

**DEPARTMENT OF HOMELAND SECURITY  
BOARD FOR CORRECTION OF MILITARY RECORDS**

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2012-048**

**XXXXXXXXXXXXXXXXXXXXX  
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**FINAL DECISION**

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application upon receipt of the applicant's completed application on December 19, 2011, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated August 16, 2012, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST**

The applicant retired from active service effective December 1, 2010. He asked the Board to correct his record to show that he voluntarily retired on July 1, 2011 with 34 years of service and with back pay and allowances.

**ALLEGATIONS**

The applicant was serving under an enlistment contract that expired on July 1, 2011. He alleged that the Coast Guard improperly and unfairly forced him to retire prior to the expiration of his enlistment by threatening to separate him without retirement, which it had no authority to do. The applicant stated the following:

After nearly 33 years of service, applicant was notified in late 2009 that he would not be permitted to compete for a follow on assignment as command master chief (CMC) as he was expected to retire within the next year. Although applicant submitted a request for voluntary retirement and selected a retirement date within his current enlistment, applicant's chosen retirement date of 1 July 2011 was denied. Applicant was encouraged to select a retirement date that fell within the period of 1 Sept 2010 thru 1 Dec 2010. It is clear that any date outside this period would not be approved. If applicant's request for voluntary retirement was not approved, applicant was told he would face an administrative separation for

convenience of the government. Applicant submitted a new Request for voluntary retirement with a retirement date of 1 Dec 2010. The new retirement date was approved. Applicant currently receives retired pay of \$5,336.00 per month. Applicant would have received retired pay of \$5,716.00 per month had his chosen retirement date been approved. [References to tabs omitted.]

### APPLICANT'S CHRONOLOGY

In late 2009, the applicant submitted a package requesting another CMC assignment. On the eve of the interview process, he was notified that his application was being withdrawn because he was expected to retire within the next year.

On February 24, 2010, the applicant sent an email to the Chief of Enlisted Assignments expressing his intention to select August 1, 2011 as his retirement date.<sup>1</sup>

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<sup>1</sup> The applicant submitted an email string of his conversation with Coast Guard personnel about his situation. On February 24, 2010, the applicant asked Coast Guard personnel about his rotation date. On February 24, 2010, an YNC E told the applicant that his rotation date was July 15, 2010. The applicant then asked YNC about the expiration of his enlistment extension contract and if it contained any conditions. YNC E responded as follows: "You last extended on October 7, 2007 to accept orders to the [REDACTED]. The only provision I see is on the PCS orders." It states "please be advised that your rotation date is subject to change based on the selecting official's desires and or Service/program needs."

After the emails with YNC E the applicant sent an email to the Chief of Enlisted Assignments, CDR G, stating that he would be submitting his retirement letter with an effective date of August 1, 2011, that coincided with his end of enlistment. The applicant argued that under the regulation he could pick a retirement date within his enlistment period. CDR G responded to the applicant's email with the following in pertinent part:

I think we are interpreting this very differently and I would encourage you to rethink this before it goes any further . . .

First let me just assure you that I can understand your position on the matter, and perhaps disappointment at the recent decision concerning your continued service. I think that the discussion between our senior leaders was extremely pointed, and once all sides were weighed out – a clear direction was afforded to us all. I was not in the room, but I know an order when I get one – and this one was crystal clear and it came from the most senior level of our organization.

While it is true that you signed a contract beyond 30 years of service, I believe the program also states that a member, ". . . in pay grade E-9 who [is] completing or [has] been ordered to a standard tour in the MCPO-CG and Commandant –designated "Gold Badge" CMC and RFMC billets may reenlist or extend beyond 30 years' active military service for a period not to exceed completion of a standard tour as the CMC or RFMC."

The key operative term here is "not to exceed completion of a standard tour as the CMC . . ." when the CMC's principal retires or is transferred, that is the completion of the CMC tour. Were it not the case, Flag [officers] and major command COs would not be able to select their Gold Badge CMCs and incumbents would always stay in position for a four-year tour. This is the reason you sought to re compete this year as well. While this may not be the case in future revisions of the program's COMDTINST, the Senior Leaders who made this decision further defined their opinion of a "standard tour" as three years – which you will have completed this summer.

You have been notified . . . that your tour of duty is complete this summer and you will not be afforded an additional HYT waiver to remain on active duty.

On February 25, 2010, the Chief of Enlisted Assignments responded to the applicant's email stating that a direct order had been given that CMC voluntary retirements should occur between September 1, 2010 and December 1, 2010.

On February 26, 2010, Chief of Enlisted Assignments sent an email to the applicant and the other CMCs similarly situated advising them to submit their voluntary requests for retirement with effective dates between September 1, 2010 and December 1, 2010, in order to avoid an administrative separation for the convenience of the government.

On March 8, 2010, the applicant submitted a voluntary retirement request with an effective date of July 1, 2011.

On March 23, 2010, the applicant was notified that his July 1, 2011 requested retirement date was disapproved.

On April 16, 2010, the applicant submitted his retirement request with a revised December 1, 2010 retirement date. He stated in that request, "In accordance with the direct orders issue to me . . . I acknowledge those orders and submit my retirement letter for the first day of December 2010." The new date was approved.

### **APPLICANT'S ARGUMENTS**

The applicant stated that he was allowed to extend his enlistment for 3 years and 10 months on April 2, 2007, without any conditions. The effective date of the extension was October 1, 2007. The extension agreement indicates that the purpose of the extension was for "obligated service for transfer." The applicant asserted that the length of his extension met the definition for a standard tour under Article 12.G.3. of the Personnel Manual. The applicant stated that Article 12.G.3 is relevant because it establishes the length of time an E-9 (master chief petty officer) may serve on in the Coast Guard. It states the following:

Thirty years' active military service. May reenlist or extend up to but not beyond 30 years, one month's active military service. Members in pay grade E-9 who are completing or have been ordered to a standard tour in the MCPO-CG and Commandant-designate "Gold Badge" CMC and RFMC [Rating Force Master Chief] billets may reenlist or extend beyond 30 years' active military service for a period not to exceed completion of a standard tour as the MCM or RFMC.

The applicant stated that based on Article 12.G.3. his tour of duty was 3 years and 10 months, the period covered by his enlistment extension. The applicant stated that years after his extension became effective the Coast Guard changed the definition of "Standard Tour Length" to some variable length of time determined by the transfer of the commander for whom the CMC worked, or in the alternative, to a three year period. The applicant stated that by operation of law, if the standard tour length was 3 years then he could only extend for 3 years. He argued that since he was allowed to extend for longer than 3 years, his standard tour length was longer than 3 years.

The applicant argued that the Coast Guard's statement that a standard tour of duty for an CMC terminates on the transfer or retirement of the commander for whom the CMC works is arbitrary because the period of duty can never be known in advance. The applicant stated that keeping a CMC in the Coast Guard whose commander has moved on does not mean that the succeeding commander cannot select his or her own CMC. In the applicant's opinion, the Coast Guard can transfer the outgoing CMC to another job until his enlistment expires. The applicant argued that once the Coast Guard extended his enlistment to July 1, 2011 that became the termination date for his standard tour of duty.

The applicant stated that ALCOAST 298/09 does not require that an enlisted member submit his retirement request for a particular year, because not doing so ensures that replacements for retiring personnel are within the normal summer rotation period. Paragraph 1. of ALCOAST 298/09 states, "Enlisted members requesting voluntary retirement should request a retirement date on the first day of any month between September and December. If the requested retirement date is for any month between January and August, the request must contain a command endorsement acknowledging and accepting the temporary position vacancy that may result from retirement outside the normal transfer season."

The applicant stated that if the Coast Guard believed that he was unfit to serve out the remaining portion of his enlistment, the appropriate mechanism was to convene a board under Article 12.C.10.c. of the Personnel Manual,<sup>2</sup> which would have afforded significant due process to the applicant. Instead of a retirement board, the Coast Guard told the applicant he would be separated, if he did not submit a request to retire by December 1, 2010. The applicant stated that the Coast Guard forced him to choose an earlier retirement date by threatening to separate him without retirement when they had no authority to do so. The applicant concluded by stating that he served the Coast Guard faithfully for over 30 years and that the Coast Guard improperly and unfairly forced him to retire by threatening to separate him without retirement.

### **VIEWS OF THE COAST GUARD**

On April 4, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in accordance with a memorandum submitted by the Commander, Personnel Service Center (PSC).

PSC acknowledged that the applicant extended his enlistment for 3 years and 10 months to accept transfer orders. PSC stated that while the applicant's travel orders indicated that the period of duty was from July 16, 2007 until July 15, 2011, the orders also stated that the assignment required a minimum of two years obligated service and that his "rotation date is subject to change base upon the selecting officials desires and/or other service/ program needs."

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<sup>2</sup> Under Article 12.C.10.c. of the Personnel Manual, the Commandant may, at his discretion, convene a Coast Guard Enlisted Personnel Board to recommend enlisted members with 20 or more years of active service for involuntary retirement. Commanding officers recommend enlisted member for consideration by an Enlisted Personnel Board whose conduct is marginal; whose financial irresponsibility will discredit the Coast Guard through voluminous correspondence with creditors; and whose leadership, performance of duty . . . are below the standards expected for their rate. Members considered by an Enlisted Personnel Board are afforded a hearing.

The applicant's travel orders also congratulated the applicant on his "Gold Badge Assignment." PSC stated that because the Commanding Officer [REDACTED] where the applicant was assigned as CMC) received transfer orders to a new assignment with a June 1, 2010 report date, the applicant was approved for retirement on December 1, 2010, although he had requested July 1, 2011. PSC stated that since a CMC's tour of duty is dependent on the flag officer's or training command CO's tour of duty, it was appropriate for the Coast Guard to end the applicant's tour of duty in the summer of 2010.

PSC argued that since the applicant exceeded his high year tenure (HYT)<sup>3</sup> (30 years active service at pay grade E-9) on September 26, 2007, he could not have remained on active duty past 2010 because he no longer had the CMC billet. He would have required a waiver to remain on active duty past 2010, which the Coast Guard was not likely to grant.

PSC stated that the applicant's request for a July 1, 2011 retirement with applicable pay and allowances amounts to a request for constructive active duty credit. PSC stated that according to *Anderson v. United States*, 59 Fed. Cl. 452 (2004), constructive credit is a doctrine under which military personnel who have been illegally or improperly separated from service are deemed to have continued in active service until their legal separation. With regard to constructive service credit, PSC stated the following:

The applicant was not illegally or improperly separated. All applicable policies were followed with regard to his PCS orders, obligating service for transfer, and ultimately leaving the CMC position; a position which allowed him three more years of active duty time that would not have been earned due to his HYT professional growth point [PGP] date.<sup>[4]</sup> Additionally, a request for constructive service credit would have to be in conjunction with voiding his separation. The applicant has not requested that his separation be voided instead he demands credit for active duty time not served. For this request to be possible, the applicant would have to return to active duty and serve the additional months, which he is not eligible to do because he has exceeded his HYT PGP.

PSC asserted that the Coast Guard is presumptively correct and the applicant has failed to substantiate any error or injustice with regard to his record.

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

On May 1, 2012, the Board received the applicant's response to the advisory opinion. He disagreed that his application should be denied. In this regard, the applicant disagreed with PSC

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<sup>3</sup> Article 12.G.1. of the Personnel Manual states that the high year tenure policy establishes limits on the amount of time an active duty enlisted member can remain at each pay grade. The policy is designed to increase personnel flow, compel members to advance in their rating, and allow more consistent training and advancement opportunities for the enlisted workforce.

<sup>4</sup> Article 12.G.3. states that the maximum time that an E-9 (master chief) can remain in the service is 30 years and one month. However as exception is made for members in pay grade in E-9 who have been ordered to a standard tour in Commandant-designated "Gold Badge" CMC billets. Such E-9s may reenlist or extend beyond 30 years' active military service for a period not to exceed completion of a standard tour as the CMC.

contention that his tour length depended upon the tour of his principal officer and ended upon the departure of RDML T. The applicant stated that RDML T was not the applicant's first commanding officer at that command. His first CO was RDML S who departed after one year. Subsequently, he worked for RDML T for two years. The applicant stated that if his tour ended upon the transfer of his CO, then it would have ended upon the transfer of RDML S. He stated that since he continued to serve for two years after RDML S left, his tour did not end upon the departure of his principal officer.

The applicant argued that under COMDINST 1306.1C, the tour length of a command master chief is four years. According to the applicant, this definition comports with him being allowed to extend his enlistment for three years and ten months beyond his normal high year tenure point. He stated that if the standard tour length was three years as argued, he would not have been able to extend beyond three years. He stated that his tour length was for four years.

The applicant stated that the caveat in his travel orders that his rotation date was subject to change based on the selection official's desires and/or service/program needs is not stated in his enlistment contract and does not apply to it. The applicant also stated the following:

PSC clearly considers [the applicant's] period of enlistment as synonymous with his tour length. But they are not the same thing. His tour length is the period of time he remains in one location or in one position. His enlistment period is the amount of time he has remaining on his enlistment contract. Just because his tour as the command master chief at [REDACTED] required an extension of his enlistment, does not mean they are not the same thing. Many tours end before an enlistment contract ends. In those cases, the Coast Guard moves the member to another location or position until the member's enlistment is over. Forcing [the applicant] to retire before his enlistment period was over was unjust. He did not wish to retire until his enlistment contract was over and he should not have been required to do so.

## **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 submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.
2. The applicant, who voluntarily retired on December 1, 2010, asked the Board to correct his record to show that he voluntarily retired on July 1, 2011, with back pay and allowances.
3. The applicant alleged that the Coast Guard forced him into submitting a voluntary retirement request prior to the expiration of his July 30, 2011 enlistment contract and prior to the end of his CMC tour of duty by threatening to administratively separate him from the Coast Guard for convenience of the government, if he did not request retirement with an effective date

no later than December 1, 2010. The applicant argued that his CMC tour of duty was for 4 years as evidenced by the length of his extension agreement (3 years and 10 months), which he executed to accept orders to the CMC assignment. The applicant argued that the Coast Guard committed an error and/or injustice by terminating his tour of duty in the summer of 2010, when the applicant's CO transferred to a new assignment.

4. Article 4.A.5.b. of the Personnel Manual (2010) discusses tour lengths for enlisted personnel. The provision described tour lengths for various assignments, ranging from one to four years, but makes it clear that the tour lengths are targets or goals and subject to change due to service needs. The applicant's transfer orders for his CMC assignment were for a period from July 16, 2007 to July 15, 2011. With regard to CMC assignments specifically, Article 4.E.12.a. of the Personnel Manual states that "the [CMC's] tour of duty depends on the flag officer's or training command CO's tour of duty." The applicant's standard travel orders for the CMC assignment contained the very same limitation. The orders stated, "Please be advised that your rotation date is subject to change based upon the selection official's desires and or service/program needs." The CO for whom the applicant served as CMC transferred to a new assignment on June 1, 2010. With the prospective transfer of the applicant's CO on June 1, 2010, the Coast Guard determined that the applicant's CMC tour of duty would also end that summer and requested that he submit a voluntary retirement request. The Coast Guard's determination that the applicant's CMC tour of duty ended with the CO's transfer to a new assignment is consistent with the Personnel Manual and with the early rotation warning on his standard travel orders.

5. The applicant argued that it was an error and/or injustice for the Coast Guard to seek his removal from active duty prior to the expiration of his enlistment extension. However, Article 12.B.12.a of the Personnel Manual states that Commander, PSC may authorize or direct enlisted members to separate for the convenience of the government for any of 18 reasons, including "When the Commandant so directs for good and sufficient reason." In *Birt v. United States*, 180 Ct. Cl. 910 (1967), the court stated that "a serviceman does not have a right per se to remain in service until the expiration of his enlistment" and that a service member may be removed administratively prior to that time. The Board is not aware of any regulation that prohibits the Commandant from discharging a member, even one with 20 or more years of active service for the convenience of the government. In addition, the applicant had reached his HYT (30 years of service) and could not be reassigned to another tour of duty without a waiver, which the Coast Guard would not grant. Accordingly, his options were voluntary retirement or discharge.

6. The applicant argued that the Coast Guard forced him to submit a voluntary retirement request by threatening to administratively discharge him for convenience of the government, if he did not submit one with an effective date no later than December 1, 2010. The question is whether or not the applicant's retirement request was voluntary. If the applicant's retirement was involuntary and improper, he could be entitled to some relief. See *Osborn v. United States*, 47 Fed. Cl. 224, 229 (2000). The evidence of record shows that the Coast Guard wanted and encouraged the applicant and several other CMCs to retire within the 2010 calendar year. The evidence indicates that the applicant initially objected to retiring prior to August 1, 2011, which was the date for the end of his enlistment. The Coast Guard indicated to the applicant's CO that

if the applicant did not submit a voluntary retirement request, he would be administratively discharged for convenience of the government, which was communicated to the applicant and which the applicant believed would cause him to be ineligible for retired pay. The applicant subsequently submitted a retirement request with a December 1, 2010 effective date, which the Coast Guard approved. The applicant's retirement request is presumed to be voluntary as it was submitted pursuant to 14 U.S.C. § 354 (Voluntary Retirement after thirty Years' service) and Article 12.C.11. (Procedures to retire enlisted members) of the Personnel Manual.

7. The applicant can rebut the presumption that his retirement was voluntary by showing that his voluntary request for retirement was extracted through duress, coercion, misrepresentation, or mental incompetence. *Osborn* at 230, citing *Longhofer v. United States*, 29 Fed. Cl. 595, 601 (1993). The applicant stated that the Coast Guard threatened him with an administrative discharge if he did not submit his voluntary retirement request. However, the Board interprets the Coast Guard's actions as providing the applicant with the option of voluntary retirement or administrative separation for convenience of the government. He chose to voluntarily retire. The applicant offered no evidence of duress, coercion, misrepresentation or mental incompetence in submitting his retirement request. In *Sammt v. United States*, 780 F.2d. 31 (Fed. Cir. 1985), ██████ had failed twice for promotion and was told that he would be involuntarily retired unless he requested voluntary retirement, which he did. The Court of Appeals stated that that the exercise of an option to retire is not rendered involuntary by the imminent imposition of a less desirable alternative. *Id* at 32; see also *Cruz v. Dep't of Navy*, 934 F.2d. 1240, 1245 (Fed Cir. 1991). In this case, to avoid being administratively discharged, which the Coast Guard had the authority to do, the applicant chose to voluntarily retire and receive retired pay. The applicant's voluntary retirement foreclosed any claim for constructive service credit and back pay and allowances. See *Smith v. Sec'y of Army*, 384 F.3d 1288, 1295 (Fed. Cir. 2004).

8. The applicant's suggestion that he should have had an Enlisted Personnel Board is without merit. Enlisted Personnel Boards are convened at the discretion of the Commandant and he had not exercised his discretion to convene one at the time of the applicant's retirement. Moreover, the applicant did not meet the criteria for consideration by an Enlisted Personnel Board under Article 12.C.10.c. of the Personnel Manual, which includes marginal performance, financial problems, and poor performance of duty. The applicant's situation was that his CMC tour had ended and he had reached his HYT that the Coast Guard did not waive. Therefore, his options were to voluntarily retire or to be discharged. He chose retirement.

9. The applicant has failed to prove that the Coast Guard committed an error or injustice in this case.

10. Accordingly, his application should be denied.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**



**ORDER**

The application of XXXXXXXXXXXXXXXXXXXXXXXX for correction of her military record is denied.

