

**DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS**

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2001-108**

XXXXXXXX, XXXXX X.  
XXXXXXXXXXXX XXXXXX

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**FINAL DECISION**

**GARMON, Attorney-Advisor:**

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on July 10, 2001, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated May 30, 2002, is signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST**

The applicant asked the Board to order the Coast Guard to pay him interest on back pay and allowances previously paid to him for an 18-month period during which the applicant held a lower rank and pay grade than that for which he was qualified.

**APPLICANT'S ALLEGATIONS**

The applicant stated that 14 U.S.C. § 727 mandates that the Coast Guard provide an active service constructive credit to Direct Commissioned Lawyers (DCL). The applicant, a DCL since July 1998, further stated that the Coast Guard had previously failed to provide him with the active service constructive credit but has since taken corrective measures, though only of a partial nature. The applicant alleged that although the Coast Guard administratively changed his dates of rank and provided back pay and allowances covering the 18-month period, the corrective actions taken

failed to provide interest on his back pay and allowances and thus, denied him full relief.

In support of his allegations, the applicant cited the Back Pay Act, 5 U.S.C. § 5596, as providing for back pay and interest, calculated for the period of erroneous pay, for federal employees of executive agencies. The applicant also cited Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979) as suggesting that the Board is authorized to afford the applicant equitable relief in a manner similar to the relief provided to federal employees under the Back Pay Act. The applicant noted that the Sanders court pointed out that BCMRs have a duty and are obligated to act to correct records to eliminate errors and injustices. The applicant further cited Loeffler v. Frank, 486 U.S. 549, 558 (1988), as supporting the proposition that the payment of prejudgment interest is a component of full compensation. The applicant alleged that in order to fully correct his record to eliminate the indicated injustice, the Board should find that the applicant is entitled to receive interest on his back pay and allowances.

### **SUMMARY OF THE APPLICANT'S RECORD**

The applicant was commissioned as a lieutenant junior grade in the Coast Guard Reserve on July 14, 1998. The applicant's date of rank for lieutenant was July 14, 2001. However, the Coast Guard, in correcting an administrative error, changed his date of rank as a lieutenant to January 14, 2000. Subsequent to the applicant's date of rank adjustment, the Coast Guard calculated and provided all authorized back pay and allowances. To date, the applicant continues to serve in the Coast Guard Reserve.

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

On November 15, 2001, the Chief Counsel provided the Coast Guard's comments to the Board. The Chief Counsel adopted the Coast Guard Personnel Command's analysis as its advisory opinion and recommended that the applicant's request for relief be denied.

The Chief Counsel stated that the doctrine of sovereign immunity operates to preclude any claim against the Federal Government not expressly authorized by statute. In the absence of express authority to pay interest, the Chief Counsel argued, a "no interest rule" applies. The Chief Counsel cited Library of Congress v. Shaw, 478 U.S. 310, 314 (1986), in support of his contention that under the rule's application, a waiver separate from the general waiver of immunity to suit is required in order to recover interest where recovery of back pay has been obtained.

The Chief Counsel stated that the phrase "other pecuniary benefits" within 10 U.S.C. § 1552 provides only for the usual types of pay and benefits earned by military personnel in accordance with law. The Chief Counsel contended that under the rules of statutory construction, because the general phrase "other pecuniary benefits" is preceded by specific categories of military pay, the general phrase contemplates only those items within the meaning of the specific pay and benefits enumerated. Such being the case, he argued, an interpretation of this general phrase that incorporates interest payments in its recovery contravenes congressional intent.

The Chief Counsel cited several cases in support of his assertion that the courts and Comptroller General have unanimously held that the Board lacks the power to award interest on the basis of equity. The Chief Counsel argued that the applicant's reliance on Loeffler v. Frank, Postmaster General of the United States, 486 U.S. 549 (1988), is misplaced, as interest within a compensation scheme fails to serve as lawful authority for its award by the Board.

The Chief Counsel stated that authority to pay interest on back pay is found in Section 5596 in Title 5 of the United States Code. However, payment of such interest is available to civil servants only. The Chief Counsel contended that because the term "civil service" is defined in 5 U.S.C. § 2101 with the express exclusion of "positions of the uniformed services," the applicant, as a member of the armed forces, is not statutorily entitled to interest on back pay. The lack of any known authority to allow the payment of interest on back pay to members of the uniformed services, he stated, requires that the Board deny the applicant's request.

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

On November 26, 2001, the Chairman forwarded a copy of the views of the Coast Guard to the applicant and invited him to respond within 15 days. On December 10, 2001, the applicant provided the Board with his response.

The applicant argued that the Coast Guard did not provide any legal support for its assertion that 10 U.S.C. § 1552 fails to include "interest" in its scheme of relief. The applicant moreover asserted that Comptroller General opinions are not binding on the Board, and accordingly, should not be given deference. The applicant contended that the Coast Guard admits that "interest is an element of complete compensation," yet concurrently fails to support its assertion that interest may not be awarded by the Board in the instant case.

The applicant stated that the expansive words included in the text of § 1552 fail to demonstrate congressional intent that the statute be read narrowly, particularly in light of the remedial spirit of the legislation. The applicant noted that within the Coast

Guard's Pay Manual (COMDTINST M7220.29A), general terms, such as "pay" and "allowances," have meanings broader than their topical sense and include a variety of specific payments. The applicant argued that a liberal reading of the general phraseology at issue in § 1552 (c) is similarly required, as both § 1552 and the noted provision in the Pay Manual serve as remedial devices in making those aggrieved whole.

The applicant alleged that the non-payment of interest on back pay and allowances fosters the postponement of corrective action taken by the Coast Guard, and thereby imposes on service members varying degrees of harm, depending upon the timing of correction. The applicant argued that as interest is collected by the Coast Guard from members on overpayments, so should interest be paid by the Coast Guard to members on underpayments. The power to enforce such corrective action, the applicant contended, is within the Board's statutory authority.

#### APPLICABLE LAW

10 U.S.C. § 1552 (c) provides that the "Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, ... 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 ... Coast Guard ...."

28 U.S.C. § 2516 (a) provides that "[i]nterest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for payment thereof."

Interest is not recoverable in a suit against the government absent a showing of the right to collect interest under statute or contract. First Nat'l Bank v. United States, 548 F.2d 928 (1977). "A general waiver of sovereign immunity, allowing litigation against the United States, does not automatically effectuate a waiver of sovereign immunity allowing recovery of interest." Jetco, Inc. v. United States, 11 Cl. Ct. 837, 850 (1987); see Library of Congress v. Shaw, 478 U.S. 310, 315 (1986).

"[T]he intention of Congress to permit the recovery of interest must be expressly and specifically set forth in the statute. ... Mere use of the term 'just compensation,' without more, is no substitute for an express provision for interest." United States v. Thayer-West Point Hotel Co., 329 U.S. 585, 590 (1947).

## 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 10 U.S.C. § 1552. The application was timely.

2. The applicant contends that 10 U.S.C. § 1552 (c) is a remedial statute that should be applied to grant him interest on the back pay and allowances he received as a result of a correction of his record. However, the applicant conceded that § 1552 (c) does not expressly authorize the recovery of interest by its stated terms. Instead, the applicant cited the general phrase "other pecuniary benefits," coupled with the Board's equitable powers, as the source of the Board's alleged authority to order payment of interest.

3. Title 28 U.S.C. § 2516 (a) is strictly construed against the award of interest in the absence of express authorization. The interpretive caselaw also prohibits claims for interest, based on a statute, that have not been authorized by the express terms of the statute. See, e.g., United States v. Jackson, 34 F.2d 241 (10<sup>th</sup> Cir. 1929); Fitzgerald v. Staats, 578 F.2d 435 (D.C. Cir. 1978); Bromley Contracting Co. v. United States, 596 F.2d 448 (Ct. Cl. 1979); Tuftco Corp. v. United States, 614 F.2d 740 (Ct. Cl. 1980). Therefore, despite the applicant's argument that interest is sometimes considered a part of "compensation," the Board finds that the phrase "other pecuniary benefits" in 10 U.S.C. § 1552 (c) does not, by itself, authorize the Board to award interest.

4. Had Congress intended that interest be included in 10 U.S.C. § 1552 (c), it could have so stated, as it has done in other provisions of the Code relating to the recovery of interest. As noted by the applicant, code provisions, such as the Back Pay Act, which designate specific judgments against the United States on which interest would be allowed establish very detailed schemes of both the rate of interest and the time period during which interest is payable. Congressional appropriations to pay interest under the Back Pay Act, however, are expressly limited to civil servants. In the absence of both express language and a statutory scheme permitting the award of interest, the Board cannot find that Congress intended for the Board to award interest under 10 U.S.C. § 1552 (c).

5. Title 10 U.S.C. § 1552 is remedial legislation, which should be construed liberally rather than narrowly or technically. Oleson v. United States, 172 Ct. Cl. 9 (1965); 41 Ops. Atty. Gen. 203, 206, 208 (1954). However, a statute is considered

remedial if it “neither enlarges nor impairs substantive rights but relates to the means and procedures for enforcement of those rights.” United States v. Kairys, 782 F.2d 1374, 1381 (7<sup>th</sup> Cir. 1986). The applicant’s interpretation of § 1552 (c) would clearly expand the substantive rights of members because it would provide a new, previously unavailable right to interest.<sup>1</sup>

6. Even though the applicant has not proved that the Coast Guard committed any legal error in refusing to pay him interest, the Board may exercise its equitable power to correct injustice if it finds that the member’s “treatment by military authorities shocks the sense of justice.”<sup>2</sup> However, the applicant has not persuaded the Board that the Coast Guard acted toward him in a way that “shocks the sense of justice” in failing to pay interest on his back pay and allowances.

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

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

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<sup>1</sup> See New York v. United States, 160 U.S. 598 (1896) (holding that the allowance of interest is not a matter of discretion but of legal right).

<sup>2</sup> Sawyer v. United States, 18 Cl. Ct. 860, 868 (1989), *rev’d on other grounds*, 930 F.2d 1577 (Fed. Cir. 1991); see also Reale v. United States, 208 Ct. Cl. 1010, 1011 (1976). The Deputy General Counsel has also 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.

**ORDER**

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

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Julia Andrews

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Angel Collaku

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Gareth W. Rosenau