DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2000-045

FINAL DECISION

ANDREWS, Attorney-Advisor:

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 application was filed on December 21, 1999, and docketed on January 7, 2000, upon receipt of the applicant's military records.

This final decision, dated October 12, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a xxxxxxxxx, who retired from the Coast Guard on June 30, 1999, asked the Board to correct his record to show that he was retired in pay grade E-7, rather than E-6.

APPLICANT'S ALLEGATIONS

The applicant alleged that he submitted a letter requesting retirement on April 6, 1998. On May 15, 1998, he alleged, he signed a pretrial agreement regarding a charge against him for larceny of property worth approximately $26.00. He alleged that he signed the agreement "with the understanding that [he] would retire at the highest grade held," which was pay grade E-7. He also alleged that both the trial judge and the Convening Authority for his summary court-martial told him that he would retire as an E-7.

The applicant alleged that the Coast Guard revised the pertinent regulation on September 14, 1998, and that, because of the revision, when he was finally

retired on xxxxx 1999, he was retired at pay grade E-6, rather than at the highest grade he had held, E-7. The applicant alleged that this was unjust because he had agreed to retire with the understanding that his retirement pay grade would be E-7. He argued that he should have been "grandfathered" under the previous regulation and retired as an E-7.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on xxxxxxx. During his 20 years on active duty, he performed over 9 years of sea service, serving on 5 different cutters and an icebreaker. He advanced steadily from seaman recruit (E-1) to xxxxxxxxx E-7).

On July 13, 1997, the applicant was charged with larceny by his command at the Marine Safety Office in xxxxxxx, in the xxxxxxxx Coast Guard District. The case was referred to a special court-martial.

On March 2, 1998, the Vice-Commandant of the Coast Guard ordered an immediate amendment to Article 12.C.15.e. of the Personnel Manual. The amendment provided that, when a member has been reduced in grade by court-martial, he can be retired in a pay grade no higher than that to which he was reduced by court-martial unless he is advanced subsequent to the court-martial and prior to his retirement.

On April 6, 1998, the applicant submitted a letter requesting permission to retire on xxxxxxxx, upon completion of 20 years of active duty.

On May 15, 1998, the applicant signed a pretrial agreement, which was approved by the Convening Authority.

On July 8, 1998, at a summary court-martial, the applicant received a $200.00 fine and a suspended sentence of reduction in rate to E-6. On July 10, 1998, the Convening Authority cancelled the suspension, thereby reducing the applicant's rate to E-6.

On September 14, 1998, Article 12.C.15.e. of the Personnel Manual was amended by Change 29. The amendments in Change 29 included the provisions in the Vice-Commandant's memorandum dated March 2, 1998.

On February 3, 1999, the applicant's retirement request was approved by the Coast Guard Personnel Command (CGPC).

In support of his allegations, the applicant submitted copies of several e-mail messages dated April 5 and 6, 1999. One message from a senior chief petty officer, inquiring on the applicant's behalf, states that when he signed the pre-trial agreement, he thought he would retire as an E-7 and that this was also the understanding of the judge and the Convening Authority. In response, the office of the Master Chief Petty Officer of the Coast Guard sent a message stating that the applicant's only recourse would be to file an application with the BCMR and that "[t]he only thing that could help his cause would be a statement from the Judge and Convening Authority acknowledging that such an agreement was reached." The applicant also submitted e-mails indicating that at one time, the Coast Guard considered not applying the new regulation to members who requested retirement prior to September 14, 1998.

On xxxxxxxx, the applicant was honorably retired in pay grade E-6 after having completed 20 years of active service.

VIEWS OF THE COAST GUARD

On August 4, 2000, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request for lack of merit and lack of proof.

The Chief Counsel stated that the applicant is mistaken in thinking that the new regulation concerning pay grade upon retirement went into effect when Change 29 to the Personnel Manual was issued on September 14, 1998. He alleged that the amendment was effective immediately, on March 2, 1998, prior to the applicant's April 6, 1998, request for retirement; May 15, 1998, pretrial agreement; and xxxxxxx, retirement. Moreover, the Chief Counsel alleged, the applicant has not proved that the Vice Commandant committed any error or injustice when he made his March 2, 1998, amendment to the regulations effective immediately.

The Chief Counsel further argued that, absent strong evidence to the contrary, the Board must presume that Coast Guard officials carried out their duties correctly, lawfully, and in good faith when they advised the applicant about his entitlements and retirement. *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1990); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). The pretrial agreement, he alleged, is silent on the matter of the pay grade in which the applicant would retire. In addition, he alleged, the applicant has not proved that there was any understanding between him and the Convening Authority concerning his pay grade upon retirement. Therefore, the Chief Counsel argued, he has not proved that any Coast Guard official promised him or advised him that he would retire at pay grade E-7. Even if the applicant was erroneously assured of

being retired at the higher pay grade, he argued, "such action would have been *ultra vires*, as [the Convening Authority] had not authority to overcome a lawful regulation then in effect."

The Chief Counsel also argued that the applicant has not proved that he would have been retired as an E-7 even if the regulation had not been amended. The old regulation allowed a member to retire in the highest grade in which he had served satisfactorily. Thus, the Chief Counsel alleged, the applicant's larceny might have prevented him from being retired in pay grade E-7 even if the regulation had not been amended.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 7, 2000, the BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited him to respond within 15 days. On August 22, 2000, the applicant filed a timely response.

The applicant alleged that on July 10, 1998, the Convening Authority, Captain X., summoned him just one hour prior to that officer's retirement ceremony. He alleged that Captain X. "explained that he felt obligated to impose the reduction because the fine was minimal so the reduction in rate was warranted but it would only effect me for the next eleven months until I retired myself at which time I would regain my highest rank held for pay purposes." The applicant argued that his punishment should have been only what the Convening Authority intended—eleven months at the reduced pay grade—and should not have been increased to a much greater punishment—retirement in the reduced pay grade—than Captain X. ever intended. The applicant alleged that if he had known the new rule prior to his retirement, he would have remained on active duty another year to retake the examination for promotion to BMC to ensure his retirement as an E-7.

The applicant further alleged that his career path in the Coast Guard was very arduous compared to those of most other rates and members. He alleged that he continued to serve even though to remain on active duty, he had to appeal a decision to retire him for medical reasons in 1982. He alleged that the Department of Veterans' Affairs has awarded him a 50 percent disability rating for the injuries he suffered while on active duty and his retirement income is very important due to his disability.

SUBSEQUENT PROCEEDINGS

On August 31, 2000, the BCMR wrote to the applicant to inform him that, although he had referred the Board to persons whom, he alleged, had erroneous-

ly advised him about his pay grade upon retirement, the Board has no authority to investigate the matter on his behalf. The BCMR told the applicant that if he intended to seek and submit affidavits from such persons, he must inform the Board within 15 days. In addition, he was advised that under 33 C.F.R. § 52.61(c), if he submitted late evidence, the Board might not meet the 10-month deadline prescribed by 14 U.S.C. § 425. The BCMR received no response from the applicant.

APPLICABLE LAWS

Prior to March 2, 1998, Article 12.C.15.e. of the Personnel Manual read as follows:

> Any enlisted member who is retired under any provision of Title 14 U.S. Code, shall be retired from active service with the highest grade or rate held while on active duty in which, as determined by the Commandant, as appropriate, performance of duty was satisfactory, but not lower than his/her permanent grade or rate, with retired pay of the grade or rate with which retired (14 U.S.C. 362).

On March 2, 1998, the Vice Commandant sent the following letter to the Commander of the xxxxxxx Coast Guard District:

> 1. This is in response to [your letter dated November 4, 1997], in which you requested that the Personnel Manual, [Article 12.C.15.e.], be amended for cases involving retiring enlisted members who have been reduced in grade as a result of a court-martial. After review and consultation with the Chief Counsel's staff, I concur with and approve your recommendation. The court-martial adjudication process is expected and presumed to consider the member's performance during the sentencing phase. However, if the member's grade changes subsequent to a court-martial, the member may retire at the new grade.
>
> 2. Although this change will be reflected in a future change to [the Personnel Manual], I have notified the Coast Guard Personnel Command to implement this change immediately.
>
> 3. You also requested Chief Counsel determine what the government is required to pay an enlisted member who is retired at a grade lower than the highest grade held. Coast Guard retirement pay is currently based on the grade at which the member is retired. In these cases, unless subsequently advanced or further reduced, the member's retirement pay would be based on the grade to which he/she was reduced by the court-martial.

On September 14, 1998, Change 29 of the Personnel Manual was issued, amending Article 12.C.15.e. to read as follows:

> Any enlisted member who retires under any provision of 14 U.S.C. retires from active service with the highest grade or rate he or she held while on

> active duty in which, as Commander (CGPC-epm-1) or the Commandant, as appropriate, determines he or she performed duty satisfactorily, but not lower than his or her permanent grade or rate with retired pay of the grade or rate at which retired (14 U.S.C. 362).
>
> In cases where a member has been reduced in grade by a court-martial, the highest grade to which the member has been reduced by the court-martial, unless the member subsequently advances or is again reduced. …

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. When the applicant submitted his request for retirement and signed his pretrial agreement, the regulatory amendment that would prevent his retirement as an E-7 (unless he stayed on active duty and was subsequently advanced back to the higher pay grade) was already in effect under the terms of the Vice Commandant's letter dated March 2, 1998.

3. The applicant alleged that he was erroneously advised that he would be retired as an E-7 even if he were reduced to E-6 by the summary court-martial. He also alleged that the new regulation caused him to be punished much more severely than was ever intended by the Convening Authority.

4. A voluntary retirement may be rendered involuntary if it results from deception or erroneous advice. *See Tippett v. United States*, 185 F.3d 1250, 1255 (Fed. Cir. 1999) (holding that "[a]n otherwise voluntary resignation or request for discharge is rendered involuntary if it … results from misrepresentation or deception on the part of government officers"); *Covington v. Department of Health and Human Servs.*, 750 F.2d 937, 942 (Fed. Cir. 1984) (holding that "misleading information can be negligently or even innocently provided; if the employee materially relies on the misinformation to his detriment, his retirement is considered involuntary"); and *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574-75 (Fed. Cir. 1983) (holding that "[a]n employee is not required to show an intent to deceive on the part of the agency in order for his retirement to be held involuntary. Rather, it is sufficient if the employee shows that a reasonable person would have been misled by the agency's statements"). At the same time, the government is not bound by the erroneous advice of its agents. *See*

Montilla v. United States, 457 F.2d 978 (Ct. Cl. 1972) (holding that the plaintiff was not entitled to retirement benefits even though several years earlier, he had received a letter from the Army informing him that he had performed a sufficient number of years of service to qualify for retirement benefits when he had not, in fact, performed enough years of service); and *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947) (holding that "[w]hatever the form in which government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority").

5. The extent to which the amendment to Article 12.C.15.e. of the Personnel Manual was publicized is unclear. The Vice Commandant's letter of March 2, 1998, indicates only that the information went to the Commander of the xxxxxxx District and the Personnel Command and does not indicate that information about the amendment was given to any other command, although the amendment greatly increased the potential punitive effect of a court-martial sentence of reduction in rate.

6. The applicant has presented no evidence substantiating his claims. Although he was encouraged by the Master Chief Petty Officer of the Coast Guard and by the Board to provide statements supporting his claims of erroneous advice, he failed to do so. The April 1999 e-mail messages that he submitted discuss his allegations but do not prove that he was misadvised. Nor has he proved that the Convening Authority was unaware of the new regulation and would not have cancelled the suspension of his reduction in rank if he had been aware. Thus, he has not proved that the Coast Guard committed any error or injustice when it retired him at pay grade E-6.

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

ORDER

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

Nancy Lynn Friedman

Robert H. Joost

Karen L. Petronis