DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-077

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FINAL DECISION

[redacted] **Deputy Chair:**

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 March 29, 2002, upon receipt of the applicant's completed application, including his military records.

This final decision, dated February 4, 2003, 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 correct his record to show that he enlisted under the Delayed Entry Program (DEP) no later than September 7, 1980, rather than on October 21, 1980. The correction would cause his retirement pay to be calculated in accordance with the law in effect prior to the enactment of Public Law 96-342, which established the "High-3" system, under which retirement pay is based upon the average of a member's base pay during the three years prior to his retirement. He also asked the Board to recommend to the Coast Guard that it ensure that all prospective recruits receive accurate information about their full benefits and entitlements upon retirement.

SUMMARY OF THE RECORD AND THE APPLICANT'S ALLEGATIONS

The applicant enlisted in the Coast Guard Reserve under the DEP on October 21, 1980. His DEP contract states that in March 1981, he would enlist in the regular Coast Guard for four years. On March 9, 1981, he enlisted in the regular Coast Guard. There

is no information about how retirement pay is calculated in the contracts he signed. He has served on continuous active duty since that date.

On September 8, 1980, the President signed Public Law 96-342, the Department of Defense Authorization Act of 1981, which altered the method of computing retirement pay for members first entering the armed services on or after its date of enactment. The law provided that anyone "who first became a member of a uniformed service on or after the date of the enactment" and later becomes entitled to retirement pay shall have that pay calculated under the High-3 system, rather than the 50 percent of base pay system in effect for members whose military obligation began prior to September 8, 1980. 10 U.S.C. § 1407. According to volume 126 of the *Congressional Record* (1980), the bill was passed by the House of Representatives on May 21, 1980, and by the Senate on July 2, 1980. On August 26, 1980, the House and Senate agreed to a conference report.

The applicant alleged that he was never informed of the "High-3" system before it went into effect. He alleged that, between the time he began the enlistment process by undergoing a physical evaluation in May 1980 and the day "High-3" went into effect, the Coast Guard "had more than ample opportunity to notify [him] that the terms and benefits of career enlistment … were changing … and failed to do so." He stated that he remembers having several discussions with his recruiter prior to May 1980 about the benefits of joining the Coast Guard, including how retirement benefits were calculated under the previous system, and that his recruiter never mentioned "High-3." He alleged that he agreed to begin the enlistment process only because he was induced by the benefits outlined by the recruiter. In addition, he alleged that if he had been informed of the new law, he would have signed his DEP contract before it went into effect. He argued that the Coast Guard unfairly prevented him and many other similarly situated members from making an informed decision by denying them information about the pending law in 1980.

The applicant also argued that, in his case, an express, binding contract actually existed between him and the Coast Guard on July 7, 1980, prior to the effective date of the new law. He argued that because his enlistment medical was approved in May 1980 and his police record checks were completed on July 7, 1980, all of the six elements of a contract were in place on July 7, 1980: the Coast Guard's offer if he were found qualified for enlistment; his acceptance by meeting the qualifications; mutual assent on the terms and obligations his recruiter described; capacity in that he was of sound mind and legal age; consideration in the benefits and obligations exchanged; and legality in an express contract. He also argued that, although the oral agreement made between him and his recruiter is parole evidence, it should not be ignored when an unfair decision would result from its exclusion. Moreover, he argued, exceptions to the rule excluding parole evidence are commonly made when contracts are determined to be incomplete, ambi-

guous, erroneous, void, voidable, modified, rescinded, or based on conditions precedent, past practices, or usual commercial practices.

The applicant also pointed out that when a recruit is enlisted today, he must sign a DD form 4/1, which informs the recruit that the laws and regulations may change without notice. However, in 1980, Coast Guard recruits were not provided this information. He argued that nothing in the contracts he signed relieved the Coast Guard of the duty to inform him of changes to the law and regulations.

Furthermore, the applicant argued that the DEP contract he signed on October 21, 1980 is invalid because there was no "mutual assent," since, unbeknownst to him, the terms of the contract changed when the new law went into effect.

VIEWS OF THE COAST GUARD

On September 4, 2002, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request.

The Chief Counsel stated that this case is virtually identical to BCMR Docket No. 2000-117, in which the Board denied an applicant's request to change his date of enrollment in the DEP to before September 8, 1980, because it found that the Coast Guard had no legal duty "to counsel civilian applicants who are considering enlistment on pending legislative changes that may affect retirement benefits." The Chief Counsel stated that no statute or regulation required the Coast Guard to counsel potential recruits about the pending law. He also argued that no injustice was committed in this case because "there is no evidence indicating that the Applicant's recruiter knew of the impending legislative change, yet unfairly concealed that information from the Applicant." He also stated that there is no evidence that the applicant's recruiter made any express or implied promise about the benefits he would receive if he remained in the service and was retired, and he argued that the doctrine of laches should bar the applicant's request. In addition, he pointed out that prior to September 8, 1980, there was no certainty that the legislation would be enacted.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 8, 2002, the BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited him to respond within 15 days. The applicant requested and was granted an extension and responded on November 14, 2002.

The applicant alleged that his application is not untimely because he did not begin to suspect the existence of an error until "the middle of 2000" and he applied to the Board within three years of that date. Moreover, he pointed out that in BCMR Docket No. 2000-117, the Board found that the application was timely because the applicant had remained on active duty since 1980.

The applicant stated that his recruiter discussed retirement benefits with him early in 1980 and had delegated authority to swear in recruits. He argued that any 19 year old recruit would believe that someone with authority to swear him in "would be of sufficient knowledge to counsel prospective Coast Guard members on all aspects of the Coast Guard including base pay and retirement pay." He pointed out that none of the documents he signed mentioned that either his base pay or retirement pay could change without his knowledge because the Coast Guard did not use DD Forms 4/1 through 4/4 in 1980, as the other services did. Moreover, he stated, his recruiter (whose name, address, and telephone number he provided) recently told him that he cannot remember hearing about the new law prior to its enactment.

The applicant alleged that, although he cannot provide the details of the discussion he had with his recruiter, he does remember discussing retirement benefits, and the Board should consider that anyone considering future employment is likely to ask about retirement and make decisions based on what he is told by a recruiter. He alleged that failing to inform a recruit about changes subsequent to such discussions violates "the principles of moral justice and ethical fairness."

The applicant alleged that the doctrine of laches should not apply to his case under an "ignorance of party rights" exception because, until recently, he did not know that there was an error in his record, that he could get a complete copy of his record from the Coast Guard, or that he could get his record corrected by the BCMR.

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 Board has jurisdiction over this matter pursuant to 10 U.S.C. § 1552. Under *Detweiler v. Pena*, 38 F.3d 591 (D.C. Cir. 1994), the application was timely.

2. The applicant alleged that, prior to September 8, 1980, the Coast Guard had a duty to counsel him and other potential recruits about the pending legislation that would alter the calculation of retirement benefits if passed by Congress and signed by the President. He alleged that, had he been counseled about the pending legislation, he would have enlisted under the DEP prior to September 8, 1980, the day the President signed the law, instead of on October 21, 1980.

3. The applicant cited no law or regulation that required the Coast Guard in the spring and summer of 1980 to advise potential recruits about the possible future enactment of Public Law 96-342, and the Board knows of none. Moreover, he submitted no evidence to support his allegation that, if he had known about the pending legislation, he would have enlisted prior to September 8, 1980.

4. The applicant argued that his retirement should be calculated in accordance with the law in effect on July 7, 1980, because, he alleged, that is when a binding contract existed between him and the Coast Guard. The applicant has mistakenly tried to apply the rules of private contract law to his military obligation, which is determined by statute. The mere fact that both the Coast Guard and the applicant had completed major preliminary steps to facilitate his enlistment prior to September 8, 1980, did not create an enforceable contract between them prior to October 21, 1980.

5. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that the Coast Guard committed any error in failing to counsel him about pending legislation or in determining that he first entered a uniformed service on October 21, 1980, six weeks after Public Law 96-342 was enacted.

6. 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 (citing *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 finds that the failure of the Coast Guard to inform the applicant and other civilians undergoing recruitment in 1980 of a possible future change in the law that might diminish their retirement benefits if they should complete a 20-year military career does not shock the Board's sense of justice. The fact that laws change cannot have been unknown to the applicant, a high school graduate. Even if, as the applicant alleged, his recruiter described the 50-percent system for retirement pay to him and he was induced to enlist in the Coast Guard on October 21, 1980, because of this and other benefits, the erroneous advice of government agents is not binding on the Government. *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); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947).

7. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.