DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-122

Xxxxxxxxxxxxxxxxxxxx
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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 June 24, 2002, upon receipt of the completed application.

This final decision, dated February 27, 2003, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his record so that his retirement pay would be calculated in accordance the 50-percent system established for members who first enlisted before September 8, 1980, rather the "High-3" system in effect for members who first enlisted on or after September 8, 1980. The applicant enlisted on September 9, 1980.

The applicant alleged that he was improperly counseled about the retirement plan since his recruiter did not tell him that if he enlisted a week, or even two days, earlier, his retirement pay would be significantly affected. He alleged that he had intended to make a career in the Coast Guard and would have done anything necessary to enlist earlier if he had known of the change. He alleged that it was very unjust and unethical for the law to change the day before he enlisted without notice to him. He alleged that only the "handful" of members who enlisted "on or about 8 or 9 September, 1980," like himself were unjustly affected by the change in the law.

The applicant further alleged that he filled out all the paperwork necessary to enlist weeks before September 9th, "[b]ut I did not actually get sworn in until the morning of the 9th of September, the same day that I flew to Alameda from Chicago! I remember bringing in the paperwork to the recruiters' office on the 9th of September and they made me fill it out again before I was sworn in so it would be dated on the same day." Moreover, the applicant alleged, during his extensive pre-enlistment communications with his recruiter, at no time did the recruiter tell him that he could have enlisted in the Reserve under the Delayed Entry Program (DEP) before reporting for basic training on September 9th, in which case his retirement pay would have been calculated under the 50-percent system.

SUMMARY OF THE RECORD

The applicant applied to enlist in the Coast Guard on June 25, 1980. Thereafter, he signed documents allowing the service to perform a background check, and he underwent a pre-enlistment physical examination.

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.

On September 9, 1980, the applicant 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.

VIEWS OF THE COAST GUARD

On October 28, 2002, the Chief Counsel of the Coast Guard 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

The BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited him to respond. The applicant responded on October 4, 2002. He alleged that his case should not be compared to that of the applicant in BCMR Docket No. 2000-117 because he enlisted just two days late, whereas that applicant enlisted 50 days late. He stated that he understands that his recruiter was not legally obligated to counsel him about the pending law but argued that he should have been given the opportunity to enlist early under the DEP or enlist before the date he had to report for basic training. He also argued that the doctrine of laches should not apply to his case because he was not provided information about his retirement until he had qualified by completing 20 years of military service.

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 argued that, prior to September 8, 1980, the Coast Guard should have offered him the opportunity to enlist in the Reserve under the DEP so that his retirement pay would be based on 50 percent of his base pay. However, he cited no law or regulation that required his recruiter to offer him a DEP enlistment, and the Board knows of none. Moreover, apart from the potential increase in retirement pay 20 years hence, 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.

3. No law or regulation 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. Moreover, there was no way, prior to September 8, 1980, for the Coast Guard to know whether or what day the President would sign the legislation.

4. 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 the pending legislation or to enlist him prior to September 8, 1980.

5. 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)). Although the applicant argued that the injustice caused by the immediate effectiveness of Public Law 96-342 would affect only the "handful" of members who enlisted on September 8 and 9, 1980, as indicated in BCMR Docket Nos. 2000-117 and 2002-077, many members who enlisted in the days, weeks, and months after September 8, 1980, and ultimately served for at least 20 years may now regret that they did not have the foresight—or were not counseled by a foresighted recruiter—to enlist before September 8, 1980. The Board is not persuaded that the decision of Congress and the President to change the calculation of military members' retirement benefits without providing prior notice to all potential recruits was so unjust as to shock the sense of justice. Nor is the Board persuaded that the Coast Guard's failure to enlist the applicant prior to September 8, 1980, or to inform him of the possible future change in the law that might diminish his retirement benefits if he should complete a 20-year military career shocks the sense of justice.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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