

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-128

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XXXXXXXXXXXXXXXXXXXXX

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 case on April 27, 2007, upon receipt of the completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 7, 2008, is approved and 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 stated the following:

I am being discharged for twice non-selection for promotion to LT. I was informed by CGHQ opm-1 in October 2006 that I was to be discharged no later than 30 June 2007, and could change my date to any earlier date without loss of benefits that would have accrued up to 30 June 2007. I was told I would be receiving severance pay from the CG according to the CG Personnel Manual and the CG Pay Manual. I am now being told that because of the law change that occurred on 26 November 2006, MTSA of 2002, I am no longer eligible to receive severance pay or separation pay. I will be working for the CG until 22 MAY 2007 to help my current unit and the CG and deserve all the pay and benefits that I have accrued since 25 NOV 2006. I think my separation date should be changed to reflect a discharge date of 25 NOV 2006 to allow me to receive the severance pay that I am due and since I have continued to work for the Coast Guard up until 22 MAY 2007 I deserve to keep all the pay and benefits that I collected during that time period as well.

The applicant argued that he is entitled to the requested relief because the Coast Guard failed to update the Personnel Manual or to issue any notice or instruction of the change in the law so he did not know that he would lose entitlement to severance pay if he continued to serve on active duty past November 25, 2006. In support of his allegations, the applicant submitted copies of 14 U.S.C. § 286; the Maritime Transportation Security Act of 2002; and Coast Guard publications and regulations.

Applicable Statutes

Under 14 U.S.C. § 286(b), as in effect prior to November 25, 2006, any Coast Guard officer who is discharged due to having twice failed of selection for promotion “is entitled to a lump-sum payment computed by multiplying his years of active commissioned service, but not more than twelve, by two months’ basic pay of the grade in which he is serving on the date of his discharge.”

On November 25, 2002, the President signed the Maritime Transportation Security Act of 2002, Public Law 107-295, section 416 of which is titled “Align Coast Guard Severance Pay and Revocation of Commission Authority with Department of Defense Authority.” Subsection 416(a)(3)(A) substituted the word “separation” in place of the word “severance” in 14 U.S.C. § 286. Subsection 416(a)(3)(B) of the act amended § 286(b) by limiting entitlement providing that an officer who is discharged due to having twice failed of selection for promotion “and has completed 6 or more, but less than 20, continuous years of active service immediately before that discharge or release is entitled to separation pay ...” Subsection 416(c) states that the amendments made in 416(a)(3) “shall take effect 4 years after the date of enactment of this Act.”

Coast Guard Publications

The applicant submitted copies of Articles 12.A.13.c. and 12.A.19.b. of the Personnel Manual, which he printed from the Coast Guard’s website on March 16, 2007.¹ Paragraph 2 of Article 12.A.13.c. states that at his request, an officer being discharged for twice failing of selection for promotion to lieutenant shall “be honorably discharged at an earlier date [than the June 30th following the second failure of selection] without loss of benefits that would accrue if the member were discharged on [June 30th].” Paragraph 1 of Article 12.A.19.b., which is titled “Severance Pay,” states that “[e]ach Regular lieutenant (junior grade), lieutenant, lieutenant commander, or commander involuntarily, honorably discharged under Article 12.A.13. is entitled to a lump sum payment. ... (14 USC 286).”

The applicant also submitted copies of Chapter 10.F.1. of the Pay Manual, printed from the Coast Guard’s website on March 16, 2007, which states that a regular commissioned officer who is discharged for twice failing of selection may receive severance pay, under 14 U.S.C. § 286.² Article 10.F.1.b.(2) states that the officer’s severance pay equals “2 months basic pay times the number of years of active commissioned service, but not more than 12. Fractions of one-half year or more are counted as a whole year. The maximum amount payable is 2 years basic pay. The basic rate of pay to which the member is entitled on the date member is discharged is used.”³

¹ Although the Coast Guard amended the Personnel Manual on June 18, 2007, with Change 41, Article 12.A.19.b., regarding officers’ entitlement to severance pay, it still does not reflect the new law.

² The Pay Manual currently available from the Coast Guard’s website was last amended on June 2, 2003, and it does not reflect the new law.

³ Therefore, had the applicant been discharged on November 24, 2006, he would have been entitled to severance pay in an amount equal to his monthly basic pay on that date (\$3774.30) times 2 (“2 months basic pay”), times 5 (because he had more than 4.5 years of active duty on that date), for a total of \$37,743.00. Instead, the applicant served on active duty for six more months.

The applicant submitted a publication of the Coast Guard Personnel Command (CGPC) titled "Frequently Asked Questions Regarding Officer Separations," which he printed from the Coast Guard's website on March 14, 2007, and which states the following under the question "What changes to severance pay are coming in the future?": The Maritime Transportation Security Act of 2002 changed the pay package for those that are discharged due to failing selection twice. Instead of severance pay, it was changed to separation pay. This change goes into effect on 26 Nov 2006, so if your separation date is after 26 Nov 2006 and you were entitled to severance pay, you will receive separation pay instead." The publication does not mention that the new law also limited entitlement to separation pay to officers with more than six years of active duty.

Finally, the applicant submitted a copy of an email from the Coast Guard's Personnel Services Center (PSC) to the applicant dated March 16, 2007, in which the PSC forwarded information about the new severance pay law and acknowledged that the applicant had "been given a lot of different answers, but in the YN's defense, the changes have not been incorporated into any of [the Coast Guard's] manuals." The PSC noted that under the new law, which mirrors the law for the other military services, lieutenants junior grade will not normally receive severance pay because they do not usually have six years of active duty. The PSC also noted that the separation pay formula results in a substantially lower payment than the prior severance pay formula.

SUMMARY OF THE RECORD

On May 22, 2002, the applicant was commissioned an ensign in the Coast Guard. He was promoted to lieutenant junior grade (LTJG) on November 22, 2003. The applicant failed of selection for promotion to lieutenant in 2005. He was not selected for promotion for a second time when the LT selection board convened on September 25, 2006. Therefore, under 14 U.S.C. § 282, he had to be discharged on June 30, 2007, but could request an earlier date of discharge.

On November 1, 2006, the Commandant released the results of the LT selection board in ALCGPERSCOM 087/06, which noted that 9 of the 21 officers whose records were being reviewed for promotion to LT a second time—i.e., who were "above the zone"—were selected for promotion, and the other 12 were not.

On November 8, 2006, the applicant submitted a memorandum to CGPC asking to be discharged on May 22, 2007.

On November 25, 2006, the provisions of section 416(a)(3) of the Maritime Transportation Security Act of 2002 went into effect, changing officers' entitlement, upon failing of selection twice, from severance pay to separation pay and precluding officers with less than six years of continuous active duty from being entitled to separation pay.

On December 29, 2006, CGPC responded to the applicant's November 8, 2006, request by issuing orders authorizing his separation on May 22, 2007.

On May 22, 2007, the applicant was discharged from the Coast Guard.

VIEWS OF THE COAST GUARD

On October 18, 2007, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he forwarded and adopted the findings and analysis provided in a memorandum on the case prepared by CGPC.

CGPC recommended that the Board deny the requested relief. CGPC stated that the applicant began active duty on May 22, 2002, and so had completed five years of active duty when he was separated on May 22, 2007. Under the Maritime Transportation Security Act of 2002, only officers with more than six years of continuous active duty are eligible for separation pay beginning as of November 26, 2006. Therefore, the applicant is not entitled to severance or separation pay.

CGPC stated that there is no evidence in the record that the applicant was advised in October 2006, as he alleged, that he would be entitled to severance or separation pay if he waited until May 22, 2007, to leave active duty. CGPC stated that the amendments made under the Maritime Transportation Security Act of 2002 are being incorporated into upcoming Changes (editions) of the Personnel Manual and Pay Manual. CGPC alleged that “the changes effected by MTSA regarding severance and separation pay were in place on the Coast Guard Personnel Command website before they became effective.”⁴

CGPC noted that in a letter to his congressman dated March 14, 2007, the applicant named LCDR B as the officer in CGPC opm-1 who allegedly miscounseled him over the telephone in October 2006, but LCDR B does not remember counseling the applicant. However, CGPC alleged, LCDR B claims to have known and applied the statutory changes when counseling officers about entitlements.

CGPC concluded that there is no law allowing the applicant to receive severance or separation pay based on his date of discharge.

In support of this recommendation, CGPC submitted a letter from LCDR B of CGPC opm-1 dated September 25, 2007, who wrote the following:

As Chief, Officer Separations Section at Coast Guard Personnel Command, I was familiar with most of the personnel statutes contained in Titles 10 and 14 of the U.S. Code. I was most conversant with and used on a regular basis those statutes directly relating to separations from the service.

Included among the aforementioned statutes was the U.S. Code cite in Title 14 authorizing severance pay. I knew this statute was amended in November 2002 to incorporate the separation pay calculations found in Title 10 of the U.S. Code. Additionally, I knew that this amendment was set

⁴ CGPC submitted nothing to show that the changes effected by the act were available to officers on the website. On the date of this decision, the Coast Guard had not yet amended either the Personnel Manual (which was last amended by Change 41 on June 18, 2007) or the Pay Manual (which was last amended by Change 4 on June 2, 2003) to reflect the change in the law regarding officers' severance and separation pay. A search of the Coast Guard's website for the "Maritime Transportation Security Act" of 2002 did produce several results, one of which was a copy of the act.

to take effect in November 2006. Lastly, I was aware that some officers who may have been entitled to severance pay under the old statute would either have their severance (now separation) pay reduced or eliminated. I did not, however, maintain a specific, name-by-name listing of officers whom this change might affect as this was entirely dependent on the outcome of the selection boards whose results could not be anticipated. As such, my general strategy was to handle queries only on a case-by-case basis, and then only when prompted, i.e., I did not initiate contact with mandatorily separating officers. One related note: I was not comfortable discussing monetary calculations/impacts and would defer any such related questions to pay technicians at CG PSC Topeka.

With regards to the present matter, I do not specifically recall speaking to [the applicant]. I do not remember if his requested change in date—from the mandated 30 June 2007 to 22 May 2007—was solely through email and/or memo communications or included a phone call to me. If asked, I would have counseled [him] accordingly, but I cannot recall what, if anything, we may have discussed.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 20, 2007, the applicant submitted a response to the views of the Coast Guard. He alleged that in late October 2006, when he was notified that he had failed of selection for promotion a second time and would be discharged, he called CGPC opm-1 and spoke to LCDR B about changing his separation date from June 30, 2007, to May 22, 2007. "During this conversation, I asked him if this in any way would affect my ability to receive severance/separation pay from the Coast Guard. He said it would not, other than I would not be getting severance pay, but separation pay instead due to an upcoming law change in November." When the applicant asked about the new law, LCDR B directed him to visit the OPM website, the Personnel Manual, and the Pay Manual. However, none of those sources informed him that officers leaving active duty after November 25, 2006, would no longer be entitled to severance or separation pay. Therefore, on November 8, 2006, he submitted a request to be discharged as of May 22, 2007.

The applicant alleged that, had his command known he could not receive severance or separation pay after November 25, 2006, he would have been allowed to leave active duty on that date. In support of this allegation, the applicant submitted copies of email correspondence with his prior commanding officer. On November 7, 2007, the applicant asked his command for a statement to the effect that "no one was informed of the change to the law and that it was not reflected in any manual and that if it had, you would have allowed me to change my separation date to the 25th of November, the day prior to the law taking effect and preventing myself and a number of my classmates from receiving severance or separation pay." The command responded on November 21, 2007, saying that he was unaware of the change in the law and that if the command had known about the law, he "would have done everything that [he] could have done to accommodate your desired separation date to maximize your entitlements under the new laws."

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 concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. Under subsections 416(a)(3) and (c) of the Maritime Transportation Security Act of 2002, now incorporated at 14 U.S.C. § 286(b), the applicant was not entitled to severance or separation pay when he was involuntarily separated from active duty on May 22, 2007. The applicant argues, however, that because he was not timely advised of the new law—which took effect on November 25, 2006, and denied any kind of severance or separation pay to officers with less than six years of active duty—he should be granted severance pay as if he had left active duty prior to November 25, 2006, and he should also retain all of the active duty pay and allowances he received up to May 22, 2007.

4. If the applicant had left active duty on November 24, 2006, following his two failures of selection for promotion, under 14 U.S.C. § 286(b) as then in effect, he would have received about ten months' worth of basic pay—or \$37,743.00—as severance pay. Instead, the applicant worked on active duty for another six months, earning six months of basic pay, housing or housing allowance, medical care, etc., and was discharged without entitlement to severance or separation pay because he had only (exactly) five years of active duty on May 22, 2007.

5. The applicant alleged that LCDR B, who was Chief of the Officer Separations Section at CGPC, told him in October 2006 that he would receive severance or separation pay if he left active duty on May 22, 2007. LCDR B, however, has stated that he was very familiar with the provisions of the new law in October 2006 and counseled officers accordingly when they called. LCDR B does not remember speaking to the applicant but does not deny having done so. Taken together, these statements indicate that someone was confused during the alleged conversation between LCDR B and the applicant. Perhaps LCDR B misunderstood how much active duty the applicant had completed,⁵ or perhaps the applicant misunderstood LCDR B's counsel. The Board cannot conclude from the evidence of record that the applicant has proved that LCDR B negligently or erroneously counseled him about his entitlement to separation or severance pay under the new law.

6. The applicant has proved by a preponderance of the evidence that the Coast Guard has long delayed revising its regulations to conform to the statute. As the act was passed on November 25, 2002, and did not take effect until November 25, 2006, the Coast Guard had four years to correct the Personnel Manual and Pay Manual so that officers would understand their entitlement to severance or separation pay before and after November 25, 2006. In addition, in failing to mention the new six-year active duty requirement, CGPC's "Frequently Asked Questions Regarding Officer Separations" publication is incomplete.

⁵ The Board notes that it is possible for a lieutenant junior grade to have had six years of continuous active duty and so be eligible for separation pay under the new law at 14 U.S.C. § 286(b). For example, the officer may be prior enlisted, may have transferred from another military service, or may have been considered for promotion late due to administrative errors.

7. According to ALCGPERSCOM 087/06, the applicant is one of twelve lieutenants junior grade who failed of selection for promotion to lieutenant for a second time in 2006 and so were required to be discharged from active duty on or before June 30, 2007. As the lieutenant selection board convened on September 25, 2006, and the results were not published until November 1, 2006, with the issuance of ALCGPERSCOM 087/06, it is unlikely that any of the twelve officers left active duty before their entitlement to severance pay expired on November 25, 2006 (assuming all twelve had less than six years of continuous active duty by June 30, 2007, which may not be the case). Processing separation requests and processing officers for separation takes time. The Board notes that, although the applicant submitted his letter requesting an early separation date on November 8, 2006, CGPC did not approve it and issue his separation orders until December 29, 2006. When an officer requests early discharge, CGPC must determine that his billet can be timely filled or that his early departure without a replacement will not unduly stress others at his unit. Therefore, even though the applicant's command stated in a recent email that, if the applicant had asked to be discharged before November 25, 2006, he "would have done everything that [he] could have done to accommodate your desired separation date to maximize your entitlements under the new laws," the Board is not persuaded that such a fast separation would have been possible.

8. Although the Coast Guard has inexplicably long delayed incorporating the new law about separation pay—which went into effect on November 25, 2006—into the Personnel Manual and Pay Manual, the Board finds that the applicant has not proved by a preponderance of the evidence that he was denied severance pay because of an error or injustice⁶ committed by the Coast Guard.

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

[ORDER AND SIGNATURES APPEAR ON THE NEXT PAGE]

⁶ *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (finding that for purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is "treatment by military authorities that shocks the sense of justice, but is not technically illegal"); see Decision of the Deputy General Counsel in BCMR Docket No. 2002-040.

ORDER

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

Philip B. Busch

Adrian Sevier

George A. Weller