

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2000-122

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. It was docketed on May 1, 2000, following the BCMR's receipt of the applicant's completed application.

This final decision, dated March 29, 2001, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a xxxxxxxx on active duty in the Coast Guard, asked the Board to correct his military record to show that, in 1982, he extended his enlistment so that he could receive a Zone B¹ selective reenlistment bonus (SRB) pursuant to ALDISTs 340/81 and 004/82.

APPLICANT'S ALLEGATIONS

The applicant alleged that he was never counseled about his eligibility to receive an SRB by extending his enlistment in 1982. When ALDIST 004/82 was in effect, most of the members of his unit at the military Pay Center had just been transferred to xxxxx,

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 served between 21 months and 6 years on active duty are in "Zone A," while those who have more than 6 but less than 10 years of active duty service are in "Zone B." In 1982, the applicant was still in Zone A. Members may not receive more than one bonus per zone.

but he had been left behind to finish shipping records to the new location. He alleged that, if he had been counseled, he would have extended his enlistment to receive the maximum possible bonus. The applicant stated that he did not discover his eligibility for this SRB until March 22, 2000, when he was reminiscing with an old friend.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on October 2, 1978, for a term of four years, through October 1, 1982. While attending "A" School to become a xxxxx in 1980, he was awarded non-judicial punishment (NJP). The court memorandum for this offense is no longer in his record. He graduated and was promoted to xxx on July 15, 1980. He was assigned to the Coast Guard Pay and Personnel Center and was promoted to xxx on August 1, 1981.

On xxxxxxx, the applicant was again awarded NJP, this time for assaulting another member with a metal curtain rod in a manner "likely to produce grievous bodily harm." He was reduced to xxx and fined \$200. As of January 18, 1982, the applicant's average evaluation marks for his enlistment were 3.5 for proficiency, 3.4 for leadership, and 3.9 for conduct. On January 19, 1982, he received new evaluation marks of 3.6 in proficiency, 3.4 in leadership, and 4.0 in conduct, making his average marks for the enlistment 3.5 for proficiency, 3.4 for leadership, and 3.9 for conduct.

There is no evidence in his record that the applicant was ever advised about the provisions of ALDISTs 340/81 and 004/82. On June 2, 1982, the applicant extended his enlistment for three years, through October 1, 1985, to obligate sufficient service for transfer to a new unit. On November 16, 1982, he was again advanced to xxx.

On October 1, 1985, the applicant extended his enlistment for another 18 months, through April 1, 1987. On March 18, 1987, he extended his enlistment for another year, through April 1, 1988. On April 1, 1988, the applicant was discharged and immediately reenlisted for three years. On April 1, 1991, he was discharged and immediately reenlisted for four years, through March 31, 1995. On November 1, 1991, he was advanced to xxx.

On May 1, 1994, he extended the enlistment for four months, through July 31, 1995. On March 28, 1995, he was discharged and immediately reenlisted for four years, through March 27, 1999. On March 11, 1999, he extended his enlistment for two years and seven months, through October 27, 2001.

The applicant has never received a reenlistment bonus. He remains on active duty.

VIEWS OF THE COAST GUARD

On November 21, 2000, the Chief Counsel of the Coast Guard issued a one-paragraph advisory opinion recommending that the Board grant the applicant's request because "its fact pattern [is] analogous to the fact pattern in BCMR Docket No. 1999-022. Therefore, the Coast Guard recommends relief consistent with [the Board's] decision in that case."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 28, 2000, the Chairman sent the applicant a copy of the Chief Counsel's advisory opinion, along with a copy of the Board's final decision in BCMR Docket No. 1999-022, and invited him to respond within 15 days. The applicant did not respond.

APPLICABLE LAW AND PRECEDENT CASES

Eligibility for Reenlistment or Extension

Article 1-G-64 of the Coast Guard Manual in effect in 1982 stated that "[t]o be eligible for reenlistment a person must meet the following requirements: ... (c) Be recommended for reenlistment by the officer effecting discharge." Article 1-G-80(a) stated that "[t]he term of enlistment of an enlisted person of the Regular Coast Guard may, by his/her voluntary written agreement, subject to approval by his/her commanding officer, be extended or reextended."

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.c.(6) of Enclosure (1) stated that early separation could only occur "within three months of [the end of] activated obligated service, in accordance with Article 12-B-7 [of the] Personnel Manual" Section 1.d.(1) of Enclosure (1) provided the criteria for SRB eligibility in Zone A. 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. . . .

(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 Enclosure (1) stated that in order to “attain the objectives of the SRB program, each potential reenlistee who would be eligible for SRB must be informed of their 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 003/82

On January 8, 1982, the Commandant issued ALDIST 003/82, which changed the performance requirements for reenlistment and extension. To be allowed to reenlist or extend an enlistment for six years, members were required to have the following average evaluation marks: 3.6 for proficiency, 3.6 for leadership, and 3.9 for conduct. Members whose evaluation marks were at least 3.3 for proficiency, 3.3 for leadership, and 3.8 for conduct were allowed to reenlist or extend their enlistments for up to four years.

ALDISTs 004/82 and 340/81

On January 12, 1982, the Commandant of the Coast Guard issued ALDIST 004/82, temporarily extending the provisions of ALDIST 340/81, which authorized SRBs for members in certain skill ratings who were within 30 days of the end of their enlistment periods and who reenlisted or extended their enlistments for at least three years. The Zone A SRBs authorized for members in the xx rating who extended their enlistments or reenlisted under ALDIST 340/81 were calculated with a multiple of one. The Zone B SRBs authorized for xxs who extended their enlistments or reenlisted were calculated with a multiple of two. ALDIST 004/82 also temporarily 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 the waiver in ALDIST 004/82, members had to sign contracts extending their enlistments before February 15, 1982. After February 15, 1982, no Zone A or Zone B SRBs were authorized for members in the xx rating.

Decision in 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 extended 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, 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 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 that responded to several of the Coast Guard’s arguments that were not mentioned in the Board’s decision. She stated that the applicant’s history of service and his statements concerning the lack of proper counseling were sufficient to nullify the presumption of regularity. She also found unpersuasive the argument that the applicant’s short extensions showed 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 concluded that the “Coast Guard erred in drafting COMDTINST 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. Therefore, she found, potential extendees such as the applicant should have been fully advised of their SRB opportunities under ALDIST 004/82. She 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.”² BCMR Docket No. 69-97, Deputy General Counsel’s Concurring Decision, at 11.

Decision in BCMR Docket No. 1999-022

In his advisory opinion recommending a grant of relief in this case, the Chief Counsel cited the Board’s decision in BCMR Docket No. 1999-022. In that case, the applicant was never counseled about ALDIST 004/82. At the end of his enlistment in 1983, he continued to serve on active duty through a series of short-term extensions. The Board granted relief, in accordance with the decision in BCMR Docket No. 69-97, finding that the applicant’s series of short-term extensions did not prove that he would

² 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.

not have extended his enlistment for four years in 1982 to receive the maximum possible Zone B SRB for which he was eligible.

Decision in BCMR Docket No. 1999-066

In BCMR Docket No. 1999-066, the applicant sought to be reenlisted retroactively on his sixth active duty anniversary to receive an SRB under ALDIST 135/97. The Chief Counsel recommended denying relief, arguing that the applicant's commanding officer would not have recommended him for a six-year reenlistment in September 1997 because of his poor performance record.

The applicant in BCMR Docket No. 1999-066 had received three negative page 7 administrative entries in his record on April 30, 1997, documenting substandard performance and unwillingness to follow instructions. His commanding officer noted that his work required constant monitoring and supervision. He received criticism for poorly prioritizing his work, supervising subordinates, and following instructions. It was also noted that he had failed to prepare his unit for inspection and frequently failed to keep his superiors informed. On May 5, 1997, that applicant received a fourth page 7 entry, for improper watch standing, failing to secure the stern mooring lines of a board, and failing to follow set policy by informing the chain of command that the boat's brow was removed. On May 12, 1997, he received a fifth page 7 entry noting that he had failed to complete Boatcrew Qualification and "Nav Rules." The page 7 stated that he must complete both by November 12, 1997, or he would be transferred and that during the six-month period, he would not be recommended for advancement. On August 13, 1997, the applicant received a sixth page 7 entry noting that his commanding officer had lost confidence in his ability to qualify as a coxswain. After nine months at the unit, he had not yet qualified as a boatcrewman and had failed the Nav Rules course four times. The page 7 stated that his "navigational skills underway are questionable at the very least." On August 24, 1997, he received a seventh page 7 entry noting that he had not responded to the unit after being paged twice and after a message was left on his answering machine. Apparently, he had failed to take his pager with him when he left home, in violation of policy.

The applicant's sixth anniversary on active duty in the Coast Guard occurred on September 17, 1997. There was no form CG-3307 in his record showing that he was counseled concerning his opportunity to seek an SRB by requesting discharge and reenlistment during the three months prior to his sixth anniversary. However, his performance apparently did not improve because on September 25, 1997, he was counseled concerning his "future in the Coast Guard" and advised to change rates. Moreover, on October 25, 1997, he was informed that he might be reduced in rate "by reason of incompetency," and on October 31, 1997, he received two page 7 entries noting that he had received very low marks on his performance evaluation for "professional/specialty knowledge," "quality of work," "directing others," and "responsibility."

The Board denied relief in this case, finding that even if the applicant had been counseled concerning the SRB opportunity, his commanding officer would not have recommended him for reenlistment.

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 over this matter pursuant to 10 U.S.C. § 1552.
2. The applicant stated that he discovered the alleged error that he has asked the Board to correct on March 22, 2000. 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. Therefore, 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 applicant asked the Board to correct his record to show that he extended his enlistment for six years in February 1982 so that he might receive a Zone B SRB, calculated with a multiple of two, under ALDIST 004/82. He alleged that he was never told about ALDIST 004/82 and that, if he had been properly advised of the SRB opportunity, he would have extended his enlistment for six years.
4. The applicant was in Zone A at the time, and his enlistment ran only through October 1, 1982, at which point he was still have been in Zone A. Therefore, if he had signed a six-year extension in February 1982, it would have qualified him only for a Zone A SRB.³ Under ALDISTs 340/81 and 004/82, the Zone A SRB for members in the xx rating was calculated with a multiple of one.
5. The Deputy General Counsel has held 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. Furthermore, the Deputy General Counsel has held that "Coast Guard regulations require that members be 'fully

³ In theory, the applicant could have signed two extension contracts in February 1982: the first extending his enlistment into Zone B and possibly qualifying him for a Zone A reenlistment (if the extension ran for at least three years) and the second qualifying him for a Zone B SRB. However, the Deputy General Counsel has determined that the Coast Guard had no duty to counsel members in Zone A that under ALDIST 004/82 they might also be eligible for a Zone B SRB if they extended their enlistments twice. *See* Decision of the Deputy General Counsel, Acting Under Delegated Authority, BCMR Docket No. 103-97.

advised' of SRB opportunities." BCMR Docket No. 121-93, Decision of the Deputy General Counsel, at 2. Thus, the Board finds that the Coast Guard had a duty to counsel the applicant about his eligibility for an SRB by extending his enlistment under ALDIST 004/82.

6. There is no evidence in the record that the applicant was advised about the SRB opportunity under ALDIST 004/82. The Coast Guard has submitted no evidence to rebut the applicant's claim that he was not informed of his eligibility for a Zone A SRB. With a credible, sworn statement by the applicant to the effect that he was not counseled, and with 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 about the SRB opportunity under ALDIST 004/82.

7. When ALDIST 004/82 waived the requirement that members be within 30 days of the end of their enlistments before extending their enlistments, the provisions of ALDIST 003/82 were in effect. Under those provisions, the applicant was not qualified to extend his enlistment for six years because his average marks for proficiency and leadership were not 3.6 or higher at any time ALDIST 004/82 was in effect. Therefore, the maximum number of years the applicant might have been allowed to extend his enlistment was four.

8. Under the Personnel Manual in effect at the time, members were required to have the recommendation of their commanding officers in order to sign reenlistment or extension contracts. The applicant was taken to mast for assaulting a member with a curtain rod in a manner "likely to produce grievous bodily harm," fined, and reduced in rate on xxxxxxxx, just two months before ALDIST 004/82 went into effect. This raises the question of whether in February 1982, his commanding officer would have allowed him to extend his enlistment for four years to earn the SRB. On January 19, 1982, while the ALDIST was in effect, the applicant received evaluation marks of 3.6 in proficiency, 3.4 in leadership, and 4.0 in conduct. Furthermore, in June 1982, just six months after the ALDIST went into effect, he was allowed to extend his enlistment for three years to obligate sufficient service to accept transfer orders. Moreover, the applicant's record is not nearly as poor as that of the applicant in BCMR Docket No. 1999-066, for whom relief was denied. Therefore, the Board finds that the preponderance of the evidence indicates that the applicant's commanding officer would have recommended him for a four-year extension if the applicant had requested one under ALDIST 004/82.

9. The applicant has proved by a preponderance of the evidence that the Coast Guard erred in 1982 by failing to counsel him about his eligibility to receive a Zone A SRB by extending his enlistment under ALDIST 004/82. The record indicates that if he had been properly counseled, his enlistment contract would have been extended for four years.

10. Accordingly, the applicant's request should be granted in part by correcting his record to show that on February 14, 1982, he extended his enlistment for four years, from October 2, 1982, through October 1, 1986. As a result of this correction, the 18-month extension he signed on October 1, 1985, will cover his active duty from October 2, 1986, through April 1, 1988, when he reenlisted. His three-year reenlistment dated June 2, 1982, and his one-year extension dated March 18, 1987, are redundant and should be nullified.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application for correction of the military record of XXXXXXXX, USCG, is hereby granted as follows:

His record shall be corrected to show that on February 14, 1982, he extended his enlistment for four years, from October 2, 1982, through October 1, 1986. The Coast Guard shall pay the applicant any Zone A SRB he may be due as a result of this correction under ALDISTs 340/81 and 004/82.

The 18-month extension he signed on October 1, 1985, shall be deemed to apply to this new extension contract, covering his active duty service from October 2, 1986, through April 1, 1988, when he reenlisted.

His three-year reenlistment dated June 2, 1982, and his one-year extension dated March 18, 1987, are null and void.

Kevin C. Feury

Todd E. Givens

Mark A. Tomicich