N.B.: The delegate of the Secretary approved this Final Decision on Remand on January 22, 1999.

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1997-123

FINAL DECISION ON REMAND

ANDREWS, Attorney Advisor:

This is a proceeding under the provisions of section 1552 of title 10 of the United States Code. The original proceeding was commenced upon the BCMR's receipt of the applicant's application on May 7, 1997. The Board's first decision, signed on April 23, 1998, was reviewed by the Deputy General Counsel, who remanded it to the Board for further consideration on August 28, 1998.

This final decision on remand, dated September 11, 1998, is signed by two duly appointed members who were designated to serve as the Board in this case. A concurring opinion was issued on September 25, 1998.

RELIEF REQUESTED

The applicant, a xxxxxxxxxx in the United States Coast Guard, asked the Board to correct his military record to show that he had extended his enlistment in February 1982 so that he could receive a selective reenlistment bonus (SRB) pursuant to ALDIST 004/82. The applicant stated that he did not discover his eligibility for this SRB until October 1996, "when a fellow Chief informed [him] about his similar case and subsequent correction and reimbursement."

APPLICANT'S ALLEGATIONS

In his application to the BCMR, the applicant alleged that he was never counseled about his eligibility, as an xxx, to receive an SRB with a multiple of one under

ALDIST 004/82. He alleged that the Coast Guard Air Station in xxxxxxxxxxx, did not publicize the fact that members not at the end of their current enlistments could nonetheless extend their enlistments to receive the bonus. In his response to the Coast Guard's advisory opinion, the applicant alleged that he was "career oriented" and "would have extended [his] enlistment for six years to obtain the Zone A SRB."

SUMMARY OF RECORD

The applicant enlisted in the Coast Guard Reserve on July 20, 19xx, for a term of six years. On November 13, 1978, he was discharged in order to reenlist in the Coast Guard for a term of four years. His rating and pay grade at the time the ALDISTs discussed herein were issued were xxx and E-5.

On October 1, 1981, the Commandant of the Coast Guard issued ALDIST 340/81, which allowed members within 30 days of the end of their enlistment periods to receive an SRB if they reenlisted or extended their current enlistments for at least three years. The Zone A SRBs authorized for xxxs who extended their enlistments or reenlisted under ALDIST 340/81 were calculated with a multiple of one. On January 12, 1982, ALDIST 004/82 temporarily locked in the multiples issued under ALDIST 340/81 and waived the requirement that members be within 30 days of the end of their enlistment periods in order to be eligible to receive the SRB for extending their enlistments. To take advantage of ALDIST 004/82, members had to extend their enlistments before February 15, 1982.

The applicant did not extend his enlistment or reenlist during the period when ALDIST 004/82 was in effect. There is nothing in his military record to indicate that he was ever counseled about the terms of ALDIST 340/81 or ALDIST 004/82.

The applicant remains on active duty with the Coast Guard. Subsequent to his four-year enlistment on November 13, 19xx, the applicant's military record shows that he either reenlisted or agreed to extend his enlistment on the following dates for the periods indicated:

November 11, 1982 . . . . . 12 months
October 20, 1983 . . . . . 1 year
October 15, 1984 . . . . . 1 year
November 8, 1985 . . . . . 1 year
September 24, 1986 . . . . . 1 year
November 2, 1987. . . . . 1 year
November 10, 1988 . . . . . 3 years
November 6, 1991 . . . . . 3 years
October 17, 1994 . . . . . 6 years

On three of the extension forms, the reason for extension was listed as "voluntary." On one form, the reason listed was "to remain on active duty." On another, it was "to have obligated service for class 'C' school." On two others, the reason given was "in lieu of reenlistment." However, the applicant's DD Form 214 for November 9, 1988, the date the applicant was discharged for immediate reenlistment, states that his extensions were "at the request and for the convenience of the government."

VIEWS OF THE COAST GUARD

On December 31, 1997, the Chief Counsel of the Coast Guard recommended denial of the applicant's request for relief.

The Chief Counsel urged the Board to deny the applicant's request for lack of proof because the applicant had failed to establish a prima facie case by proving that (1) the Coast Guard owed him a duty to counsel him regarding his eligibility for an SRB under ALDIST 004/82, (2) the Coast Guard did not so counsel him, and (3) had he been so counseled, the applicant would have been willing, in 1982, to extend his service from 1982 through 1988.

Regarding these issues, the Chief Counsel argued first that, under ALDIST 004/82, the Coast Guard had no duty to inform potential extendees of their eligibility. COMDTINST 7220.13E required the Coast Guard to inform only potential reenlistees, and the applicant was not a potential reenlistee in February 1982 because he was not within three months of the end of his existing enlistment.

Second, the Chief Counsel argued that, even if the Board were to find that the Coast Guard had a duty to counsel the applicant, a lack of memory of counseling is particularly unreliable after so many years, and the applicant's statement about his lack of memory of counseling should be "insufficient to overcome the strong presumption that military officials carried out their duties correctly, lawfully, and in good faith."

Third, the Chief Counsel argued that, even if the Board were to find that the Coast Guard had a duty, but failed, to counsel the applicant, the Board could not presume, based on the member's word and subsequent years of service, that the applicant would have, in fact, chosen to obligate himself to serve through 1988. The Chief Counsel cited the applicant's six short-term extensions of his enlistment in the mid 1980s as evidence that the applicant had not committed himself to a career in the Coast Guard. The Chief Counsel urged the Board to require the applicant "to articulate specific, fact-based reasons for his conclusion" that he would have extended his enlistment had he been counseled about ALDIST 004/82, rather than excepting the applicant's "speculation" and "self serving opinion" that he would have extended.

In addition, the Chief Counsel argued that, even if the Board found that the Coast Guard had erred and that the applicant would have extended his service if he had been counseled, the Board should still deny relief because, under the Supreme Court's decisions in United States v. Caceres, 440 U.S. 741 (1979), and Cort v. Ash, 422 U.S. 66, 78 (1975), violations of agency procedural regulations do not create private rights of action.

Finally, the Chief Counsel argued that Congress intended the SRB program to benefit the Coast Guard and the United States by encouraging experienced members with critical skills to extend their military service. Therefore, paying the applicant retroactively would be contrary both to the statute's purpose (because it would not benefit the Coast Guard) and to the fact that applicant did not in fact obligate himself to serve for another six years when ALDIST 004/82 was in effect.

APPLICABLE REGULATIONS

SRB Regulations

Commandant Instruction 7220.13E (Administration of the Reenlistment Bonus Program) was released on May 4, 1979 and was in effect when ALDIST 340/81 and ALDIST 004/82 were distributed. Section 1.c.(4) of Enclosure (1) to the Instruction stated that "[e]ntitlement to an SRB vests only on the date the member reenlists or makes operative an extension of enlistment . . . ." Section 1.d.(1) of Enclosure (1) provided the criteria for SRB eligibility in Zone A.[1] It stated the following, in part:

> (1) Zone A Eligibility. [To be eligible, a member must meet all of the following criteria:]
>
> > (a) Be serving on active duty in pay grade E-3 or higher in a military specialty designated [in the SRB announcement].
> >
> > (b) Must have completed at least 21 months of continuous active duty, other than active duty for training, but not more than six years of total active duty, immediately preceding the date of reenlistment or operative date of extension of enlistment. . . .

[1] SRBs vary according to the length of each member's active duty service, the length of the period of reenlistment or extension of enlistment, and the need of the Coast Guard for personnel with the member's particular skills. Coast Guard members who have more than 21 months but less than 6 years of active duty service are in "Zone A," while those who have more than 6 but less than 10 years of active duty service are in "Zone B." At the time ALDIST 340/81 and ALDIST 004/82 were issued, the applicant was in Zone A. Members may not receive more than one bonus per zone.

> (c) The extension of enlistment or reenlistment must be at least three years and, when combined with prior active duty, must yield a total of at least six years of active duty. [Emphasis in original]
>
> (d) Has not previously received a Zone A SRB, nor previously enlisted, reenlisted, or extended (extensions that have become effective) beyond six years of active duty. . . .

Section 1.g. of the Enclosure stated that in order to "attain the objectives of the SRB program, each potential reenlistee who would be eligible for [an] SRB must be informed of [his or her] eligibility and the monetary benefits of the SRB program. It is expected that the reenlistment interview, held approximately six months before expiration of enlistment, will provide the potential reenlistee with complete information on SRB."

ALDIST 340/81

ALDIST 340/81, issued on October 2, 1981, changed the existing multiples of the SRBs that members could receive to reflect the degree to which the Coast Guard needed to retain personnel in each skill rating. The multiple to be used for calculating SRBs for reenlisting or extending members in the xx rating was one.

ALDIST 004/82

ALDIST 004/82, issued on January 12, 1982, locked in the multiples used for calculating SRBs under ALDIST 340/81 until February 15, 1982. Thereafter, the multiples were to change to reflect the degree to which the Coast Guard needed to retain personnel in each skill rating. ALDIST 004/82 also suspended the provisions of Article 1-G-83 of the Personnel Manual (Execution of Agreement to Extend Enlistment) until February 15, 1982, and therefore allowed members to extend enlistments that were not within 30 days of termination.

Article 1-G-83 of the Coast Guard Personnel Manual (COMDTINST M1000.6A) stated the following, in part:

> (b) Generally, an individual should not be permitted to agree to extend his/her enlistment until approximately 30 days prior to the date of expiration of the then existing enlistment. For certain purposes, however, such as qualifying for assignment to a service school, duty outside CONUS, assignment to active duty in the case of a Reservist, or for other duty requiring additional obligated service, it is permissible to permit an individual to agree to extend his/her enlistment a considerable time in advance.

FEDERAL COURT CASES CITED

***United States v. Caceres*, 440 U.S. 741 (1979).**

In Caceres, the Supreme Court held that a criminal defendant was not entitled to the benefit of the exclusionary rule even though the IRS had violated its own regulations when an IRS agent tape recorded the defendant offering the agent a bribe. The Court reasoned that neither the Constitution nor a federal statute (or even defendant's reasonable reliance on IRS regulations) required the IRS agent to obtain advance approval from his superiors before tape recording the conversation.

***Cort v. Ash*, 422 U.S. 66 (1975).**

In Cort, the Supreme Court held that a stockholder does not have a private cause of action (i.e., stockholder's derivative suit for damages and an injunction) against corporate directors for violating a federal statute prohibiting corporate expenditures in a Presidential election campaign. The Court listed four factors that should be considered in determining whether a statute creates a private cause of action and private remedy: (a) whether the stockholder was one of the class for whose special benefit the statute was enacted; (b) whether Congress intended, implicitly or explicitly, to create or to deny such a remedy; (c) whether the private remedy is consistent with the underlying purposes of the legislative scheme; and (d) whether the cause of action is traditionally relegated to state law and is basically the concern of the states.

APPLICABLE BCMR DECISIONS

BCMR Docket No. 121-93.

In BCMR Docket No. 121-93, the applicant asked the Board to reconsider its denial of his request (in the final decision in BCMR Docket No. 237-91) to correct his military record to show that he had extended his service on February 14, 1982, and was therefore due an SRB. Although the Board again denied the requested relief, the Deputy General Counsel granted relief, finding in part that

1. because the Coast Guard had presented no evidence as to how the applicant could or should have learned of ALDIST 004/82 any earlier than he claimed, the applicant's sworn statement that he learned of it in 1991 would be accepted at face value, especially since "[a]llegations that the first knowledge members have had of the provisions of ALDIST 004/82 came from contact with [the 'C' school] are common, and have often been accepted without challenge in the past";[2]

[2] The Deputy General Counsel cited in support BCMR Docket No. 151-91.

2. "Coast Guard regulations require that members be 'fully advised' of SRB opportunities";[3] and

3. the Board had "commonly afforded relief under similar circumstances in the past, and . . . reversal of such precedents without a firm basis in the record would be clearly unreasonable here."

BCMR Docket No. 69-97

In BCMR Docket No. 69-97, the applicant had reenlisted on May 2, 1980, for a six-year term, after completing his first, four-year enlistment. Subsequently, the applicant extended his enlistment three times for periods of two years or less before reenlisting for three years on March 1, 1991, and for another six years on January 6, 1994. The applicant asked the BCMR to correct his record to show that he had requested an extension of his enlistment for a period of six years on February 14, 1982, in order to receive a Zone B SRB. He stated that if he had been properly counseled and made aware of the provisions of ALDIST 004/82, he "would have taken the necessary steps to secure [a] zone 'B' bonus." There was no documentation in the applicant's record to indicate that he was ever advised of the provisions of ALDIST 004/82 while it was in effect.

The Board recommended that the requested relief be granted. That recommendation was based in part on (1) the applicant's sworn statement that he had not been properly counseled about ALDIST 004/82 when it was in effect and that he had not learned of it until 1997; (2) the applicant's statement that he would have extended his enlistment to receive the SRB had he known of the opportunity; (3) the applicant's previous enlistments and subsequent years of service, which provided a reasonable basis to believe that he would have extended his service obligation had he been properly counseled about ALDIST 004/82; and (4) the Coast Guard's failure to reveal if and how information about ALDIST 004/82 had been disseminated to the members.

The Deputy General Counsel wrote a concurring decision[4] which responded to several of the Coast Guard's arguments that were not mentioned in the Board's decision but are pertinent to the case in hand:

1. In response to the argument that the Coast Guard was only required to counsel potential reenlistees, not potential extendees, the Deputy General Counsel found that Congress had intended both groups to benefit from the SRB program and that the Coast Guard had presented no rational basis for counseling one group but not the other. She concluded that the "Coast Guard erred in drafting COMDTINST

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[3] The Deputy General Counsel cited BCMR Nos. 224-87, 263-87, 268-87, 285-87 for this position.

[4] The Deputy General Counsel's arguments in this case were very similar to those she made in her concurring decision in BCMR Docket No. 54-97.

7220.13E when it failed to require mandatory counseling for potential extendees . . . ." BCMR Docket No. 69-97, Deputy General Counsel's Concurring Decision, at 3.

2. In response to the argument that the applicant's statements were insufficient to overcome the presumption of regularity in administrative matters such as counseling, she stated that the applicant's history of service and his statements concerning the lack of proper counseling and what he would have done had he been properly counseled were sufficient to nullify the presumption in this case.

3. The Deputy General Counsel found unpersuasive the argument that the applicant's short extensions show that he was not, in fact, committed to a career in the Coast Guard and therefore was not likely to seek a maximum SRB. She reasoned that short extensions for particular purposes, such as enrollment in school or transfer to a different station, are made frequently for the convenience of the government and do not necessarily reflect a member's lack of career commitment to the Coast Guard.

4. In response to the Coast Guard's claim that the applicant had no private right of action under its regulations, the Deputy General Counsel found that Congress had created a private right of action in the SRB statute (37 USC § 308) and the BCMR statute (10 USC § 1552).

5. In response to the argument that paying SRBs many years after the applicable ALDIST had expired was inconsistent with the purpose of the statute, which was to benefit the Coast Guard, she cited the decision in Larinoff, which held that "[t]he intention of Congress in enacting the [reenlistment bonus statute] was specifically to promise to those who extended their enlistments that a [reenlistment bonus] award would be paid to them at the expiration of their original enlistment in return for their commitment to lengthen their period of service." United States v. Larinoff, 431 U.S. 864, 878-79 (1977).

6. Finally, the Deputy General Counsel cited several "Comptroller General cases that authorize government agencies to correct errors of wrongful advice or failure to advise when an employee otherwise meets the statutory criteria for obtaining a benefit."[5] BCMR Docket No. 69-97, Deputy General Counsel's Concurring Decision, at 11.

HISTORY OF THIS CASE

The Board's first decision in this case was issued on April 23, 1998. Based on the applicant's allegations, his military record, and the views of the Coast Guard presented above, the Board made the following findings: (1) the application was timely; (2) the

[5] The Deputy General Counsel cited Matter of Hanley, B-202112, November 16, 1981; Matter of Anthony M. Ragunas, 68 Comp. Gen. 97 (1988); and Matter of Dale Ziegler and Joseph Rebo, B-199774, November 12, 1980.

Coast Guard had a duty to counsel the applicant concerning his eligibility for an SRB under ALDIST 004/82; (3) the Coast Guard erred by failing to counsel the applicant; and (4) the applicant's request should be granted. The Board ordered that the applicant's record be corrected to show that he had extended his enlistment for six years under ALDIST 004/82.

On August 28, 1998, the Deputy General Counsel, acting as the Secretary's delegate, remanded the decision to the Board for further consideration. The Deputy General Counsel stated that the Board had not addressed some of the Coast Guard's arguments against granting the applicant's requested relief. She asked the Board to address each of the Coast Guard's arguments in its decision on remand. She specifically requested that the Board make findings about the following issues: (1) whether the Coast Guard had a duty to counsel the applicant on his eligibility for an SRB under ALDIST 004/82; (2) whether the applicant has proved that he was not counseled on the ALDIST's provisions; (3) whether failure to counsel creates a private right of action; (4) whether Congress intended the SRB program to benefit only the Coast Guard or to benefit Coast Guard members as well; and (5) whether the applicant would have extended his enlistment in 1982 if he had been properly counseled.

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, United States Code.

2. The applicant has made a sworn statement that he discovered the alleged error which he has asked the Board to correct in October 1996. The Coast Guard did not present any evidence indicating that the applicant knew or might have learned of his eligibility to receive an SRB under ALDIST 004/82 any earlier than the date of discovery alleged by the applicant. The Board finds that the application was timely as it was filed within three years of the date of discovery of the alleged error.

3. The SRB statute, 37 USC § 308(a), expressly includes members who "voluntarily extend[] [their] enlistment[s]" among those who may be eligible for SRBs. To achieve Congress's goals for the SRB program, the Coast Guard must inform members who are eligible to receive a bonus of their eligibility. In Larinoff, the Supreme Court held that "[t]he intention of Congress in enacting the [reenlistment bonus statute] was specifically to promise to those who extended their enlistments that [an SRB] would be paid to them at the expiration of their original enlistment in return for their commit-

ment to lengthen their period of service." United States v. Larinoff, 431 U.S. 864, 878-79 (1977).

Thus, the Coast Guard's argument that it was required to inform only potential reenlistees and not potential extendees because its regulation specified only the means by which potential reenlistees would be informed of their eligibility must be rejected. The fact that the Coast Guard neglected to specify in its regulations how potential extendees should be informed of their eligibility under ALDIST 004/82 does not mean potential extendees had less right to be informed than did the potential reenlistees. In BCMR Docket No. 69-97, the Deputy General Counsel has held that the Coast Guard erred when it failed to require counseling of potential extendees under COMDTINST 7220.13E. Moreover, the Deputy General Counsel held in BCMR Docket No. 69-97 that the "Coast Guard erred in drafting COMDTINST 7220.13E when it failed to require mandatory counseling for potential extendees on an equal basis with potential reenlistees." BCMR Docket No. 69-97, Deputy General Counsel's Concurring Decision, at 3. The Board therefore finds that the Coast Guard did have a duty to counsel the applicant about his eligibility under ALDIST 004/82.

4. The Coast Guard does not dispute that, under ALDIST 004/82, the applicant was eligible to extend his enlistment for up to six years, from the end of his then-current enlistment in November 1982 to 1988.

5. As the Coast Guard stated, the lack of evidence of counseling in the applicant's record is not proof that he was never counseled, because the regulations at the time did not expressly require members to sign documents stating that they had been properly counseled about SRBs. However, the applicant made a sworn statement on his DD Form 149 that he had not been properly counseled about his eligibility for an SRB under ALDIST 004/82.[6] Although the Coast Guard called the applicant's memory concerning an event that might have occurred 15 years in the past unreliable, the Board finds that most people would recall being offered a large bonus.

Moreover, the Coast Guard has made no statement and submitted no evidence to rebut the applicant's claim that he was not informed of his eligibility for the SRB. The Coast Guard has not presented any evidence that potential extendees were informed of the opportunity. Therefore, the Board finds that the presumption that military officials have carried out their duties correctly is overcome with respect to the Coast Guard's informing potential extendees of their eligibility for an SRB under ALDIST 004/82. With a credible, sworn statement by the applicant and no contrary evidence presented by the Coast Guard, the Board finds that the preponderance of the evidence indicates that the applicant was not properly counseled in 1982 about his eligibility for an SRB.

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[6] The BCMR application, DD Form 149, contains a warning for applicants regarding the penalties for willfully making a false statement or claim, pursuant to 18 USC §§ 287 and 1001.

6. The applicant signed a letter to supplement his application in which he swore that if he had been counseled about his eligibility for an SRB under ALDIST 004/82, he would have extended his enlistment for six years to take advantage of the opportunity to receive the SRB. Although the Coast Guard called the applicant's statement self-serving and speculative, it presented no evidence indicating that in the winter of 1982 the applicant was in any way dissatisfied with or had any intention to leave the Coast Guard.

7. The applicant's series of short-term extensions subsequent to the expiration of his first, four-year enlistment does not necessarily reflect a lack of commitment to continue to serve in the Coast Guard. Short-term extensions of enlistments are common and are made for a variety of reasons, such as personnel specialists' avoiding the extra administrative work and arrangement of medical appointments required to process a reenlistment or a member's attending school or being transferred to a new station. At least three of the applicant's one-year extensions were executed for a particular purpose such as to attend a school or in lieu of reenlistment. The other three one-year extensions were characterized as "voluntary" or as an extension "to remain on active duty." The DD Form 214 in the applicant's military record, however, states that the short extensions were "at the request and for the convenience of the government." None of these purposes recorded in the applicant's military record suggests that the applicant was considering leaving the Coast Guard or did not want to pursue a career in the Coast Guard.

The Board also notes that the applicant had no break in service whatsoever during this six-year period even though Article 1-G-7A of the Personnel Manual permits a three-month break in service with no loss of eligibility for an SRB or loss of time in pay grade in rating for advancement. The lack of any break in service during this period—as well as the applicant's approximately 20 years of continuous service to date without an SRB—demonstrates his commitment to the Coast Guard.

In short, there are so many reasons why a member might request or be directed toward short-term extensions in lieu of reenlistments that the Board will not consider such extensions to be proof of a lack of commitment to the Coast Guard without more evidence.

Finally, the facts in this case are not dissimilar to those in BCMR Docket No. 69-97, in which the Deputy General Counsel found that two two-year extensions and one ten-month extension did not establish that the applicant would not have extended for six years if he had been counseled about ALDIST 004/82. In support of that finding, the Deputy General Counsel looked to the purpose of the extensions and found that each one was for a particular purpose and was for the convenience of the Coast Guard. In the Board's view, the difference between that applicant's extensions and this applicant's

one-year extensions is not so significant as to require the Board to reach a different result in this case.

8. The Coast Guard's argument that the applicant might have procrastinated or hesitated because of his youth and thereby lost the opportunity to receive the bonus is not compelling. Few people would ignore a sure opportunity to receive a bonus if they wanted to continue on active duty. Likewise, the applicant's youth (he was then 26 years old) has not convinced the Board that he would not have extended his enlistment for the required period if he had known about ALDIST 004/82.

9. The Coast Guard's argument that even if the applicant had chosen to extend his service in 1982, the Coast Guard did not have to retain him is true but irrelevant since it did retain the applicant on active duty from 1982 to 1988, and there is nothing in the record to indicate that he would not have been retained had he taken advantage of ALDIST 004/82.

10. In light of the fact that the applicant did make a career in the Coast Guard, his sworn statement that he would have extended his enlistment for six years had he been properly counseled about ALDIST 004/82, and Findings 6, 7, 8, and 9, above, the Board finds that the applicant would have extended for six years had he been properly counseled about ALDIST 004/82.

11. In regard to whether the applicant has a private cause of action, the Deputy General Counsel has already decided that issue in her concurring opinion in BCMR Docket No. 69-97. In that opinion, she found that Caceres does not support the Coast Guard's position, because the applicant's claim to an SRB is not based solely on the Coast Guard's regulations but on the SRB statute (37 USC § 308) that authorized payment. In Caceres, there was no underlying federal statute to support the criminal defendant's claim of being deprived of a right.

Nor does Cort support the Coast Guard's position. All four factors that the Court stated should be considered weigh in the applicant's favor here: (a) Congress specifically intended Coast Guard members to benefit under the SRB statute; (b) Congress implicitly created a private remedy;[7] (c) a member's suit for a wrongfully withheld SRB would be consistent with the underlying legislative scheme; and (d) disputes over SRBs are clearly not within the province of the states.

12. The Coast Guard stated that Congress intended the SRB program to benefit the Coast Guard and the United States by encouraging experienced members with critical skills to extend their service, and that paying the applicant retroactively would be contrary both to the statute's purpose and to the fact that applicant did not in fact

[7] Furthermore, the Board finds that the applicant has a private right of action to seek relief from the alleged error of the Coast Guard under the BCMR statute (10 USC § 1552).

extend for six years when ALDIST 004/82 was in effect. However, the Deputy General Counsel has held that Congress intended to benefit experienced members with critical skills who would agree to extend their years of service. In Larinoff, the Supreme Court held that "[t]he intention of Congress in enacting the [reenlistment bonus statute] was specifically to promise to those who extended their enlistments that a [reenlistment bonus] award would be paid to them at the expiration of their original enlistment in return for their commitment to lengthen their period of service." 431 U.S. at 878-79 (footnote omitted). Furthermore, although the applicant did not extend his service during the month when ALDIST 004/82 was in effect, he did serve continuously for more than six years after the end of his original four-year enlistment.

13. The Coast Guard erred in 1982 by failing to counsel the applicant of his eligibility to receive an SRB by extending his enlistment.

14. Accordingly, the applicant's record should be corrected to show that on February 14, 1982, he extended his enlistment for six years and thereby became entitled to receive a Zone A SRB with a multiple of one.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application for correction of the military record of XXXXXXXX shall be granted as follows: The military record shall be corrected to indicate that the applicant agreed to extend his enlistment for six years on February 14, 1982, and he thus became entitled to receive a Zone A selective reenlistment bonus with a multiple of one. The applicant's extensions and reenlistments dated November 11, 1982, October 20, 1983, October 15, 1984, November 8, 1985, September 24, 1986, and November 2, 1987, will be canceled. These shall be null and void and shall have no effect on his SRB entitlement. All other extensions and reenlistments shall remain as they now appear in the record, with no break in service shown.

The Coast Guard shall pay the applicant the amount due him as a result of these corrections to his record.

(see also, concurring opinion below)
Robert J. Patton, Jr.

Sharon Y. Vaughn

Betsy L. Wolf

Concurring Opinion

I. Purpose

The purpose of this Concurring Opinion is to address more fully the remand of the Deputy General Counsel that the BCMR (Board) make findings of fact on the issue of whether the applicant would have extended his enlistment for six years and to address

the U.S. Coast Guard's arguments on that issue. I otherwise join in the Majority Opinion, including its conclusions. In view of previous decisions by the Board and Deputy General Counsel, the would-have-extended issue is the crucial issue in this docket. The Concurring Opinion is purely to present a more complete rebuttal to Coast Guard arguments.

II. Remand of Deputy General Counsel

On August 28, 1998, the Deputy General Counsel remanded this case to the Board "for a finding of fact" "on the issue of whether applicant would have extended his enlistment contract for six years pursuant to ALDIST 004/82, as he claimed." Further, the Deputy General Counsel directed the Board to "address fully the arguments raised in the Chief Counsel's December 22, 1997, advisory opinion." A full response to the Chief Counsel's arguments, except as to the would-have-extended issue is set forth in the Majority Opinion.

III. Coast Guard Advisory Opinion

In the Chief Counsel's Advisory Opinion of December 22, 1997, it is argued, as relevant to this Opinion, (1) that the applicant's self-serving "opinion" is not substantial evidence "on what he would have done fifteen years earlier under different circumstances," (2) that the applicant had only one month in which to decide to extend and he might have procrastinated, (3) that the applicant could have decided to wait for a higher bonus, (4) that the most substantial evidence is his one-year extension in 1982, (5) that additional one-year enlistment extensions in 1983, 1984, 1985, 1986, and 1987 demonstrate that the applicant was not inclined to limit his options by agreeing to long term extensions, (6) that the Coast Guard did not have to keep the applicant for the full six years of extension, (7) that the applicant is not entitled to a presumption that he would have extended under ALDIST 004/82 merely because he eventually did serve in the Coast Guard during that period, and (8) that the applicant has not proved by a preponderance of the evidence that he would have extended for the maximum period under ALDIST 004/82.

IV. Recent Precedent

Subsequent to the Chief Counsel's Advisory Opinion the Deputy General Counsel rendered two concurring decisions on analogous dockets concerning ALDIST 004/82 and eligibility for a Selective Reenlistment Bonus (SRB). In those decisions the Deputy General Counsel discussed the would-have-extended issue in the particular

circumstance of those dockets and rejected a number of arguments that the Coast Guard sets forth in this docket.

A. BCMR Docket No. 54-97

The applicant in BCMR 54-97 enlisted in the Coast Guard for four years in 19xx and thereupon reenlisted for three years. As of January 1982, when ALDIST 004/82 was released he had served about half of his extended three year commitment. The applicant claimed that he "surely would have participated in it [SRBs under ALDIST 004/82]." In 1983 he reenlisted for three years and in 1986 he reenlisted for three more years. At the time of his application, he had continuously served 22 years in the Coast Guard.

The Deputy General Counsel on July 20, 1998, aside from otherwise upholding the Board's decision, rejected the Coast Guard's arguments on applicant's assertion that he would have reenlisted if he had known. As to the argument that he might have procrastinated beyond the one-month decision period, the Deputy General Counsel found it was sufficient time for a reasonable man or woman to decide whether to extend enlistment to benefit from an SRB and that the Coast Guard had presented no evidence that he could not have decided within the one month. As to the contention that applicant could have decided to wait for a higher bonus, the Deputy General Counsel noted that the Coast Guard had not presented any evidence contradicting applicant's statement that he would have taken advantage of the SRB. As to the claim that the Coast Guard might have terminated applicant's enlistment before the end of the six-year SRB period, the Deputy General Counsel noted that the Coast Guard had not so terminated the applicant's enlistment and that the Coast Guard had presented no evidence that the applicant would have been treated any differently than he had been treated if he had extended under ALDIST 004/82. Finally, the Deputy General Counsel rejected the Coast Guard's argument that the applicant's pattern of reenlistment for three years indicated he was not inclined to obligate himself for long periods of time. It was noted that there were a number of factors that could influence the applicant's decision to extend, that the official explanation for his extension in 1986 for three years was "at the request and for the convenience of the Government" and that the more persuasive evidence was applicant's statement on the issue.

B. BCMR Docket No. 69-97

The applicant in BCMR 69-97 enlisted in the Coast Guard in 19xx for four years and in 1980 reenlisted for six years. In January 1982 he therefore had over four years to serve. His reenlistments thereafter were: 1986 two years, 1988 10 months, 1989 2 years, 1991 3

years, and 1994 6 years. As of the date of his application to the Board, he had continuously served in the Coast Guard for 21 years and 10 months.

The Deputy General Counsel again upheld the Board's decision to grant his application, and in a concurring decision addressed, among other things, the same Coast Guard arguments on the would-have-extended issue as were discussed in BCMR Docket No. 54-97. The Board had noted that the applicant's reenlistment in 1976 for an additional six years indicated an early dedication to the Coast Guard and explained that his multiple short-term extensions were not uncommon in order to move to a new station or assume new duties and were probably for such reasons. On this issue, the Deputy General Counsel noted there were many possible reasons for short term extensions, that an explanation for the 1986 and 1988 extensions was "at the request and for the convenience of the Government," and that the applicant's statement was the more persuasive evidence on the issue.

V. Findings of Fact

1. Applicant's Statement. Applicant's sworn statement, that he would have extended his enlistment if he had been counseled about eligibility under ALDIST 004/82, is significant evidence that he would have so extended his enlistment.

The applicant signed a letter to supplement his application in which he stated that if he had been counseled about his eligibility for an SRB under ALDIST 004/82, he "would have extended [his] enlistment for six years to obtain a Zone A SRB." The statement is deemed "sworn" inasmuch as it is subject to penalty of prosecution for perjury if erroneous.

The Coast Guard labeled the statement "self serving" and "speculative," implied that the statement is not credible fifteen years after the fact, and argued that the statement cannot be considered "substantial" evidence. The Coast Guard cites no authority for its arguments, offered no evidence that the applicant was not truthful 15 years ago or currently, and offered no evidence that 15 years ago the applicant was in any way dissatisfied with or had any intention to leave the Coast Guard. Fifteen years ago the applicant was 26 years old, not a youth. While the statement is self serving and speculative, in the circumstances and in the absence of contrary evidence, the statement is significant.

2. One Month Decision Time. The applicant would have decided within the one month allowed to extend enlistment under ALDIST 004/82.

The Coast Guard speculates that for any number of reasons that applicant might have procrastinated beyond the allowed one month in deciding to extend his enlistment under ALDIST 004/82. It presented no evidence to support such speculation as to the

applicant specifically. As already noted, the Deputy General Counsel has ruled that one month is sufficient time for a reasonable man or woman to decide whether to extend his or her enlistment to obtain the benefit of an SRB, which must have been precisely the logic of the Coast Guard in issuing ALDIST 004/82 in the initial instance.

3. Better Bonus. The applicant would not have passed up ALDIST 004/82 until a better bonus was offered.

The Coast Guard speculates, again without offer of evidence, that applicant might have refused to have extended under ALDIST 004/82 on the chance that he might have later gotten a better bonus. There is no evidence that the applicant had any reason to believe that there would be higher multiples in the future and that he was prepared to wait for them. In the absence of such evidence, the more controlling evidence is applicant's statement that he would have taken advantage of the SRB if he had known he was eligible.

4. 1982 One-Year Extension. The applicant's one-year enlistment extension in 1982, without knowledge of ALDIST 004/82, is not the most significant evidence that applicant would not have extended his enlistment for six years under ALDIST 004/82.

The Coast Guard argues that the most significant evidence of the applicant's intentions during this period is his reenlistment in 1982 for one year and not for the six years authorized by ALDIST 004/82. Again, the Coast Guard presents no evidence of applicant's 1982 circumstances. The Coast Guard previously and unsuccessfully made a similar argument in BCMR Docket Nos. 54-97 and 69-67. The personnel file notation for the applicant's 1982 extension has the characterization "voluntary." The Board and Deputy General Counsel have noted that a multiple of circumstances attend to decisions on enlistment extensions, such as schooling and location, that are not inconsistent with a career decision. Further, it has been noted, as equally true in this docket, that applicant's DD Form 214 under remarks for extension of service indicate "at the request of and for the convenience of the Government." In sum, while the one-year extension is relevant evidence, the more persuasive evidence in the context of this docket, is applicant's statement on the issue.

5. Multiple Short-Term Extensions. The applicant's multiple short-term extensions during the early portion of his Coast Guard career, without knowledge of SRB opportunities, is not significant evidence that the applicant would not have extended his enlistment for six years under ALDIST 004/82.

The Coast Guard argues that the applicant's six one-year extensions of enlistment from 1982 to 1987 indicate that he was not inclined to limit his options by obligating service far into the future. Each of these extensions has been reviewed, although the record is not robust. Three extensions were for a particular purpose, such as to attend a school or

in lieu of reenlistment, and the three others were characterized as "voluntary" or as an extension "to remain on active duty." The DD Form 214, as already noted, states as to all extensions: "at the request of and for the convenience of the government." There is no evidence that any of the short-term extensions were in the face of offered SRBs, that the applicant was considering during this time leaving the Coast Guard, or that he did not want to pursue a career in the Coast Guard at any time during these extensions. Further, and importantly, there was no interruption in his service during this six-year period even though a three-month break in service was allowed without loss of eligibility for an SRB or loss in time in pay grade in rating for advancement. It has been noted that there are many reasons influencing a decision to extend enlistment other than career choice. If there is no evidence grappling with those reasons, the more persuasive evidence, even with six one-year extensions, is applicant's statement that he would have extended.

6. Possible Coast Guard Termination. The Coast Guard retained the applicant for six years beyond ALDIST 004/82 and presented no evidence to support a finding that he would have been discharged in that period if he had extended under ALDIST 004/82.

The Coast Guard makes the point that even if the applicant had extended for six years in 1982, the Coast Guard did not have to retain him for six years. The arguments apparently are that because of this possibility, either (a) the applicant would not have extended his enlistment under ALDIST 004/82 or (b) his present statement, that he would have enlisted, should not be accepted, or (c) he should not be entitled to the full amount of the SRB under ALDIST 004/82. The arguments are not persuasive. The Coast Guard has retained him for the six-year period, and, to quote the Deputy General Counsel in Dockets 54-97 and 69-97, "that is a sufficient basis on which to conclude that Coast Guard would have retained applicant for six years if he had obligated himself for six years under ALDIST 004/82." In this docket the Coast Guard has presented no evidence that if the applicant had extended under ALDIST 004/82 his tenure in the Coast Guard would have been different than it was.

7. Presumption From Career Service. The applicant's uninterrupted long-term career in the Coast Guard is evidence of career interest in the Coast Guard.

The Coast Guard contends that the applicant is not entitled to a presumption that he would have extended under ALDIST 004/82 merely because he eventually did serve in the Coast Guard during that period. At the same time the Coast Guard is arguing that the Board should characterize that portion of his career following ALDIST 004/82 as "the most significant evidence of Applicant's intentions." Particularly given the absence of contemporaneous evidence of the applicant's circumstances in 1982, his career is relevant evidence regarding what he would have done in 1982. Portions of his career have already been discussed, namely his reenlistments from 1982 through 1987. It is also relevant that his career reflects almost 20 years of continuous service to date,

even without an SRB. This service firmly demonstrates his commitment to the Coast Guard. The Coast Guard has presented no contravening evidence.

8. Preponderance of Evidence. The preponderance of evidence establishes that the applicant would have, if properly counseled about ALDIST 004/82, extended his enlistment for six years to obtain the benefit of the SRB.

As a conclusionary argument, the Coast Guard argues that the preponderance of evidence does not support the applicant's request. It offers no further argument or evidence to support that conclusion beyond those already discussed.

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ROBERT J. PATTON, JR.