DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 1999-132

FINAL DECISION

[redacted] **Attorney-Advisor:**

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The BCMR docketed the case on July 28, 1999, upon receipt of the applicant's completed application, including his military records.

This final decision, dated May 18, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a lieutenant (LT; pay grade O-3) now retired from the Coast Guard, asked the Board to correct his record to show that he was retired upon completion of 20 years of active duty, instead of retiring under Temporary Retirement Authority (TERA) after just 18 years, 8 months, and 17 days of active duty. In addition, he asked to receive all back pay and allowances he would be due as a result of the correction.

SUMMARY OF THE RECORD AND THE APPLICANT'S ALLEGATIONS

The applicant alleged that his TERA retirement was unjust; instead, he should have been retired upon completion of 20 years of active duty, as he had been promised.

The applicant enlisted in the Coast Guard on September 14, 1977. On February 9, 1978, he was appointed an ensign in the Coast Guard Reserve. In November 1979, he was promoted to the rank of lieutenant junior grade and received a permanent commission in the regular Coast Guard. In July 1983, he was promoted to lieutenant. After being passed over for promotion to the rank of lieutenant commander in 1988 and 1989, the applicant was slated for discharge in June 1990.

In 1990, however, the BCMR found that three of the applicant's officer evaluation reports (OERs), covering his performance as the engineering officer for the cutter *Valient* from May 28, 1986, to May 10, 1987, were inaccurate and unjust. Therefore, the BCMR ordered these OERs removed from his record and replaced with OERs marked "For Continuity Purposes Only." The BCMR also removed his failures of selection so that he could be reconsidered for promotion to lieutenant commander.

In 1990 and 1991, the applicant again failed of selection for promotion. The applicant alleged that these failures were caused by the hole in his record created by the continuity OERs and by his 1983 date of rank. Although not selecting him for promotion, the 1991 selection board recommended that he be offered a four-year active duty continuation contract. On September 11, 1991, the Commandant sent him a letter containing the following provisions:

> 1. ... [U]nder the provisions of Section 283(b) [of 14 U.S.C.], the Secretary has approved the recommendation of the Board that you be continued on active duty in the grade of lieutenant for a period of 4 years commencing 1 July 1992.
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> 2. While you are continued as a lieutenant, you remain eligible for consideration for promotion to lieutenant commander. Since you will complete more than 18 years of active service by the end of the continuation period, you will be retained on active duty and retired on the last day of the month in which you complete twenty years of active service, in accordance with Section 283(a)(4) [of 14 U.S.C.]. If you do not desire to be continued, you will be honorably discharged with severance pay on 30 June 1992, or you may request discharge at an earlier date without loss of benefits.
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> 3. ... When making this decision, you should know that two of the officers selected for promotion this year had been previously continued. In addition, three officers were selected for their second period of continuation and now will have an opportunity to earn an active duty retirement. ... I am sure that you [will] make the choice that enables you to pursue your professional and personal goals.

On October 21, 1991, the applicant accepted continuation on an active duty contract in lieu of discharge. The "Extension Election Form" he signed included the following terms:

> 1. I elect to be continued on active duty for a period of 4 years as a lieutenant. I understand that:
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> a. Acceptance of this continuation incurs an obligation to remain on active duty for at least 2 years.
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> b. While I am on active duty, I remain eligible for consideration for promotion to lieutenant commander.
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> c. If I am not selected for promotion by a future board, I will be eligible for further consideration for continuation as a lieutenant as long as I have not completed over 18 years of active duty.
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> d. If I am not selected for promotion by a future board, and I will complete over 18 years of active duty by 30 June 1996, I will be retained until I

> complete twenty years of active service. I may, however, request to be discharged with severance pay.
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> e. If I am not selected for promotion by a future board, and I will complete 20 years of active duty by 30 June 1996, I will be retired on the last day of the month in which such service is completed.

In light of these promises and terms, the applicant alleged, he expected to be retained on active duty until he could retire with 20 years of service because he would have completed over 18 years of service by the time his four-year active duty continuation contract expired on June 30, 1996. Therefore, he accepted continuation and began serving under his four-year contract on July 1, 1992. However, on September 13, 1993, he received a letter from the Coast Guard's Officer Personnel Division with the following information:

> 1. We have recently been informed that a section of [the Commandant's letter dated September 11, 1991] regarding your status under the lieutenant continuation provisions of [14 U.S.C. § 283] is incorrect. We had erroneously informed you that if you reached 18 years of service under your current agreement that you would be retained on active duty until the last day of the month in which you complete 20 years of active service. [14 U.S.C. § 283(b)], the statute authorizing the Coast Guard to continue lieutenants who would otherwise be discharged under [14 U.S.C. § 283(a)] due to being twice non-selected for lieutenant commander, does not contain any authority to continue officers beyond the end of their agreements.
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> 2. Your current agreement expires on 30 June 1996. The law currently requires that you be discharged with severance pay[1] at that time unless selected for lieutenant commander or a subsequent lieutenant continuation board [sic]. We are currently pursuing a legislative change to [14 U.S.C. § 283] which would provide for retention beyond 18 years, until retirement eligible. However, we have no certainty that the proposed change will be approved by Congress or that it will be approved before your current agreement expires. We regret the uncertainty that this places you in and are willing to reconsider your obligated service under your current agreement if you so desire.
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> 3. We apologize for our original error and assure you we are doing everything possible to ensure we can legally retain you on active duty until you are eligible for retirement. ...

On October 23, 1993, the applicant responded with a letter stating that he had considered the Commandant's letter and the Extension Election Form a binding agreement. He further stated that, because retirement traditionally "vests" after 18 years of active service, he had no reason to suspect the information was wrong, and he had made significant life and career decisions based on the expectation of a 20-year service retirement. The applicant asked that his continuation contract be extended to permit him to retire with 20 years of service.

On November 3, 1993, the Coast Guard Personnel Command (CGPC) denied the applicant's request for a one-year extension of his contract. CGPC stated that active duty contracts could only be extended by board action. In

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[1] The Coast Guard stated that the applicant's severance pay if he had been discharged on June 30, 1996, would have been one lump-sum payment of approximately $86,000.

addition, CGPC stated that the proposed legislative remedy had been submitted to the Commandant but could be approved by Congress no earlier than November 1994 and perhaps as late as December 1995. CGPC further stated that

> we are as concerned as you are with making this situation right. In addition to the personal anxiety being caused to you and the other officers affected, the credibility of other officer accession programs could be at stake. Even if the requested legislation is not approved in time to resolve your status, we have several alternative plans under consideration. They are all considerably more legally complicated and at this point it is premature to pursue them further. We will keep you advised of any changes to your status ....

The applicant chose to continue serving under his active duty contract, but he was never selected for promotion to lieutenant commander. The Coast Guard's legislative change proposal (LCP) to fix its mistake was not enacted in 1994 or 1995. In the mid 1990s, the Coast Guard began downsizing, and no further lieutenant continuation contracts were offered until 1998.

On January 16, 1996, the Commandant issued ALCOAST 007/96, which implemented TERA. TERA permitted members with more than 15 years of active duty service to retire. However, retirement pay was "reduced by 1/12 percent for each month short of 240 months (so years)."[2] TERA retirees were to receive the same non-pay benefits as regular retirees. The same day, the Military Personnel Command sent the applicant an e-mail message recommending that he apply for early retirement under TERA. The e-mail stated that "it's not as we promised, i.e., a 20-year retirement, but I'd take the "r" word [retirement] over the "d" word [discharge] anytime. Ongoing discussions will ensue re: undoing an approved TERA retirement in the event the LCP gets approved ... more to follow." The applicant applied and was approved for a TERA retirement.

On March 26, 1996, the applicant requested to be recalled to active duty after his TERA retirement so that he could complete 20 years on active duty. On June 11, 1996, the same officer at the Military Personnel Command who had previously mentioned "undoing" an approved TERA retirement responded to this request by stating that "[a]pproval of a recall request immediately following an 'early' retirement would be a total contradiction to the intent of TERA and would constitute an egregious misuse of government funds."

On May 3, 1996, the Commandant issued the applicant's retirement orders but advised him that, if the LCP was enacted before June 30, 1996, he would be allowed to remain on active duty until he had completed 20 years of active service. On June 30, 1996, the applicant was retired under TERA having completed

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[2] Normally, retirement pay was calculated at 2.5% of the member's base pay times the number of years served on active duty. Example: 0.025 x $47,000 x 20 years = $23,500 per year. Retiring with 18 years, 8 months, and 17 days of active service under TERA, the same member would receive approximately $20,870 per year [(0.025 x $47,000 x 18 years) minus 1.33% of that amount (1/12 times 16 months)]. The Coast Guard stated that retiring under TERA reduced the applicant's retirement pay from 50% of his base pay to 44.4%.

18 years, 8 months, and 17 days on active duty.[3] The LCP was finally enacted four months later, in October 1996.

The applicant alleged that it was an injustice for the Coast Guard to renege on its promise to retain him for 20 years, especially since officers of the other armed services and officers of the Coast Guard Reserve would have been so retained. The Senate Report on the LCP stated the following:

> There are currently 31 Coast Guard lieutenants on active duty under this section. Some of these officers will have served between 18 and 20 years of service by the end of their current continuation agreements. At present, the law requires discharge upon expiration of an agreement, unless an officer is retirement eligible or again continued by board action. Under similar circumstances, officers in other armed services and Coast Guard Reserve officers are retained by operation of law. This section of the reported bill would amend section 283(b), conforming it to similar statutory provisions for other military personnel and allowing retention of lieutenants who have attained 18 or more years of service until they are eligible for retirement.

S. Rep. No. 104-160, 104th Cong., 1st Sess. (1995), 1996 USCCAN 4255.

Therefore, the applicant asked the Board to correct his record to show that he was retired with 20 years of active service and to order the Coast Guard to award him any back pay and allowances due as a result of the correction.

VIEWS OF THE COAST GUARD

On February 28, 2000, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request for relief.

The Chief Counsel stated that the Coast Guard "sincerely regrets the conceded erroneous advice the Applicant received and the unfortunate effects of that injustice. However, there is no legal basis to provide Applicant with the relief requested."

The Chief Counsel argued that the Board should deny relief due to lack of jurisdiction. He alleged that "the Board has no authority to supersede the pertinent statute. This conclusion is fully supported by a long line of case law that holds that equitable estoppel cannot negate a statutory requirement. If it could, agents of the Executive Branch who make statements concerning entitlements could effectively shift control over financial disbursements away from Congress, in contravention of the Appropriations Clause of the Constitution." The Chief Counsel stated that the following cases support this conclusion: *Utah Power & Light v. United States*, 243 U.S. 389, 409 (1917); *Montilla v. United States*, 457 F.2d

[3] The Coast Guard stated that in 1996 the applicant was one of four lieutenants serving on continuation contracts with more than 18 years of active service. All four were granted retirement under TERA. The Coast Guard alleged that many lieutenants serving on continuation contracts with less than 18 years of active service were denied TERA retirements and discharged with severance pay.

978 (Ct. Cl. 1971); *Goldberg v. Weinberger*, 546 F.2d 477 (2d Cir. 1976), *cert. denied sub nom. Goldberg v. Califano*, 431 U.S. 937 (1977). He further argued that even detrimental reliance on misinformation obtained from a seemingly authorized government agent does not excuse a failure to fulfill the requirements of a statute. *Goldberg*, 546 F.2d at 481.

While acknowledging that the Board has a statutory duty to remove injustices from members' records, the Chief Counsel argued that no relief is due in this case because the injustice suffered by the applicant does not "shock the senses." *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (Fed. Cir. 1991) (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976)). Moreover, the Chief Counsel argued, the Coast Guard did everything in its power to try to mitigate the situation by informing the applicant promptly upon discovery of the mistaken advice, attempting to enact the LCP prior to the end of his continuation contract, and approving the applicant's retirement under TERA. In fact, the Chief Counsel alleged, because the applicant was already slated for discharge, awarding him a TERA retirement was contrary to the law, which was intended to separate members who were not otherwise slated for separation for some time. The Chief Counsel further argued that whenever a benefit is enacted, "there is always going to be a group of personnel who just miss out on the benefits ... of new legislation, unless the legislation has retroactive provisions, which this did not."

Finally, the Chief Counsel argued that the Coast Guard has no authority to pay the applicant for 16 months of service he did not perform. However, he stated that "if the Board decided to grant partial relief, the Coast Guard recommends that Applicant be provided the opportunity to return to active duty to complete twenty (20) years of active service."[4]

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 29, 2000, the BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited him to respond. On March 13, 2000, the applicant responded.

The applicant argued that because the Coast Guard admits that it committed an injustice, he should be granted relief. He stated that the fact that three other lieutenants apparently suffered the same injustice should be immaterial to his case.[5] The applicant compared his case to that of the applicant in BCMR Docket No. 1999-150 and argued that the Board should grant relief in his case because "the misinformation here came from the Coast Guard and concerned a statute administered solely by the Coast Guard."

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[4] The Chief Counsel further stated that if the Board grants full or partial relief in this case, the same relief should be granted to the three other lieutenant's who were in the applicant's situation.

[5] The applicant pointed out that if those three lieutenants were also retired under TERA in 1996, the BCMR's three-year statute of limitations has expired on their claims.

The applicant also argued that the Board has (and often exercises) authority to order the Coast Guard to pay any sums due as a result of the correction of military records. Furthermore, the applicant alleged that if the Board granted relief by correcting his record to show that he was not retired until after he had completed 20 years of active service, he would not be owed any additional sums for back pay because during the 14 months from July 1, 1996, to October 1, 1997, his private salary and TERA retirement payment exceeded what he would have received on active duty.

Finally, in response to the Chief Counsel's remarks about the applicant returning to active duty, the applicant argued that "[m]aking relief contingent on [his] returning to active duty at this time is not only unnecessary in light of the Board's power to grant constructive credit, but also unfair and wasteful." The applicant pointed out that the Coast Guard repeatedly refused to permit him to continue on active duty to serve 20 full years in 1996 when it would have been appropriate. Now, he argued, since he has established a civilian career, returning to active duty for 16 months would be a great hardship. He also questioned whether his returning for 16 months of active duty would be of any benefit to the Coast Guard since normal duty tours for marine safety officers last four years.

APPLICABLE STATUTES

According to 10 U.S.C. § 1552(a)(1), "[t]he Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice."

According to 10 U.S.C. § 1552(c), "[t]he Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be."

When the applicant was retired on June 30, 1996, 14 U.S.C. § 283 included the following provisions:

> Sec. 283. Regular lieutenants; separation for failure of selection for promotion; continuation
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> (a) Each officer of the Regular Coast Guard appointed under section 211 of this title who is serving in the grade of lieutenant and who has failed of selection for promotion to the grade of lieutenant commander for the second time shall:
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> (1) be honorably discharged on June 30 of the promotion year in which his second failure of selection occurs; or
> (2) if he so requests, be honorably discharged at an earlier date without loss of benefits that would accrue if he were discharged on that date under clause (1); 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.
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> (b) When the needs of the service require, the Secretary may direct a selection board, which has been convened under section 251 of this title, to recommend for continuation on active duty for terms of not less than two nor more than four years a designated number of officers of the grade of lieutenant who would otherwise be discharged or retired under this section. When so directed, the board shall recommend for continuation on active duty those officers under consideration who are, in the opinion of the board, best qualified for continuation. Each officer so recommended may, with the approval of the Secretary, and notwithstanding subsection (a), be continued on active duty for the term recommended. Upon the completion of such a term he shall, unless selected for further continuation, be honorably discharged with severance pay computed under section 286 of this title, or, if eligible for retirement under any law, be retired.
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> (c) Each officer who has been continued on active duty under subsection (b) shall, unless earlier removed from active duty, be retired on the last day of the month in which he completes twenty years of active service.

In October 1996, 14 U.S.C. § 283 was amended by deleting the last sentence of § 283(b) and adding a second paragraph, which states the following:

> (b) (2) Upon the completion of a term under paragraph (1), an officer shall, unless selected for further continuation—
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> (A) except as provided in subparagraph (B), be honorably discharged with severance pay computed under section 286 of this title;
> (B) in the case of an officer who has completed at least 18 years of active service on the date of discharge under subparagraph (A), be retained on active duty and retired on the last day of the month in which the officer completes 20 years of active service, unless earlier removed under another provision of law; or
> (C) if, on the date specified for the officer's discharge under this section, the officer has completed at least 20 years of active service or is eligible for retirement under any law, be retired on that date.

FEDERAL CASE LAW

Montilla v. United States, 457 F.2d 978 (Ct. Cl. 1972).

Montilla was a World War II veteran who served in the Army Reserve after the war. Because he was negligent in informing the Army of a change of address, he did not learn for many years that between 1949 and 1952, he had been transferred to the Inactive Reserve. In 1952, he accepted an indefinite Active Reserve appointment. In 1953, Montilla received a letter telling him that he had completed 20 years of service creditable in the computation of basic pay and that therefore he should inform the Army about whether he wanted to elect a certain annuity benefit. The letter did not state that he had 20 years of service creditable in the computation of retirement pay, but Montilla assumed this was true. In 1955, Montilla was notified that he was to be assigned to an Inactive Reserve unit. He was concerned about the effect of this change on his retirement

eligibility and sought the advice of a Senior Army Advisor. He alleged that the advisor reviewed his record and told him that he did not need to be concerned because he had already completed 20 years in the Active Reserve. Upon reaching the age of 60, Montilla applied for retirement pay, but it was denied because he had never completed 20 years service in the Active Reserve. In 1966, he applied to the Army BCMR, which denied relief.

The U.S. Claims Court upheld the BCMR's decision. It concluded that, even if it assumed that Montilla's allegations concerning his conversation with the Army advisor were true, no relief was due. The Court quoted the following passage from *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947):

> Whatever the form in which government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rulemaking power. . . . Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents. *Id.* at 384-85.

***Goldberg v. Weinberger*, 546 F.2d 477 (2d Cir. 1976), *cert. denied sub nom. Goldberg v. Califano*, 431 U.S. 937 (1977).**

Goldberg was a widow receiving Social Security survivor's benefits when she considered remarrying and sought advice at a local Social Security office on how remarrying could affect her benefits. She was advised that the benefits would be reduced but not stop altogether. However, because Ms. Goldberg was under the age of 60 when she remarried, her survivor's benefits were stopped.

The Second Circuit upheld the Social Security Administration's refusal to pay the survivor benefits. It found that "[i]t is well established that 'estoppel cannot be set up against the Government on the basis of an unauthorized representation or act of an officer or employee who is without authority in his individual capacity to bind the Government.'" *Id.* at 481 (citations omitted).

***Reale v. United States*, 208 Ct. Cl. 949 (1976).**

Reale was an Air Force captain who was discharged in 1961 for dereliction of duty. In 1969, the court found his discharge to be illegal and void. Reale was awarded back pay and allowances, and the Air Force BCMR, on remand, corrected his record and retired him. Reale sued to be returned to active duty so that he could prove himself.

The court denied relief and found that the Air Force had committed no errors in implementing the court's 1969 decision. In the absence of error, the court characterized the BCMR's role thus:

> "Injustice", when not also 'error', is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal. *Yee v. United States*, 206 Ct. Cl. 388, 512 F.2d 1383 (1975). ... When [servicemembers] apply to Boards established under 10 U.S.C. § 1552, for correction of such "injustice", these Boards exercise high discretionary functions in the management of the military establishment.

PRIOR BCMR DECISION

In BCMR Docket No. 1997-194 and its reconsideration, BCMR Docket No. 1999-105, the applicant was an officer who had worked in the federal civil service for many years. In 1989, he retired from the civil service, began receiving retirement pay from the Civil Service Retirement System (CSRS), and began working on an active duty contract for the Coast Guard. While serving on active duty, he applied to join the Senior Executive Service (SES) and asked Coast Guard personnel specialists if his time on active duty in the Coast Guard would count toward his CSRS retirement if he left active duty and returned to civil service in the SES. The Coast Guard personnel specialist said it would but failed to inform him that he would have to work in the civil service for at least five years for his active duty time to be included in the calculation of his CSRS payment. The applicant was approved for SES service and began working for the Coast Guard as a civilian. However, he was never appointed to an SES position and left the civil service after just two years. Therefore, his time on active duty in the Coast Guard was not included in the calculation of his CSRS retirement payment. Moreover, while the applicant was in the civil service waiting for an SES appointment, he did not receive his CSRS payments. He asked the Board to correct his record to show that he had remained on active duty in the Coast Guard instead of returning to the civil service. He alleged that if this correction were made, the Office of Personnel Management (OPM) would award him the CSRS payments he had forgone during his last two years in the civil service.

The Board calculated that the applicant's return to the civil service cost him between $60,000 and $70,000, mostly in forgone CSRS payments. However, the Board denied the applicant relief. The Board made the following finding:

> In asking a specialist from the Coast Guard Civilian Personnel Branch to determine what effect such a move would have on his annuity, he was asking the Coast Guard to interpret OPM regulations for him. The Supreme Court has held that "[w]hatever the form in which government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947). Therefore, the Board finds that the Coast Guard's error in interpreting OPM's CSRS regulations did not constitute such an injustice as would justify granting the requested relief."

The applicant applied for and was granted reconsideration based on the recent decision in *Tippett v. United States*, 185 F.3d 1250 (Fed. Cir. 1999). However, the Board again denied relief in its final decision in BCMR Docket No. 1999-150. The Board found that the Coast Guard "should not be held liable for its

employees' unsuccessful attempts to explain another agency's rules, and the applicant should not have relied on such second-hand advice."

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 Chief Counsel of the Coast Guard argued that the BCMR should deny relief for lack of jurisdiction because "the Board has no authority to supersede the pertinent statute." The Coast Guard's argument about proper application of the statute raises a question of what relief the Board is authorized to order, not of the Board's jurisdiction. The applicant alleged that the TERA retirement shown in his record, in lieu of a 20-year retirement, constitutes an injustice. The BCMR statute expressly authorizes the Board to "remove an injustice" from a military record. 10 U.S.C. § 1552(a)(1). Therefore, the Board finds that it does have jurisdiction over this case. The application was timely.

2. In 1991, the Coast Guard incorrectly promised the applicant that, if he accepted a four-year active duty continuation contract, he would be able to remain on active duty until he could retire with 20 years of active service. This promise was based on a misreading of 14 U.S.C. § 283(a)(4) and (b). When the Coast Guard discovered the mistake two years later, it offered to release the applicant from his contract, which had already been in effect for 14 months. The Coast Guard also informed him that if he stayed on, new legislation might be enacted in time to enable him to remain on active duty for 20 full years.

3. When the applicant protested the apparent change in the terms of his continuation contract, the Coast Guard told him that the LCP "could be approved by Congress no earlier than November 1994 and perhaps as late as December 1995." Even the latter date would have been well in time to permit the applicant to remain on active duty for 20 years. The Coast Guard also told the applicant that if the new legislation were not enacted in time, there were "several alternative plans under consideration" to "resolve" his problem. In light of this news, the applicant chose to continue serving under his contract, though on notice that his 20-year retirement was in jeopardy.

4. Congress did not enact the Coast Guard's LCP until after the applicant had left the Service, and none of the Coast Guard's "alternative plans" resolved the problem. However, the Coast Guard permitted the applicant to retire under TERA, which gave him a retirement payment for 18 years, 8 months, and 17 days of service that is 88.8% of the retirement payment he would have received had he been permitted to complete 20 years of service.[6]

[6] The Board notes that 18 years, 8 months, and 17 days constitutes approximately 93.5% of 20 years.

5. If the Coast Guard had not misinformed the applicant about the law, he might have left active duty to launch a civilian career in 1992. Moreover, if the Coast Guard had not been overly optimistic about the possibility that Congress would act, he might have chosen to seek a release from the contract and launched his civilian career. The Coast Guard committed no error by not retaining the applicant until he had completed 20 years of active duty.

6. The government is not estopped from repudiating the wrong advice of its agents, in this case Coast Guard officers. *Goldberg v. Weinberger*, 546 F.2d 477, 481 (2d Cir. 1976), *cert. denied sub nom. Goldberg v. Califano*, 431 U.S. 937 (1977); *Montilla v. United States*, 457 F.2d 978, 987 (Ct. Cl. 1972). The BCMR has "an abiding moral sanction to determine insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief." *Caddington v. United States*, 178 F. Supp. 604, 607 (Ct. Cl. 1959). Therefore, the Board must determine whether the Coast Guard, in wrongly advising the applicant, has committed such an injustice as to warrant the Board's exercise of its "abiding moral sanction" to remove injustices in military records.

7. The Board finds that the Coast Guard's treatment of the applicant was significantly mitigated by his retirement under TERA. The difference in his resulting retirement pay—88.8 percent of what he would have received for performing 93.5 percent of the active duty time—must be compared against what would have happened had the Coast Guard not misinformed him—discharge with severance pay either on June 30, 1992 (if he had declined the continuation contract) or on June 30, 1996 (if he had accepted the contract). It is unknowable what opportunities in civilian employment the applicant missed during the two years he had no reason to suspect his 20-year retirement was in jeopardy. Nevertheless, in light of these facts, the Board finds that the Coast Guard's actions, though misinformed and unwise, did not constitute an injustice. After all, absent the Coast Guard's misinformed and unwise actions, the applicant may very well have been in a worse position with respect to federal retirement pay.

8. Even if the Board were to find injustice in this case, it does not shock the sense of justice. In accordance with *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (Fed. Cir. 1991), and *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976), the Board should deny relief because the Coast Guard did not violate 14 U.S.C. § 283 and because the injustice suffered by the applicant does not "shock the sense of justice." The Deputy General Counsel has ruled that in the absence of legal error, an applicant's treatment by military authorities must "shock the sense of justice" to justify correction by the Board. BCMR Docket No. 346-89. The Board finds that any injustice suffered by the applicant in receiving a TERA retirement rather than a 20-year retirement does not "shock the sense of justice" so as to require correction by the Board.

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

ORDER

[redacted] application for correction of the military record of [redacted] USCG, is hereby denied.

[redacted]