

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

Application for Correction
of Coast Guard Record of:

BCMR Docket, No. 1998-103

FINAL DECISION

██████████ Chairman:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on August 5, 1998, upon the BCMR's receipt of the applicant's request for correction of his military record.

The final decision, dated May 6, 1999, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S STATUS AND REQUEST FOR RELIEF

The applicant enlisted in the Coast Guard (CG) in 1978. In ██████████ he graduated from officer candidate school. Thereafter, he served as a commissioned officer until ██████████. On ██████████ he was honorably discharged from the Coast Guard.

At the time of his discharge, the applicant had served on active duty 12 days short of 18 years. He alleged that if he had remained on active duty for 18 years, he would have been eligible for retirement benefits.

The applicant alleged that he sustained an injury to his back which he alleged was not due to any misconduct on his part. He alleged that "[h]e was seriously injured and disabled from fully performing his military duties." According to the applicant, the CG refused to evaluate his disability prior to September 15, 1995. "[T]he Coast Guard [allegedly] refused to properly evaluate Petitioner. . . However, the Coast Guard was well aware of his medical condition and his resulting disability."

On October 11, 1995, the applicant's early retirement request under TERA (Temporary Early Retirement Act) was denied. The applicant's length of service allegedly qualified him for TERA retirement, but the CG exercised its discretion to not grant retirement. The CG said that he was simply discharged, not retired.

On October 30, 1995, the applicant was notified that he was to be discharged on June 30, 1996, due to non-selection for promotion to lieutenant commander (LCDR). Effective June 3, 1996, he accepted a position as a [REDACTED]

On June 12, 1996, the applicant's medical officer requested that his discharge be postponed pending medical consideration. The applicant had requested an initial medical board because of an injury to his back, but on June 17, 1996, his request for an initial medical board was disapproved.

On August 31, 1996, the applicant was discharged with a separation code of "JGB." This separation code signified an involuntary discharge with respect to an officer who was not selected for permanent promotion. It does not include disability, failed medical standards, or comparable medical conditions.

The applicant asked for medical evaluation by the Coast Guard. His medical condition should, in the applicant's judgment, be evaluated by the CPEB (Central Physical Evaluation Board) and, perhaps, by a FPEB (Formal Physical Evaluation Board). The requests were denied.

The applicant was discharged, but he was discharged for non-selection for promotion to LCDR rather than for a physical condition, as he had alleged. The Applicant was not entitled to a medical board evaluation under the physical disability evaluation system "because an individual is not an authorized convening authority, and thus may not request such an evaluation on his own behalf."

The applicant also asked for other relief. He alleged he should be paid all back pay and allowances, active duty pay, accrued leave, and medical expenses including medical insurance premiums. He asked that he be retired if he is found to be physically qualified from further active duty, given an opportunity to participate in the Survivors Benefit Plan, and have his DD-214 corrected.

VIEWS OF THE COAST GUARD

On March 1, 1999, the BCMR received the recommendations of the Chief Counsel of the Coast Guard as to this application. The Chief Counsel said that the applicant should be denied relief because he has not provided evidence of error or injustice.

The following points were made by the Chief Counsel:

The applicant had asked for authority to retire under TERA. The request was denied, on October 11, 1995, on the ground that an applicant does not have a right to retirement. The retirement eligibility determination is entirely within the discretion of the Coast Guard.

The applicant has not provided evidence of any error or injustice. A Coast Guard LT who has failed of selection for promotion to LCDR for the second time could be retired if the applicant is eligible for retirement under any law. According to the Chief Counsel, the applicant was not eligible for retirement under any law, including TERA.

The Coast Guard TERA statutes do not create entitlements that are not provided by statute. "No person in the Coast Guard was 'entitled' to be retired under TERA merely by meeting TERA's minimum criteria."

The Chief Counsel said that the Board should deny relief in this case for lack of merit and proof. The Chief Counsel said that the CG followed proper procedures in processing the applicant for discharge.

The Chief Counsel found that the applicant was properly "discharged from the Coast Guard due to non-selection for promotion for [LCDR], not for a physical condition as he alleges." The Chief Counsel and the CGPC also found that the applicant was not entitled to a medical board under the physical disability evaluation system [PDES].

The Chief Counsel also said that the applicant was not entitled to any back pay for the period of September 1 to 15, 1996. The CGPC was within its authority to order that the applicant be separated effective 9/1/96 "via its 13 September 1996 message." The applicant did not establish that the Coast Guard committed any error or injustice.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 1, 1999, the Board sent a copy of the advisory opinion of the Coast Guard to the applicant, with a request for comments, if appropriate. On April 5, 1999, the Board received the applicant's response to the advisory opinion of the Coast Guard.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction to determine the issues in this proceeding under section 1552 of title 10, United States Code.

2. The application was timely, under Detweiler v. Peña, 38 F.3d 591 (1994).

3. The applicant requested an oral hearing. The Chairman, pursuant to § 52.31 of the Board's rules, recommended disposition on the merits without a hearing. The Board concurred.

4. The applicant twice failed of selection for promotion to LCDR, and he was notified that he would be honorably discharged from the Coast Guard not later than June 30 of the promotion year in which the second failure of selection occurs, under Article 12.A. 13.d. of the Coast Guard Personnel Manual.

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 September 1 - 15, 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.

8. The applicant did not show error or injustice, and his application for correction should be denied.

-[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application to correct the military record of [REDACTED]
[REDACTED] USCG is denied.

