

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1999-042

FINAL DECISION

ANDREWS, Attorney-Advisor:

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 BCMR docketed this case on January 7, 1999, upon receipt of the applicant's completed application.

This final decision, dated December 9, 1999, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a xxxxxxxxxxxx on active duty in the Coast Guard, asked the Board to correct his military record to show that on July 16, 1996, he extended his enlistment for two years instead of reenlisting for six years. The correction would allow the applicant to receive a maximum Zone B selective reenlistment bonus (SRB) for the six-year reenlistment contract he signed on August 4, 1998, prior to his ten-year active duty anniversary date.

APPLICANT'S ALLEGATIONS

The applicant alleged that when he reenlisted for six years on July 16, 1996, the Coast Guard failed to counsel him concerning the effect of the reenlistment on his future entitlement to an SRB. He alleged that if he had been properly counseled, he would have extended his then current enlistment for only two years, rather than reenlisting for six years, to preserve his eligibility to receive a maximum Zone B SRB on the tenth anniversary of his active duty date. He alleged that because he was not properly counseled, on his tenth anniversary, he had almost four years of obligated service left to serve. Therefore, he could receive an SRB for only two years of additional service

under ALDIST 046/98, instead of for all six years of the new enlistment contract he signed on August 4, 1998. The applicant alleged that this was unfair because the Coast Guard was required to counsel him properly, but did not.

The applicant submitted with his application a letter from his commanding officer, who stated that there was no administrative entry (page 7) in the applicant's record documenting SRB counseling prior to his reenlistment on July 16, 1996.

VIEWS OF THE COAST GUARD

On October 6, 1999, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant's request.

The Chief Counsel argued that the Board should deny relief because the Coast Guard had no duty to counsel the applicant regarding the effect of his 1997 reenlistment¹ on a potential future SRB. The Chief Counsel alleged that Coast Guard regulations do not require that a member's SRB counseling include "a discussion of the effect of either an extension or reenlistment on a future SRB eligibility." He alleged that regulations require only that members be counseled concerning the SRB multiple currently applicable for their ratings; the number of years for which they may reenlist; and the number of months of newly obligated service upon which their SRBs will be calculated. The Chief Counsel argued that because there is no statute mandating SRB counseling, the Board should defer to the Coast Guard's determination of what constitutes proper SRB counseling. Furthermore, the Chief Counsel argued, the Coast Guard's regulations "were not intended to create any personal rights" and "neither government agents, nor the BCMR, can create entitlements or rights that are not provided for by statute. Therefore, the internal counseling procedure, based on Coast Guard policy to encourage reenlistments, is not a right that the BCMR may independently impose on the Coast Guard as it is within the discretion of the Coast Guard to decide how to manage its workforce policies."

The Chief Counsel also argued that the Board should deny relief because the applicant's record contains a page 7 entry dated March 15, 1997, which indicates that he was counseled in accordance with Article 12.B.4. of the Personnel Manual. Article 12.B.4., the Chief Counsel stated, requires members to be counseled concerning their SRB eligibility. "Hence, under the presumption of regularity afforded his military superiors, the Applicant can be presumed to have received such counseling in the absence of substantial evidence to the contrary."

¹ The Chief Counsel stated that the applicant was mistaken in alleging that he had reenlisted for six years on July 16, 1996, through July 15, 2002. In fact, the Chief Counsel stated, the applicant reenlisted for five years on July 15, 1997, through July 14, 2002.

The Chief Counsel stated that this case is similar to the case in BCMR Docket No. 1999-014 in which the Board denied relief. He further stated that this case involves a significant issue of Coast Guard policy. Therefore, if the Board decides relief should be granted, the decision must be reviewed by the Secretary's delegate.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 7, 1999, the BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited him to respond within 15 days. On November 3, 1999, the applicant responded, stating that the case was ready for decision.

SUMMARY OF THE RECORD

On August 15, 198x, the applicant enlisted in the Coast Guard for four years, through August 14, 199x. On June 16, 1992, he was discharged and immediately reenlisted for a term of three years, obligating himself to serve through June 15, 1995. On April 20, 1995, the applicant extended his enlistment for two years, through June 15, 1997. In May 1996, the applicant received PCS (permanent change of station) orders. To accept the orders, he had to obligate himself to serve for at least one full year at the new station. Therefore, on May 8, 1996, the applicant extended his enlistment for three months, through September 15, 1997. Both the June 15, 1995, and May 8, 1996, extension agreements signed by the applicant indicate that he was provided a copy of "SRB Questions and Answers" and fully understood the effect of his extensions on his current and future SRB eligibility.

On March 15, 1997, six months prior to the end of his enlistment, the applicant's command made a page 7 entry in his record stating, "reenlistment interview conducted this date per Article 12-B-4 Personnel Manual" Four months later, on July 15, 1997, the applicant reenlisted for five years, through July 14, 2002. His reenlistment contract, DD Form 4/1, did not provide any information concerning SRBs.²

On March 2, 1998, the Commandant of the Coast Guard issued ALDIST 046/98, which allowed members to receive an SRB if they reenlisted or extended their current enlistments between April 1, 1998 and September 30, 1998. ALDIST 046/98 provided that members in the xx rating who extended their enlistments or reenlisted would receive an SRB calculated with a multiple of one.

On August 4, 1998, the applicant reenlisted for six years, through August 3, 2004, for the purpose of receiving a Zone B SRB with a multiple of one. Under ALDIST 046/98, the applicant's reenlistment made him eligible to receive an SRB for any additional service to which he obligated himself. Because the applicant had already obli-

² No copy of this reenlistment contract was in the applicant's record received from Coast Guard headquarters. However, upon inquiry by the BCMR staff, the Coast Guard Personnel Command confirmed the date, duration, and form of the reenlistment contract.

Enclosure (5) to the SRB Instruction, "SRB Questions and Answers," explains that previously obligated service reduces an applicant's SRB. It further advises members, "[w]hen coming up on your end of enlistment, carefully consider the advantages/disadvantages of reenlisting vice extending."

Section 3.d.(9) of Enclosure (1) to the SRB Instruction states that "[c]ommanding officers are authorized to effect early discharge and reenlist members within 3 months prior to their 6th, 10th, or 14th year active service anniversary dates (not to be confused with the normal expiration of enlistment), for the purpose of qualifying for a Zone A, B, or C SRB respectively. In such cases, SRB payments will be reduced by any portion of unserved service obligation."

Article 1.G.14.a. of the Personnel Manual provides that an extension of an enlistment requested by a member must normally be of at least two years' duration unless the member is required to extend his or her enlistment for a particular purpose, such as to accept transfer orders, complete a cruise, attend school, or be promoted.

BCMR DOCKET NO. 1999-014

In BCMR Docket No. 1999-014, the applicant asked the Board to change a four-year reenlistment dated March 1997 to a two-year extension in order to maximize an SRB he received for reenlisting for six years on his tenth anniversary in July 1998. There was no page 7 in the applicant's record indicating that he had been counseled concerning SRBs prior to signing the four-year reenlistment contract. However, an extension contract signed by the applicant in March 1996 stated that he had been given the chance to review the SRB Instruction, including "SRB Questions and Answers," and that he understood the effect of his extension on his current and future SRB eligibility.

The Board denied the applicant's request, in accordance with the recommendation of the Coast Guard. The Board found that the Coast Guard had erred by failing to counsel the applicant when he reenlisted in 1997, but concluded that

the applicant's present contention amounts to a retrospective review of his military record based on a later opportunity that the applicant could not have known about in 1997. ... [S]ince there was no SRB multiple for the applicant's rate in 1997, and the applicant is not alleging this, any error that occurred at that time was harmless. ... The Board is not persuaded that if the applicant had received a page 7 entry in 1997, he would have extended for two years rather than reenlisting for four years. ... The applicant's reenlistment history suggests that he would have reenlisted for four years in 1997 (as he did) because he had previously enlisted for four years both in 1988 and 1992. ... Additionally,

the required page 7 counseling entry does not mandate a discussion of the effect of either an extension or reenlistment on a future SRB.^[3] ... The Board notes that just a year before his 1997 reenlistment, the applicant acknowledged on his 1996 extension agreement that he had been informed about his SRB eligibility (although one was not available for him) and that he understood the effect that the extension would have on his current and future SRB eligibility. Yet, he reenlisted in 1997 without asking any questions. The Board finds that even with SRB counseling in 1997, the applicant would have probably reenlisted for four years. ... 'The Board is only obligated to grant enough relief to correct what it sees as an injustice.' Reale v. United States, 208 Ct. Cl. 1010, 1011 (1976). The Board does not find that any corrective action is necessary in this case. ... [T]he Board's job is not to perfect records but to correct harmful errors and remove injustices.

BCMR DOCKET NO. 1999-059

In BCMR Docket No. 1999-059, the applicant alleged that he had not been properly counseled concerning SRBs before he signed a four-year reenlistment contract on February 11, 1998. There was no page 7 in his record documenting the required counseling. No SRB was authorized for members in the applicant's rating in February 1998. However, the applicant alleged that, if he had been properly counseled, he would have extended his enlistment and reenlisted later when an SRB became available.

The Chief Counsel of the Coast Guard recommended that the Board grant the applicant's request in Docket No. 1999-059.⁴ He stated that "[a]lthough there is sufficient legal basis to deny relief in this case, the totality of the circumstances indicate that it would be proper for the Board to grant relief in this case by voiding the Applicant's 11 February 1998 reenlistment contract and replacing it with a third extension of ten (10) [sic] months." The Chief Counsel stated that the Board should grant relief because the applicant could have extended his enlistment for less than four years and because he was willing to sign a new long-term reenlistment as consideration for the SRB.

The Board granted the applicant's request because the lack of a page 7 in the applicant's record indicated that the Coast Guard had erred by failing to counsel him properly concerning SRBs. Given the applicant's statement that he would not have reenlisted for four years if he had been properly counseled, and with no evidence to the contrary, the Board found that the preponderance of the evidence indicated that he would have extended his enlistment for nine months rather than reenlisting for four years if he had been properly counseled.

³ *But see* Section 3.d.(6) of Enclosure (1), Enclosure (3), and Enclosure (5) to the SRB Instruction, COMDT-INST 7220.33.

⁴ The Chief Counsel also recommended that relief be granted in BCMR Docket Nos. 1999-015 and 1999-031. The applicants in those cases, like the applicants in this case and in Docket Nos. 1999-059 and 1999-014, asked the Board to shorten the terms of previous reenlistments/extensions because they had not been properly counseled and the extra years of obligated service were reducing their SRBs.

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. The application was timely.

2. The record supports the Chief Counsel's statement that the applicant reenlisted for five years on July 15, 1997, rather than for six years on July 16, 1996, as alleged by the applicant. The applicant alleged that he was not properly counseled about SRBs and the effect of obligating service on potential future SRBs prior to this reenlistment.⁵ He alleged that, had he been properly counseled, he would have extended his enlistment for only two years, so that on his tenth anniversary on active duty,⁶ he would have had no remaining obligated service and therefore would have been eligible to receive the maximum possible SRB for his rating.

3. Under Section 2 of Enclosure (1) and Enclosure (3) to Commandant Instruction 7220.33, the applicant had a right to be counseled concerning SRBs within three months prior to his enlistment. Such counseling must be documented by a signed page 7 entry. There is no evidence in the record indicating that the Coast Guard counseled the applicant about SRBs within three months of his enlistment on July 15, 1997.

4. The Chief Counsel argued that the page 7 entry made in the applicant's record on March 15, 1997, proves that he received proper SRB counseling in accordance with Coast Guard policy and regulations. However, the page 7 entry made in the applicant's record on March 15, 1997, does not meet the requirements of the Coast Guard's regulations in Commandant Instruction 7220.33. It was made more than three months before his enlistment, and it was not signed by the applicant. Moreover, it did not indicate that the applicant was provided a copy of "SRB Questions and Answers" as required by Enclosure (3) of the Instruction. "SRB Questions and Answers" informs members of the effect of obligated service on potential future SRBs and advises them to consider carefully the advantages and disadvantages of extending versus reenlisting with respect to future entitlement to SRBs.

⁵ The Board assumes that the applicant's claims concerning lack of counseling apply to his reenlistment dated July 15, 1997, although he was mistaken about the date and duration of this reenlistment.

⁶ The Board notes that the applicant alleged he would have extended his contract for two years to remain eligible for a maximum SRB on his tenth anniversary because he thought he had reenlisted in July 1996, two years before his tenth anniversary on active duty. In fact, however, the applicant reenlisted just one year before his tenth anniversary.

5. The page 7 entry in the applicant's record dated March 15, 1997, indicates that he had a predischarge interview conducted "per Article 12-B-4 Personnel Manual" However, under Article 12.B.4.b.3., a member's predischarge interview must include a discussion of SRBs only if the member is eligible for an SRB at the time of the interview. Because the applicant was not eligible for an SRB at the time of his predischarge interview, it is unclear whether he was informed about SRBs. Furthermore, Article 12.B.4.b.3. does not specifically require the petty officer conducting a predischarge interview to inform the member of the effect of previously obligated service. Therefore, because the requirements of Article 12.B.4.b.3. do not ensure that members receive the counseling that is required by the SRB Instruction, the Board finds that the page 7 entry made in the applicant's record on March 15, 1997, does not prove that the applicant received proper SRB counseling.

6. There is no page 7 entry meeting the requirements of Enclosure (3) to the SRB Instruction in the applicant's record. Had proper counseling occurred, such an entry should appear. Therefore, the Board finds that the applicant has proved by a preponderance of the evidence that the Coast Guard failed to counsel him properly in accordance with the terms of the SRB Instruction, COMDTINST 7220.33.

7. The Chief Counsel argued that the regulations created no right or entitlement to counseling on the part of the members. He also argued that the Board should defer to the Coast Guard's determination of what constitutes proper SRB counseling and that the Coast Guard had decided that counseling concerning the effect of a reenlistment on a potential future SRB was not required. However, the provisions for SRB counseling in COMDTINST 7220.33 are not permissive but mandatory.⁷ The Board was established by Congress in part to correct the injustices that arise when the Coast Guard fails to follow its own regulations. The Board will not defer to a Coast Guard determination that it may ignore the mandatory language in its own regulations.

8. The Chief Counsel argued that the Board should deny relief for the reasons stated in its final decision in BCMR Docket No. 1999-014. Like the applicant in that case, this applicant learned when he received proper SRB counseling prior to his tenth active duty anniversary date (a) that his SRB would be reduced because of the length of his last enlistment; (b) that the last time he reenlisted, he should have been counseled concerning and in accordance with the provisions of the SRB Instruction, COMDTINST 7220.33; (c) that if he had been properly counseled the last time he reenlisted, he would have learned that reenlisting for many years of service might reduce any future SRB for which he might become eligible and that he would have an opportunity to reenlist on his tenth anniversary if an SRB was authorized for his rating. Also like the applicant in Docket No. 1999-014, this applicant alleged that if he had been properly counseled and

⁷ Moreover, the Deputy General Counsel, acting as the delegate of the Secretary, has determined that Coast Guard regulations require members to be "fully advised" of their SRB opportunities. See BCMR Docket Nos. 1997-123, 1997-069, 1997-062, 1997-054, and 121-93.

learned the advantages of extending his enlistment until his tenth anniversary, he would not have reenlisted for so many years.

9. This applicant's case is also very similar to the cases in BCMR Docket Nos. 1999-059, 1999-031, and 1999-015. In those cases, as in Docket No. 1999-014, the applicant was not properly counseled and learned the advantages of a shorter extension after he had already enlisted for several years. However, in these other cases, unlike in Docket No. 1999-014, the Chief Counsel recommended that the Board grant relief, and the Board granted relief. The Board concludes that it is difficult if not impossible to reconcile the Chief Counsel's recommendations in this case and in Docket No. 1999-014 with his recommendations in Docket Nos. 1999-059, 1999-031, and 1999-015. Nor is it possible for the Board's decision in this case to be entirely consistent with its decision in Docket No. 1999-014 and its decisions in Docket Nos. 1999-059, 1999-031, and 1999-015.

10. Under Article 1.G.14.a. of the Personnel Manual, members who voluntarily extend their enlistments must normally extend them for at least two years. The applicant has not proved by a preponderance of the evidence that he would have been permitted in July 1997 to extend his enlistment for less than two years had he requested to do so.

11. The Coast Guard erred in failing to counsel the applicant in accordance with the requirements of COMDTINST 7220.33 when he reenlisted for five years on July 15, 1997. Had the Coast Guard properly counseled the applicant, he would have been given the SRB Instruction with Enclosure (5) to read and thereby been informed of (a) the negative effect a long reenlistment would have on possible future SRBs and (b) the fact that he could reenlist to receive an SRB the next year if one was authorized for his rating during the three months prior to his tenth anniversary, August 15, 199x. Whether the applicant would have acted on this information and chosen to extend his enlistment for only two years in hope of receiving an SRB on his tenth anniversary is necessarily a matter of speculation. However, given that SRBs involve thousands of dollars, the applicant's allegation that he would have chosen to extend only until his tenth anniversary, his history of short-term extensions, and a lack of any evidence to the contrary, the Board finds that if the Coast Guard had properly counseled the applicant, he would have extended his enlistment for two years so as to remain eligible for a maximum SRB on his tenth anniversary.

12. Accordingly, relief should be granted by correcting the applicant's five-year reenlistment dated July 15, 1997, to a two-year extension.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application for correction of the military record of XXXXXXXXXXXX, USCG, is hereby granted as follows.

His record shall be corrected to show that on July 15, 1997, he extended his enlistment for two years, from September 16, 1997, through September 15, 1999. His five-year reenlistment contract dated July 15, 1997, shall be null and void.

The Coast Guard shall pay the applicant the amount due him as a result of this correction.

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