

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-161

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

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 and military records on May 23, 2009, and subsequently prepared the final decision as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 28, 2010, 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 asked the Board to correct his record so that he is entitled to the difference in pay for selling 48.5 days of leave as an E-6 in 2004 and the amount he would have received if he had sold that leave as an E-7 in 2009. According to the applicant,+ the difference amounts to \$2,153.88.

The applicant alleged that he was required to sell leave when he entered into an indefinite reenlistment contract in 2004 because the policy at that time was that the indefinite reenlistment would be the last opportunity for a member to sell leave. He stated that he did not want to sell leave at that time; rather, he wanted to wait and sell the leave at the E-7 rate closer to his retirement date. He stated that the Coast Guard recently issued ALCOAST 307/08, which allows members who entered into indefinite reenlistments prior to September 1, 2008, to cancel them and enter into new indefinite reenlistments for the purpose of selling leave. He argued that this option was not available to him and thinks it is unjust that he was required to sell leave in 2004.

The applicant submitted a copy of his reenlistment contract dated April 5, 2004, which shows an indefinite term of enlistment. It also shows that the "member is selling 48.5 days of regular leave."

ALCOAST 307/08, with an effective date of September 1, 2008, provided for the following in pertinent part:

1. In order to afford members serving on indefinite reenlistment contracts the opportunity to sell leave prior to separation or retirement, the following change is effective immediately and will be reflected in future change to the [Personnel Manual].

2. Effective 1 September 2008, members who are currently serving on an indefinite reenlistment contract are authorized to enter into a new indefinite reenlistment, one time, during a career for the purpose of selling leave. Those members who desire to enter into a new indefinite contract should contact their unit YN and submit a career intentions worksheet . . . indicating their desire to reenlist and the number of days of leave they desire to sell.

* * *

4. The statutory limit of selling a maximum of 60 days leave during a career remains in effect.

5. It is important for members to understand that if they were already in an indefinite reenlistment, and cancel that contract to sell leave, they will return to an indefinite reenlistment . . .

6. Effective 1 Sep 2008, members who have 10 or more years of active service will be allowed to reenlist for periods of three years, four years, five years, six years or for an indefinite period up to their 30-year active duty anniversary date. Members reenlisting for an indefinite period on or after 1 Sep 2008 cannot reenlist again later in their career for the purpose of selling leave. Paragraph 2 above only applies to member who entered into indefinite reenlistment contracts prior to 1 Sep 2008.

VIEWS OF THE COAST GUARD

On September 30, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted a memorandum adopting the comments provided by Commander, Personnel Service Center (PSC), as the Coast Guard's advisory opinion. PSC did not recommend relief. In this regard, PSC stated that ALCOAST 307/08 that became effective on September 1, 2008 did not contain any provision for retroactive entitlements. PSC further stated the following in pertinent part:

The Coast Guard's policy at the time of the time of the applicant's indefinite reenlistment was, by virtue of an indefinite reenlistment, to provide members the opportunity to sell leave upon entering into a reenlistment contract at either time of retirement or separation, as per [ALCOAST 307/08]. Thus the applicant was not required to sell leave. The applicant could have waited to sell his leave upon retirement or separation from the Coast Guard but made a conscious decision to sell leave in conjunction with his reenlistment based upon policy at the time. The applicant had not been advanced to the higher pay grade of E-7, and, if accruing

entitlements at the highest grade/rate possible were the intent of the applicant, conserving his leave balance to be sold in conjunction with retirement/separation could have been an appropriate course of action.

Subsequent policy changes (i.e. ALCOAST 307/08) that do not provide for a retroactive provision cannot be arbitrarily applied to previously executed contracts.

A review of the administrative processing regarding pay and entitlement to applicant was performed by PPC Topeka. Applicant was found to be compensated properly for the 48.5 days of regular leave sold at time of reenlistment.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 8, 2009, the BCMR received the applicant's response to the views of the Coast Guard. He disagreed with them and stated the following:

When I first joined the Coast Guard there was no indefinite enlistment policy. My plan to be prudent and receive maximum benefits for my service was to sell a total of 60 days leave at the highest possible pay grade four years prior to retiring, then retire with 60 days terminal leave. My plan would have allowed me to sell the 45.5 days accumulated leave four years prior to my retirement and have plenty of time to gain the 60 days of terminal leave for retirement. I was in pay grade E-6 when I entered the indefinite reenlistment at my ten years of service and knew I would be in a higher pay grade with higher longevity pay four years prior to retiring.

In addition to changing the indefinite enlistment policy regarding selling leave; the new policy also changes the enlistment periods available for members over 10 years of service allowing members now to enlist for periods of 3, 4, 5, and six years of for an indefinite period . . . When I was required to enter an indefinite enlistment I was not afforded the opportunity to enter any other contract period and that policy stated that would be the last opportunity to sell leave during a career until retirement or separation.

I suggest the error or injustice to my contract is based on the initial policy error and injustice. The Coast Guard recognized the initial policy error and injustice and changed to allow the selling of leave during an indefinite enlistment and also changed to allow any one over 10 years of service to enter into an enlistment contract for 3, 4, 5, or 6 years. I contend that the second policy is also in error and unjust by not allowing the same opportunities to those members that entered into an indefinite enlistment under the first policy. I see a great injustice in the Coast Guard's first indefinite enlistment policy and I am one of the few that were impacted by selling leave and having my plans changed by a policy that was later changed again.

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. A change to the Personnel Manual in May 2001 required personnel with 10 or more years of active service to reenlist for an indefinite term up to 30 years of active service. See Article 1.G.2.a. of the Personnel Manual. When the applicant's enlistment expired in 2004 he was required to reenlist for an indefinite term, as he stated in his application. At the time of his discharge and reenlistment in 2004, the applicant sold 48.5 days of leave back to the Government, in accordance with Article 7.A.20.a. of the Personnel Manual. This provision states:

Each member on active duty . . . is entitled to a lump sum leave payment for unused earned leave accrued to his or her credit on date of discharge, separation from active duty, or the date preceding the effective date of the first extension regardless of duration, to a maximum career total of 60 days. A combination of cash settlement and carryover of unused leave is permissible in addition to any leave accumulated due to service in hostile fire pay area.

3. The allegation that Coast Guard policy in 2004 eliminated additional opportunities to sell leave for members entering into indefinite reenlistments is not accurate. Under the circumstances that existed in 2004 and until September 1, 2008, when the new policy was implemented, an indefinite reenlistment would be a member's last opportunity to sell leave *until* the member's discharge, separation, or retirement from the Coast Guard. Under Article 7.A.20.a. of the Personnel Manual, an active duty member could sell leave on the date of discharge or separation from active duty up to a maximum career total of 60 days. Therefore, the applicant was not required to sell leave upon his indefinite reenlistment but could have carried it over into his new indefinite reenlistment and sold it upon his retirement, when he would have been in a higher pay grade. The change in Coast Guard policy in 2001 requiring indefinite reenlistments for members with more than 10 years of service did not deny the applicant the opportunity to sell leave; it may have limited the frequency with which he could do so. Prior to 2001, members reenlisted for 3, 4, 5, or 6 years, and at the end of the enlistment, leave could be sold as long as the 60-day career maximum was not exceeded. In contrast, because there was no need for reenlistments under indefinite enlistment policy, leave could only be sold upon discharge and execution of the indefinite reenlistment contract or when the member was permanently discharged or retired. While the applicant argued it was Coast Guard policy that he was required to sell leave, he puts forth no evidence of such policy. Instead it appears that the applicant mistakenly believed that his indefinite reenlistment in 2004 would be his last opportunity to sell leave. That mistaken belief was not caused by the Coast Guard because the policy with respect to selling leave was explained in the Personnel Manual as well as the Pay Manual in 2004.

4. The Coast Guard modified the reenlistment policy again in 2008 to allow members currently serving on indefinite reenlistments contract executed prior to September 1, 2008, a one-time opportunity to cancel such contracts and enter into new indefinite reenlistment contracts for the purpose of selling leave. The applicant argues this policy is unjust because he sold leave in 2004 while in a lower pay grade. However, as mentioned above, neither the policy in 2004 nor the current policy requires any member to sell leave. It merely allows the opportunity do so. The applicant chose to sell leave in 2004 at the E-6 pay grade and received the appropriate payment at that time. As the Coast Guard advisory stated, while the ALCOAST allows those in indefinite reenlistments a one-time opportunity to sell leave prior to separation or retirement, it does not authorize the Coast Guard to make adjustments or otherwise recalculate leave payments already executed prior to September 1, 2008. If the applicant is able to sell additional days of leave, the current policy does not prevent him from doing so, as long as he does not exceed the maximum statutory limit of 60 days.

5. The applicant asserts that it was erroneous and unjust for the Coast Guard to implement the indefinite reenlistment policy in 2001 and that the current policy is also unjust because it allows members with 10 years or more of service a choice of reenlisting for 3, 4, 5, 6 or an indefinite period, which was not available to the applicant when he reenlisted in 2004. The Board finds that the Commandant in issuing the various ALCOASTs exercised his authority under 14 U.S.C. § 632 to issue rules, orders, and instructions, not inconsistent with law, relating to the organization, internal administration, and personnel of the Coast Guard. The Commandant's authority to modify the Personnel Manual and to do so through the issuance of ALCOASTS was upheld in *Vierrether v. United States*, 27 Fed. Cl. 357 (1992), *aff'd* 6 F.3d 786 (Fed Cir. 1993), *cert. denied* 114 S. Ct. 1537 (1994) (upholding the authority of the Commandant to suspend for few months the hearing requirement for members who had more than eight years of service and were not recommended for retention to facilitate a reduction in force policy.) The applicant has not established an error with respect to the actions of the Coast Guard; nor has he shown that he has suffered an injustice. For the purposes of the BCMRs, "[i]njustice", when not also "error", is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). Nothing in the treatment of the applicant in this situation shocks the Board's sense of justice. The applicant was properly paid for 48.5 days of leave in 2004 and if he has additional leave days he wishes to sell (not to exceed a career total of 60), he can do so under the current policy by cancelling his indefinite reenlistment and entering into a new indefinite reenlistment for the purpose of selling leave.

5. Accordingly, the applicant has failed to prove an error or injustice in his military record, and his request for relief should be denied.

[ORDER AND SIGNATURES APPEAR ON FOLLOWING PAGE]

ORDER

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

Robert S. Johnson, Jr.

Randall J. Kaplan

Thomas H. Van Horn