

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-136

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FINAL DECISION

This is a proceeding under 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 May 25, 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 21, 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 asked the Board to correct his record by changing his retirement date from February 1, 2006, to April 1, 2006, so that he would receive two more months of active duty pay and allowances and two fewer months of retirement pay.

The applicant stated that after more than 30 years of service, he did not receive "a fair opportunity to retire from the Coast Guard on my desired mandatory retirement date of 1 April 2006."¹ He alleged that the Coast Guard Personnel Command's (CGPC's) Office of Personnel Management (OPM-2) pressured him to retire two months earlier than he wanted to so that there would be "on-site relief" in the small office in which he worked. He stated that OPM-2 told him and his supervisor, CDR X, that if he requested retirement on a date after February 1, 2006, his position would not be filled until the following assignment season, which would have left the office with a six to nine month gap between his own departure date and the arrival of whoever was assigned to fill the position. Therefore, he "moved my retirement date up two months" to ensure that his relief would arrive prior to his departure. He "made this decision based on the needs of [his small office], because of loyalty to my boss and to my commitment to the office. This was not my desire." He argued that due to the size of the office, he "had no other choice but to move my retirement date to be fair to my boss and the attorneys." He stated that he under-

¹ Article 12.C.6.a. of the Personnel Manual states that the Commandant may retire any CWO with at least 20 years of active service upon his or her request. Article 12.C.6.b.1. states that a CWO "who has at least 30 years of active service retires 60 days after he or she completes that service (10 U.S.C. 1305)."

stands the dynamics of detailing personnel because he previously served as an Assignment Officer for chief warrant officers and believes he was unjustly treated.

SUMMARY OF THE RECORD

On January 15, 1975, the applicant enlisted in the Coast Guard. He advanced to chief yeoman and was appointed a chief warrant officer (CWO) on July 1, 1994, in the personnel administration, or "PERS," specialty.

In a memorandum dated January 6, 2005, the applicant "request[ed] retirement on the first day of February 2006." His command endorsed the request with a recommendation that it be approved.

On January 21, 2005, the Chief of the Separations Section at OPM recommended approval of the applicant's request, noting that the "[m]andatory retirement for [the applicant] would be the first day of the month after he achieves 30 years [and] 60 days [of] service, or in his specific case, 1 April 2006." On January 28, 2005, the CWO Assignment Officer also recommended approval, noting that the "job will be filled during normal AY05 [assignment year 2005] season. On January 29, 2005, the Chief of the Officer Assignments Branch recommended approval of the request.

On January 31, 2005, CGPC approved the requested retirement date of February 1, 2006, and issued orders authorizing the applicant's retirement on February 1, 2006.

On February 1, 2006, the applicant was retired as a CWO4 upon completing 30 years and 18 days of active duty. His DD 214 indicates that he was retired for "maximum service or time in grade" pursuant to Article 12.C.7. of the Personnel Manual.

VIEWS OF THE COAST GUARD

On November 6, 2007, the Judge Advocate General of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request and arguing that the applicant had "not met his burden of proving the existence of an error or injustice by the preponderance of the evidence." In so doing, he adopted the facts and analysis in a memorandum provided by CGPC.

CGPC stated that the CWO Assignment Officer informed the applicant that if he retired on April 1, 2006, his position "would not be factored into that year's assignment process and would result in a gapped billet." CGPC alleged that this decision regarding "the applicant's backfill was motivated by prudent expenditure of resources" and would result in the billet being empty for four or five months. The Assignment Officer also informed the applicant that if he retired on February 1, 2006, his relief would be assigned in July 2005 so that there would be a seven-month overlap. CGPC stated that the evidence does not clearly indicate that pressure was applied on the applicant to retire two months before the law required, but it is clear that the applicant agreed to retire on February 1, rather than April 1, 2006, so that there would be a seven-month overlap in his billet instead of a gap. CGPC noted that the applicant's relief, another

CWO, reported to the office to fill his position on July 1, 2005, so there was indeed a seven-month overlap.

CGPC noted that the applicant was not required to submit his letter requesting retirement and that, if he had not done so, he would have been retired on April 1, 2006. CGPC admitted that if the applicant had chosen to retire on April 1, 2006, “his coworkers would have endured a gap of four to five months, and [he] may have felt guilty or responsible for that gap.” However, CGPC argued, it “is unreasonable to conclude that the Assignment Officer’s business rules regarding timing of billet overlaps amounted to pressure to change his retirement date.” CGPC stated that the applicant was informed of the Assignment Officer’s rules and deliberately and voluntarily decided for the good of his office and coworkers to retire on February 1, 2006, so that there would be overlap rather than a gap in his billet. Therefore, CGPC recommended that no relief be granted.

In support of these allegations, CGPC submitted copies of several email messages. On December 7, 2004, the CWO Assignment Officer informed the applicant that if he wanted his tour of duty to be extended until his retirement date, he needed to get his command’s endorsement because someone else wanted the position and the Assignment Officer needed the command’s endorsement “to leave you there for the time you have left.”

On December 8, 2004, the CWO Assignment Officer informed the applicant that “[w]ith a 1 April retirement date, I cannot provide a replacement until AY06. We base the assignment on the retirement date, not the terminal leave date. I don’t have any intention of moving you, but need an endorsement for all extension requests.”

On December 8, 2004, CDR X told CAPT H of OPM-2 that his office had

a warrant, 5 attorneys, & an admin assistant. The warrant, [applicant’s name], hits 30 years on 1 Apr 06. As a practical matter, he’ll be gone next Christmas w/ [terminal] leave and proceed time. He is tour complete in AY05 & has asked to extend in [the office] for the last 4 months of his career. The word he’s getting from the detailer is if he extends, the billet cannot be filled until AY06. With this size of office, I can’t afford to have the billet gapped for 7 months. An on-site relief is also critical since it’s a topic matter his relief is virtually guaranteed to have no experience in. I certainly don’t want to jack him around by fighting his request to extend for 4 months – just so I can get the position filled in AY05. He’s offered to stay on until summer ’06, but the word he got was that wasn’t an option for a warrant PERS. Any ideas?

On December 8, 2004, CAPT H of OPM-2 replied to CDR X as follows:

Regret my preliminary answer here would be to avoid filling this position in AY05, if [the applicant] desires to serve his entire 30 years (plus two months) and depart in April of 2006.

This is not all that unusual—many of our dedicated CWOs elect to serve out their full service eligibility. Some even ask to stick around longer. We can, and do, accommodate them if they are serving in a critical specialty. ... It is a bit unfortunate, for the legal program in general, and your shop in particular, that the PERS specialty is not among those for which we can extend CWOs beyond 30. ...

With that as a preface ... our standard practice is to use February as a “cut-off” date for the current assignment season. Positions vacated in March and later are filled the following assignment season. Otherwise, we create situations where there are significant (and costly) overlaps. If we

assigned an AY-05 relief for [the applicant], you'd have two CWOs filling one position for 6-8 months ... not sound from an AFC-01 stewardship standpoint.

If [the applicant] were willing to reconsider his retirement date and shift it up a couple of months, we'd be happy to identify a qualified relief during the current assignment season. This outcome would have a CWO reporting in Summer 2005, affording you the overlap with which you're concerned. Please advise.

On December 8, 2004, CDR X replied that he was "not inclined to ask him to move his retirement up to accommodate an arbitrary deadline. He'd like to stick it out till the bitter end & after 30 years I think he should be able to leave under his own terms. So, if we have to take it in the shorts, we will."

On October 12, 2007, the CWO Assignment Officer wrote that she remembers the applicant asking for an off-season assignment to replace him to avoid a gap in the billet. The Assignment Officer further stated that she informed the applicant

of the policy that was in place for providing replacements for retiring CWOs. At that time, [OPM's] assignment policy was, any unit with a CWO retiring on or before 1 Feb would receive a replacement the summer before. For any unit w/ a CWO retiring ... after 1 Feb through the remainder of that AY would receive a replacement the following summer. This prevented the overbilletting of CWOs for an extended period of time. If we had provided replacements the summer before for any CWO, regardless of the timeframe of when the member retired, we could have had an overbillet situation that could have potentially lasted 10 – 12 months placing us in a position where the CG might have well over its allotted number of CWOs at any give time.

[The applicant] was fully aware of the reasoning behind this policy. I explained it to him in detail plus he was a CWO detailee before he went to the legal job in HQ, from which he retired. Actually, he held the same detailee job I had and as far as I know the policy was in place when he held the job. He, serving in the capacity of liaison between OPM and his office, was given the facts of the assignment policy. I believe we did discuss this on a couple of occasions, [but] there was in no way ANY undue pressure put on him to retire early. [He did not file a complaint about being pressured to retire early.] ... It was his decision to go ahead and change his retirement date based on the needs of his office. There is no way I could have forced him to make that particular decision. I had nothing to hold over his head or to offer him to make him change his mind.

On October 12, 2007, a lieutenant who worked in the applicant's office at the time of his retirement wrote that he cannot recall being privy to any discussion between the applicant and CDR X about the timing of the applicant's retirement. The lieutenant stated that he remembers

that there was a relationship between [the applicant's] retirement date and orders for his relief. My recollection is that the detailers informed him that an April 2006 retirement meant that his relief could not be ordered in until the summer of 2006. I recall that in order for his relief to arrive in the summer of 2005, he would have to retire no later than February 2006. I also recall that [the applicant] was concerned about leaving his billet vacant, but I am not aware of any coercion placed upon [him] by his detailee. ... I am not aware of any coercion placed upon [him] by [CDR X/the command].

On October 18, 2007, CDR X forwarded to CGPC the email messages dated December 7 and 8, 2004, shown above. He stated that after receiving the response from CAPT H, he asked the Chief of Legal Policy & Program Development and the Deputy Judge Advocate General to

discuss the problem with the Chief of OPM to see if an exception to the policy could be made, but they did not do so. CDR X further stated that he believes that

the hard and fast “February rule” is a matter of convenience for the detailers so they don’t have to make case-by-case determinations. I’m as much a fan of arbitrary rules as the next person, but it was disappointing that no one in the legal program was willing to back [the applicant] up in what was, in my view, a modest request. It was unfortunate [he] was forced to choose between his own interests and leaving [the office] shorthanded for 8 months. In the end, his loyalty to the office and to the legal program resulted in him forgoing what he said was his goal when he first entered the Coast Guard—serving a full 30 year career. It’d be great if the [BCMR] could help him out.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 26, 2007, the BCMR received the applicant’s response to the Coast Guard’s advisory opinion. He stated that the advisory opinion is not factual in that it suggests that when he asked to retire on February 1, 2006, he actually wanted to retire on that date. He argued that “[t]o think that a person after 30 years [of] service would retire two months earlier than mandatorily required without being pressured is ridiculous.

The applicant stated that CAPT H of OPM-2 pressured him into requesting to retire two months earlier than he wanted to and had to. He alleged that the emails submitted by CGPC prove his allegations about the pressure put on him to retire early. He argued that, after 30 years in service, he should have been able to retire when he wanted instead of being “pressured due to some arbitrary assignment date to make the detailer’s job easier.” He stated that almost all retirements are voluntary retirements because very few personnel stay on active duty for 30 years and the members who do so should not be treated as if they were voluntarily retiring. The applicant argued that the strong evidence that he was not retiring on the date he wanted to retire should be considered sufficient evidence that he was unjustly pressured to retire early. He stated that his loyalty to his office and the work of that office and the pressure applied by CAPT H due to assignment considerations deprived him of the opportunity to retire on his desired retirement date. He argued, “[t]his is not the way to treat the few that retire from the Coast Guard with 30 years of service.”

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 over this matter pursuant to 10 U.S.C. § 1552. The application was timely.
2. Absent evidence to the contrary, the Board presumes that government officials, including the applicant’s chain of command and officers within OPM, have carried out their duties “correctly, lawfully, and in good faith.”² To be entitled to relief, the applicant must submit

² *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

sufficient evidence to overcome this presumption and prove by a preponderance of the evidence that his retirement date is either erroneous or unjust.³

3. The record shows that the applicant originally wanted to retire on April 1, 2006—the last possible date permitted by statute—and would have done so if his office would not have been left short-handed for a few months following his departure. The applicant does not allege that the Coast Guard violated any statute, regulation, or policy when it retired him on February 1, 2006, upon completing more than 30 years of service, and since he actually submitted a request for that retirement date, the record does not support a finding of error. Instead, the applicant argues that his retirement date was unjust because (a) he was pressured into requesting a retirement date two months before that mandated by law; and (b) he had served more than 30 years on active duty and yet OPM would not make an exception to the assignment policy that would have left his office understaffed had he not submitted a request to retire on February 1, 2006.

4. The assignment policy at issue is apparently not inscribed in any regulation but nonetheless firmly enforced. There is no evidence in the record showing that exceptions have been made for other CWOs retiring under similar circumstances. Since the applicant had recently served as the CWO Assignment Officer, he may have known about the policy before making his inquiries in December 2004. The policy provides that when a CWO retires on February 1 or earlier, CGPC will assign his relief during the prior assignment season (which occurs each summer) so that there will be a few months of overlap; but when a CWO retires after February 1, CGPC will not assign relief until the following summer and so the billet remains unfilled for a few months. The policy apparently ignores the amount of terminal leave the incumbent CWO is entitled to take prior to the date of retirement.

5. The emails in the record support the applicant's contention that he felt pressured into requesting the February 1, 2006, retirement date. The emails show that he was informed of the assignment policy, which would cause his office to be understaffed for a few months if he retired on April 1, and was told that no exception to that policy would be made for his billet. The applicant was tremendously loyal to the Coast Guard, his office's mission, and his colleagues and, as a result of his loyalty, submitted a request to retire on February 1 so that his office would not be understaffed for a few months following his retirement. If he had not been so loyal, he would have retired on April 1, 2006, despite the fact that his office would be left understaffed for a few months because of the Coast Guard's assignment policy.

6. The emails do not show that any member of the Coast Guard actually applied improper pressure or verbally coerced the applicant into submitting his retirement request. The emails do not show that he would personally suffer any negative repercussions if he chose to retire on April 1, 2006, and he has not alleged that he expected any such repercussions. In fact, CDR X's last email dated December 8, 2004, shows that CDR X did not intend to ask the applicant to retire early for the sake of his coworkers or their mission, and the applicant has not

³ 33 C.F.R. § 52.24(b). Under 10 U.S.C. § 1552(a), the BCMRs are authorized to correct both errors and injustices in applicants' military records. In *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976), the Court of Claims held that, the word "injustice" as used in § 1552(a) means "treatment by military authorities that shocks the sense of justice, but is not technically illegal." This Board has the authority to determine the existence of injustice on a case-by-case basis when it is supported by the preponderance of the evidence in the record. See Decision of the Deputy General Counsel in BCMR Docket No. 2002-040.

alleged that CDR X did so. Instead, the emails show that OPM informed the applicant and CDR X of the policy that would apply in assigning the applicant's relief depending upon his retirement date. A less loyal member might have ignored the information and retired on April 1, but the applicant's loyalty led him to request retirement February 1. Although the applicant felt pressure to submit a request to retire two months earlier than required by statute because of the consequences of a later retirement date for his office, the Board cannot conclude on this basis that his request to retire on February 1 was not voluntary.

7. In emails dated December 8, 2004, and October 18, 2007, CDR X called the assignment policy arbitrary and stated that it was based on the convenience of the Assignment Officers so that they would not have to make judgments on a case-by-case basis. Both he and the applicant believe that an exception should have been made because the applicant was retiring after 30 years, instead of 20 or 25 years, so that the applicant would not have to choose between his desired retirement date of April 1 and a date two months earlier that would not leave his office understaffed for a few months.

8. The Board does not believe the assignment policy to be arbitrary just because it may ease the Assignment Officer's workload. If no firm "cut-off" date were provided and such matters were decided on a case-by-case basis, inequities would likely abound given the number of Assignment Officers making such decisions, the number of factors involved in the assignment process, the number of reasons that affect retirement dates (e.g., should an exception be made for a member with 30 years of service but not for one with 25 years who must retire to take care of a sick child or parent?), and the variety of billets and office circumstances.

9. According to CGPC, moreover, the policy is based in large part on financial prudence. The Coast Guard has apparently decided that when a CWO retires in the "off-season"—i.e., not in the summer—the Coast Guard can afford to pay for only a few months of overlap in the CWO's billet. For example, when the applicant retired, the Coast Guard paid for seven months of overlap since both the applicant and his relief were assigned to the billet from July 1, 2005, through January 31, 2006. However, because of the extra cost, the Coast Guard is not willing to pay for longer periods of overlap, such as from July 1, 2005, to March 31, 2006. CGPC also argued that the amount of overlap in billets must be limited because the more CWOs are overlapped, the fewer CWOs there are to fill other critical billets. In light of these considerations, the Board cannot find that the assignment policy was arbitrarily or unfairly applied to the applicant's billet.

10. Although the applicant's loyalty and dedication should be honored, the fact that he retired from the Coast Guard with 30 years of service does not persuade the Board that OPM committed an injustice by not granting an exception to its assignment policy so that he could avoid having to choose between following his own desire by retiring on April 1 or helping his office by retiring on February 1. OPM's actions in informing the applicant of the assignment policy and in refusing to make an exception for his billet do not constitute either legal error or "treatment by military authorities that shocks the sense of justice."⁴

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

⁴ *Reale*, 208 Ct. Cl. at 1011.

ORDER

The application of CWO xxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG (Retired), for correction of his military record is denied.

Nancy L. Friedman

Patrick B. Kernan

(recused*)

Donald A. Pedersen

* This Board member recused himself from the deliberations in this case. Under 33 C.F.R. § 52.11(b), two members constitute a quorum of the Board.