.

2. The Chairman has recommended disposition of the case without a hearing. 33 CFR § 52.31. The Board concurs in that recommendation.

3. The Coast Guard concedes, and the Board finds, that it committed an error by terminating the applicant's EAD contract without first giving him a hearing before a board of officers. The applicant's EAD contract stated that the applicant "shall not be involuntarily released without an opportunity to be heard by a board of officers prior to such release." Since the Chief Counsel has admitted that the Coast Guard erred in terminating the applicant's EAD contract without giving him a board of officers, it is not necessary for the Board to reach the merits on the reasons for the termination. Therefore, the main issue before the Board is the remedy, if any, to be provided to the applicant.

4. The day after the effective termination of the applicant's EAD contract, he began a period of temporary active duty. He has served various periods of temporary active duty without a break in service, since March 12, 1998.

5. As noted the Coast Guard violated its agreement with the applicant by not giving him a hearing before a board of officers before terminating his EAD contract. Although it appears that the Coast Guard terminated the contract without any regard for the applicant, the Board finds that he had not suffered harm because of the violation. In reaching this conclusion, the Board notes that the applicant has been permitted to serve on active duty continuously since March 12, 1998, suffering no break in service at the termination of his EAD contract. He has not alleged that he is receiving less pay and allowances than he would have received under the active duty contract.

6. The applicant lost his assignment as a [REDACTED] with the termination of the EAD contract, but the contract does not specify the nature of his work. Therefore, the Board does not find the assignment to duty as a [REDACTED] to be a term of the EAD contract.

7. The Coast Guard recommended that the applicant receive the severance pay called for in the contract. However, the Board finds that the applicant is not entitled to severance pay because he has continued on active duty with no break in service. In 56 Comp. Gen 587, the Comptroller General ruled that "Army Reserve officers involuntarily separated from active duty, with readjustment payments computed under 10 USC 687 . . . whose military records are subsequently corrected to show

continuation on active duty, are liable to repay such readjustment payments to the United States." Applying the reasoning of that decision to the facts of this case, the Board finds that the applicant can not have both severance pay and active duty pay, particularly covering the same period of time. As stated above, the applicant has been on continuous active duty since the termination of the EAD contract. Therefore, severance pay in this case is not appropriate.

8. The Board will not, as requested, reinstate the EAD contract, which expired on January 14, 2000, and allow the applicant to complete the approximately one year and nine months he had remaining at the time the Coast Guard terminated the contract. Although the Coast Guard terminated the applicant's EAD contract on March 11, 1998, he began a period of TEMAC on March 12, 1998 and has served continually on active duty from that time. The manner in which the Coast Guard terminated the EAD contract is unfortunate, but it has mitigated damages in this case by allowing the applicant to continue to serve on active duty. Therefore, the Board finds that while the Coast Guard erred in terminating the applicant's EAD contract, the applicant has failed to show that he has been harmed by the error.

9. Although the applicant's request for removal of the page 7 entry about his weight was not raised in his original application to the Board, the Coast Guard indirectly made it a matter of contention by arguing that the applicant was not physically fit to perform the duties of [REDACTED]. The Board will not order the page 7 entry removed because the applicant has not submitted sufficient evidence to establish that it is erroneous.

10. With respect to the applicant's complaint that he did not receive a DD Form 214 upon the termination of EAD contract, he should ask to have this period of active duty included on the DD Form 214 he will receive upon his release from TEMAC.

11. The Board finds that under the circumstances of this case no correction to the applicant's military record is warranted.

12. Accordingly, this application should be denied.

ORDER

The application of [REDACTED] USCGR, for
correction of his military record is denied.

