

DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction  
of Coast Guard Record of:

BCMR Docket  
No. 1999-098

FINAL DECISION

Chairman:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was received by the BCMR on April 26, 1999, and it was docketed upon receipt of the applicant's military records on August 23, 1999.

The final decision, dated June 29, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant asked the Board to change his separation status from discharged to retired. He alleged that the Coast Guard committed error or injustice in denying him the right to retire under Temporary Early Retirement Authority (TERA).

The applicant was honorably discharged from the Coast Guard on June 30, 1996, after being denied retirement under TERA.

APPLICANT'S ALLEGATIONS

The applicant alleged that he met all the requirements for early retirement under TERA. He asserted that the Coast Guard discriminated against him in denying his request while approving the requests of other officers with less active duty service.

He alleged that the Coast Guard applied the TERA statute<sup>1</sup> arbitrarily and violated his "statutory ... and contractual retirement rights and expectations and was inconsistent with an existing published Coast Guard Personnel Policy regarding prioritization of personnel."

He further alleged that by "denying [the applicant's] request for retirement

<sup>1</sup> Public Laws 103-337 and 102-484 (see note following 10 U.S.C. § 1293) Oct. 5, 1994.

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under TERA, while granting TERA retirements to others also meeting the specified eligibility criteria (but some having lessor seniority), the Coast Guard committed an injustice that should be corrected" by the BCMR.

He alleged that the Coast Guard should not be permitted to deny TERA benefits "at whim or with deliberate discriminatory intent." TERA was intended, he said, to "provide a benefit to hard working military personnel." The applicant said he should have qualified under a "correct and uniform application of the law."

The applicant said that he was entitled to TERA benefits because he had 17 years and 9 months of active duty service, which was more than enough. When the Coast Guard implemented the TERA statute, "it made 15 years of service the benchmark for eligibility."

The applicant also alleged that the Coast Guard should turn over to the BCMR certain materials which the applicant had requested of it under the Freedom of Information Act (FOIA), and which the Service refused to turn over to him. The applicant said this material would substantiate his claim "that the denial of his request for TERA benefits is entirely arbitrary."

The applicant also argued that 14 U.S.C. § 286 provides that Coast Guard lieutenants continued on active duty for 2 to 4 years shall, on the completion of such a term, "be honorably discharged with severance pay ... or, if eligible for retirement under any law, be retired." The applicant said TERA was "any law" and the "wording of the statute is such as to provide that retirement is the required result, once eligibility is established."

### VIEWS OF THE COAST GUARD

On March 18, 2000, the Acting Commander of the Coast Guard Personnel Command (CGPC) issued "Program Input" on this case. CGPC's conclusion: "Grant no relief."

On March 28, 2000, the Chief Counsel of the Coast Guard adopted the CGPC analysis and stated that CGPC's views and the additional comments of the Chief Counsel are the Advisory Opinion of the Coast Guard on this case. The Chief Counsel recommended that the Board deny any relief.

The Coast Guard said that Congress had granted it broad discretion to manage its workforce by offering members early retirement. The purpose of the legislation, he said, was to give this Service a "force management tool" to effect the "drawdown" of military forces. According to the Coast Guard, it is completely within the discretion of the Coast Guard whether to use TERA to reduce force size and how it should be used. The sole criterion for granting early retirements under TERA "was the achievement of force reductions consistent with the needs of the Coast Guard." The Coast Guard said that "[n]either the TERA statute, nor the implementing policy, provide any member an

entitlement or a 'right' to an early retirement."

CGPC stated that the applicant was passed over two times for promotion and would normally have been discharged under 14 USC § 283(a). He entered into a four-year continuation agreement instead, which afforded him the benefit of being considered by four additional LCDR promotion boards. He was non-selected for promotion to LCDR each year until he was discharged with 17 years 9 months active service. CGPC distinguished cases where retirement under TERA was granted by stating that these lieutenants had served over 18 years of service or had been twice non-selected.

According to the Coast Guard, the TERA statute was intended to be a Coast Guard tool to achieve force reductions rather than a benefit for members who are needed on active duty at a time of personnel shortages. "TERA was designed to provide incentive for officers who were not scheduled for discharge to opt out of the Service."

The Chief Counsel said that the Commandant had the discretionary authority to deny the applicant TERA retirement benefits. Its purpose, as enunciated by the Congress, was to provide the Coast Guard with a "force management tool with which to effect the drawdown of military forces." It was a matter entirely within the discretion of the Coast Guard whether to use it at all or whether to use it in a limited or broad fashion. Greek v. United States, 44 Ct. Cl. 43, 44 (1999). "It is up to the respective Secretaries to determine whether this early retirement is necessary in order to meet desired force levels." *Id.*

The Coast Guard emphasized that the TERA statutes did not create individual entitlements or mandate procedures, which means that the applicant has no cause for relief by the BCMR. The Coast Guard documented this proposition as follows:

The lieutenants who were permitted to retire under TERA were not arbitrarily selected. A panel was held on February 7, 1996 to recommend officers to be retired under TERA. The panel selected the number of applicants needed to meet its drawdown goals.

See, e.g. United States v. Caceres, 440 U.S. 741 (1979) and its progeny (Violation of an agency regulation generally only provides a cause for relief where the rule was mandated by the Constitution or federal law or the violation contravened some constitutional right); Cort v. Ash, 422 U.S. 66, 78 (1975)(establishing a 4-part test for whether a statute creates a private right of action); in particular, neither Government agents, nor the BCMR, can create entitlements that are not provided by statute. See, e.g. Montilla v. United States, 457 F.2d 978, 986-987 (Ct. Cl. 1972)(government was not required to pay military retirement benefits despite his reasonable reliance on incorrect statements of Army officials, and BCMRs have no authority to provide such relief); See, generally

Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) and its progeny. Therefore, the Coast Guard acted properly and objectively in denying Applicant TERA retirement benefits.

The Coast Guard denied the applicant's claim that it acted arbitrarily and capriciously, and it denied the implication that it played favorites. These allegations are plainly contrary to the presumption that Coast Guard officials acted correctly, lawfully, and in good faith. The Coast Guard gave reasoned explanations for providing TERA benefits to specified members whom the applicant mentioned.

Selections for TERA retirement were made according to Coast Guard criteria. For example, members who would have served 18 years upon expiration of their lieutenant continuation agreements were permitted to retire because an "18-year lock" provision was about to be approved. Another special policy dealt with twice non-selected lieutenants. That policy called for discharge upon expiration of their continuation agreements, unless they had reached 18 years. The applicant did not complete 18 years and was twice non-selected, so he was discharged with severance pay as per Coast Guard policy.

CGPC said that TERA did not provide "authority to retire members of the Coast Guard whose retirement would not contribute to a realizable reduction in the size of the active duty force." CGPC said that the "manifest intent of TERA excluded Applicant from the general language of [14 USC § 283(b)], which refers to retirement eligibility 'under any other law.'"

#### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On April 3, 2000, the Board sent the applicant a copy of the views of the Coast Guard in this case. It invited the applicant to comment on these views within 15 days from the date of that notice.

On June 2, 2000, the applicant submitted his response to the Coast Guard's views. He said that Coast Guard policies do not require denial of TERA benefits. He repeated his allegations that priority should be given to officers like himself "who have the most active service."

The applicant said that the manifest intent of TERA was not to deny benefits to those who had expiring continuation agreements. He said that the Coast Guard was wrong in asserting that TERA did not authorize the Coast Guard to retire members "whose retirement would not contribute to a reduction in the size of the active duty force." The applicant asserted that he was entitled to TERA benefits and should now be retired, not discharged.

The applicant also repeated his appeal of the denial of a FOIA request. He called the Coast Guard response "insulting as well as absurd."

### APPLICABLE REGULATION

ALCOAST 007/96, dated January 1996, sets forth the provisions governing TERA. The pertinent provisions of the ALCOAST are as follows:

1. . . . This year we implemented two voluntary programs: an early out program and a waiver of the two year time-in-grade requirement for retirement. CGPC has received many applications for these two programs; however they are not enough to meet our workforce reduction targets. To help meet our workforce targets, we now offer TERA, a voluntary program allowing military personnel the opportunity to retire with 15 to 19 years of active duty service.

2. This ALCOAST solicits applications for early retirement from officer and enlisted members who:

A. have completed at least 15 years of active duty prior to the requested retirement date.

B. have served at least 1 year in their current assignment as of the requested retirement date and have at least at least 10 years of active commissioned service. . .

3. Applicants for early retirement must apply via message to Commander, CG Personnel Command . . . via their Commanding Officer. Applications must be received by GGPC NLT Feb 96. Service need will determine whether individual applications for early retirement are accepted. . .

### 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. The application was timely.

2. 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.

3. The applicant asked the Board to change his separation from discharge to early retirement under TERA on the ground that he had met all the requirements for this program.

4. He could not have met all the requirements of TERA. The purpose of TERA was to provide a force management tool to effect the drawdown of military forces. The Congress granted the Coast Guard broad discretion to manage its workforce by

offering members early retirement. Thus, neither the TERA statute nor the implementing policy provide any member "an entitlement or a 'right' to an early retirement."

5. The applicant has not proved that the Coast Guard committed an error or an injustice with respect to how his application for early retirement was considered. The selections were made according to Coast Guard criteria, such as members who would have served 18 years upon expiration of their lieutenant continuation agreement; and a special policy with respect to twice non-selected lieutenants. The latter policy called for discharge upon expiration of the applicable continuation agreement, unless they had reached 18 years of service. The applicant did not complete 18 years and was twice non-selected, so he was discharged with severance pay rather than retired under TERA.

6. A panel was held on February 7, 1996 to recommend officers to be retired under TERA. The panel calculated the number of applicants needed to meet its drawdown goals and selected them in accordance with Coast Guard policies.

7. A primary purpose of TERA was to retire officers who would otherwise remain on active duty. Because the applicant was already slated for discharge due to his failures of selection, awarding him a TERA retirement would not have reduced the total number of officers on active duty.

8. The applicant alleged that the Coast Guard illegally denied a request for information he requested under FOIA. However, he did not prove that any such request was illegally denied, nor did he indicate how the information he had requested under FOIA would have proved any of his allegations in this case.

9. Accordingly, the application for correction should be denied.

**ORDER AND SIGNATURES ON FOLLOWING PAGE**

ORDER

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

