

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-169

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receiving the completed application on May 26, 2009, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 26, 2010, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, who was retired from the Coast Guard Reserve as a first class petty officer on March 1, 2007, asked the Board to void his retirement and reinstate him in the drilling Selected Reserve (SELRES).

The applicant alleged that after he failed a physical fitness test (PT) in October 2006, a third class yeoman (YN3) at his port security unit (PSU) told him that if he did not request retirement, he would be transferred from the SELRES to the Individual Ready Reserve (IRR) and discharged within two months because of his age. (He was 53 years old in October 2006.) Moreover, he alleged that the YN3 also told him that his discharge would be other than honorable because he had failed the PT and that he would not be able to get a job in law enforcement without an honorable discharge. Therefore, the YN3 advised him to request retirement.

The applicant alleged that he failed his final PT retest in October 2006 primarily because during the running part of the test, he "went back to help a third class petty officer who was injured." After the applicant failed the final PT, his chief inquired about his options and was told that retirement was his only option. In November 2006, a lieutenant also told him that retirement was his only option.

On December 28, 2006, when the applicant visited the Administrative Office, a YN1 told him, "you were deliberately forced to retire by providing you with inaccurate information regarding the IRR and they could have transferred you to another command if they wanted to. ... You

need to contact Master Chief [M] of D7 and provide him with this information.” When the applicant raised the issue with Master Chief M, he assigned Master Chief K to address the applicant’s claim. Master Chief K was told that the applicant had failed the PT retest after being given only five months to prepare. The applicant claimed that he should have had six months to prepare and that he should have been given remedial physical training instruction during those six months. Master Chief K reached an agreement under which the applicant would return to his unit for a baseline PT and remedial training and would have a final retest six months later. If he passed the PT, he would not have to retire. The applicant stated that he “agreed to this arrangement, but it was broken.”

The applicant alleged that when he took the baseline PT in March 2007, he failed it because he had been working 82 hours per week at his civilian job. “During the run, however, I was being paced by one of the Chiefs, who just happened to find out why I have never been able to pass the running” portion of the test. “Since his observation, I have since been able to make the correction and have passed a law enforcement PT within the necessary time limit. It has taken this long for anyone to realize that I have difficulty in running and that it could be corrected.”

The applicant alleged that in July 2007, he ran into a former subordinate and his wife. When the applicant spoke to him, the man said he was in a hurry and had to leave. When his wife asked him why he would not stop to talk, the man told her he had been ordered not to talk to the applicant.

Applicant’s Submissions

In support of his allegations, the applicant submitted a copy of an email that he sent to Master Chief K on February 3, 2009. In the email, he stated that when he arrived at his new unit, a PSU, on May 5, 2006, they were not happy to hear that he had not been required to take a PT for 15 years. On May 19, 2006, he took the PT and received a Page 7 because he failed it. The Page 7 was dated April 19, 2006, but he was told that he should sign it anyway and that the date would be corrected. The unit conducted PT practice on his drill weekends in June and July, and he was told that he was improving. In August, there was no PT—just administrative work. On September 16, 2006, family problems prevented him from participating in a unit PT exercise. On October 21, 2006, he took the PT again and passed the sit-up, push-up, and stretch portions but failed the 1.5-mile run “because there was no one around to help a third class who had hurt himself while running.” Chief F told him he would be “processed for other than honorable conditions” discharge and so his only option was to retire. On October 24, 2006, he asked Chief F if he could transfer to the Marine Safety Office in xxxxxxxx, and Chief F said he would look into it. The applicant also contacted YN1 A “to put a hold on the retirement until [Chief F] let me know about the transfer.” On November 18, 2006, Chief F told him that the command would not allow him to transfer and that his only option was to complete his request for retirement. LT A asked him why his request for retirement had been placed on hold. When he explained that he had hoped for a transfer but that it had not been approved and that he would be retiring, LT A smiled and said it was the only way. On December 21, 2006, he was visiting the administrative office of the air station when YN1 A told him that “the command was deliberately forcing me to

retire.” On January 5, 2007, he visited the administrative office again. YN1 A suggested he contact Master Chief M. LT K from the PSU arrived to hear his complaint.

The applicant submitted a copy of a letter he sent to a Master Chief J on April 11, 2008, about information that he wanted an admiral to have in considering his request to return to an active status in the Reserve. He submitted evidence of an award that was missing from his record because his jacket had been lost by his prior command and he noted that he had been sent to Leadership School in September 2006 and had spent \$200 on new parts of his uniform. On May 6, 2008, the applicant wrote to Master Chief J again and inquired into the status of his request to return to an active status.

The applicant also submitted an email that he sent to Master Chief K on May 26, 2008. He stated that someone had voided the agreement that Master Chief K and the PSU had reached in March under which the PSU was supposed to help him improve his PT run. He asked about his other options.

SUMMARY OF THE APPLICANT’S RECORD

On May 20, 1988, the applicant enlisted in the Coast Guard Reserve. He had previously served four years on active duty in the U.S. Navy. He gained a satisfactory year of service for retirement purposes every year thereafter, and on May 31, 2004, the Personnel Service Center (PSC) sent him notification that he was eligible for Reserve retired pay when he turned 60 years old on December 27, 2012, because he had completed 20 years of satisfactory service for retirement purposes. For most of his military service, the applicant drilled at xxxxxxxxxxxxxxxxxxxx. On May 9, 2006, the applicant reported for SELRES duty at a PSU in xxxxx.

A form CG-3307 (“Page 7”) in the applicant’s record dated June 11, 2006, states that he had failed to pass the physical fitness test administered on April 22, 2006, and that every member of the PSU had to pass the test within six months and biannually thereafter to be fit to deploy. The Page 7 further states that members who do not pass the test might be transferred to the IRR and will not normally be transferred to another unit but might be able to return to drilling at the PSU from the IRR once they pass the test.

The applicant submitted a request to retire after failing another PT test in October 2006, and he was retired from the Reserve on March 1, 2007.

VIEWS OF THE COAST GUARD

On October 15, 2009, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided by the Personnel Service Center (PSC) in an attached memorandum.

PSC stated that the applicant’s “concerns have been previously addressed by subject senatorial inquiry” and submitted copies of that correspondence, which is summarized below. PSC claimed that the applicant failed to pass his initial PT upon arriving at the PSU and “was

provided an additional six months to successfully complete all physical fitness requirements” but was unable to do so. PSC stated that members who fail the PT are normally transferred to the IRR, but in this case the applicant “elected retirement in lieu of transfer to the IRR.” The applicant submitted his request for retirement on March 1, 2007, and it was approved. Under Article 12.C.11.c. of the Personnel Manual, approved retirement requests are not cancelled or delayed “unless a specific Service need exists.”

PSC stated that the command of the PSU presumptively acted correctly in applying Coast Guard policies and procedures and that the applicant “has failed to substantiate any error or injustice with regards to his record.”

PSC’s Submissions

On April 5, 2007, the applicant sent his senator a letter regarding his “involuntary retirement from the Coast Guard Reserve.” The applicant stated that he was supposed to return to inactive duty training (IDT) for six months and to take a “base line” PT test. The applicant stated that after six months of IDT, he “was to be placed in remedial physical training in preparation for a formal PT exam after the six months of training. ... Depending on the results, I was to remain on duty or face retirement without any questions.”

The applicant stated that while attending drills on March 10 and 11 (no year stated), he took his base line PT test and received the Page 7 regarding his failure to pass it. A chief at the PSU ran with him during the base line PT test and recommended a change in his running technique.

The applicant requested the senator’s “assistance in returning to duty based on the fact that procedures for someone that had not taken any PT exams since March 1991 in preparation for Operation Desert Storm. ... My retirement should be removed because I should not have had a choice of an other than honorable discharge or retire[ment].”

The senator forwarded his letter to the Coast Guard and requested a response. On June 12, 2007, the Coast Guard replied that personnel assigned to a PSU must successfully complete a physical fitness test and members who do not meet the standards are usually moved to the IRR. The Coast Guard stated that the applicant failed to pass the test when he arrived at the PSU and was given another six months to pass the test but was unable to do so. The applicant “elected retirement in lieu of transfer to the IRR. After a thorough review of [his] service record, we found the member requested a voluntary transfer to retired status awaiting pay (RET-2) on November 19, 2006. [His] retirement was effective March 1, 2007.”

The Coast Guard further stated that the applicant participated in a scheduled drill on March 10 – 11, 2007, after his retirement date. Because it is unclear whether he had received “proper notification of his retirement prior to his scheduled drill,” the Coast Guard had authorized payment for those drills.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 4, 2010, the applicant submitted his response to the views of the Coast Guard. The applicant alleged that his pay statements would prove that he first reported for duty at the PSU in May 2006 and that he was not given a full six months to pass the PT test. He stated that he moved from xxxxxx to xxxxx in April 2006 and did not report to his new unit until May. He alleged that the date on the Page 7 concerning his failure to pass the PT is erroneous and that he pointed out the error when he signed the Page 7 and was told that it would be fixed. Therefore, he should have had June, July, August, September, October, and November to pass the test, but he was given only five months. When he took the retest in October 2006, he failed the 1.5-mile run because he stopped to help a third class petty officer who was suffering from a back injury. After helping this petty officer to the PSU and telling him to see the corpsman, the applicant continued his run. However, he had lost five minutes and did not pass the test. "The third class was able to get a page seven with an alibi. There was no excuse for my failure; I used my judgment in assisting a fellow serviceman and as a [result] ended my military career."

The applicant alleged that when he failed the second PT test in October 2006, he was told that his only option was to retire and that his command would not approve his transfer to the IRR or to another unit. Although he submitted his retirement paperwork, he stopped it from being submitted to Headquarters and asked Chief F for a transfer to another unit or "anything else that could be done to avoid retirement." Chief F was told that "the unit would only entertain my retirement; nothing else would be approved." A YN3 told him that if he did not retire, then because of his age he "would be [discharged] after being in the IRR and that it was going to be with a General Discharge." When he complained that he was being forced to retire, the YN3 told him that it was in his best interest.

The applicant repeated his allegations about YN1 A's statements and alleged that Master Chief M contacted the PSU on his behalf and they reached an agreement that he was to drill for six more months, take another base line PT, and take a final PT six months after that. If he passed, the retirement would be rescinded.

The applicant stated that he attended drill in March 2007 and took the PT but did not pass because of the number of hours he had been working at his civilian job. A chief ran with him and noticed a major problem with his running posture and promised to work with him to help him improve. Although that did not happen, the applicant did take his advice, and his running has greatly improved. The applicant alleged that he knows of another reservist who was told, "we can get you to retire." The applicant asked the Board to obtain his leave and earnings statements and to contact some of the people he has named to get statements from them.

APPLICABLE REGULATIONS

Chapter 1.C.2. of the Reserve Policy Manual (RPM) states that the Ready Reserve consists of members in an active status—i.e., they may be recalled to active duty—are in either the SELRES or the IRR. The two groups are distinguished as follows:

- a. The Selected Reserve (SELRES). Those individuals within the Ready Reserve designated as so essential to initial contingency requirements that they have priority over all other Reserve ele-

ments. They are assigned to Coast Guard or selected Joint Service units, and are required to train for mobilization as prescribed in 10 U.S.C. 10147 by participating in inactive duty training periods and active duty for the purpose of annual training. Coast Guard SELRES members are generally authorized 48 paid Inactive Duty Training (IDT) drills and at least 12 paid Active Duty for Training (ADT) days per fiscal year. ...

b. The Individual Ready Reserve (IRR). A manpower pool principally consisting of individuals who have had training and have previously served in the Active forces or in the Selected Reserve. The IRR consists of individuals who ... have fulfilled their MSO and who voluntarily remain in the IRR. IRR members are not required to meet the same IDT and ADT training requirements as Selected reservists.

(1) IRR members may voluntarily participate in Reserve training programs (i.e., IDT or ADT) for retirement points only, without pay, and shall be assigned to the same Coast Guard or selected Joint Service units as their SELRES counterparts. They may also apply to perform Active Duty Special Work (ADSW) or Readiness Management Periods (RMPs) for pay. ...

(2) Non-drilling IRR members are assigned to Commander, Personnel Command (rpm), who serves as members' commanding officer and point of contact for all administrative purposes.

Chapter 4.A.2. of the RPM states that to satisfactorily participate in the SELRES, members are obligated to, *inter alia*,

i. Maintain physical fitness and weight standards. Different physical fitness standards are applied to different Coast Guard programs and can be found in the Training and Education Manual, COMDTINST M1500.10 (series) ... ; and,

j. ... Additionally, all members in the Ready Reserve or Standby Reserve, Active Status who are retirement qualified, except for having reached sixty years of age, must accrue a minimum of 50 retirement points in an anniversary year to remain in an active status (see Section 4.B.5).

Unsatisfactory participation is the failure to comply with any of the contractual obligations or program requirements listed above. ... See Section 4.B, Failure to Participate.

Chapter 4.B.2.b. of the RPM states the following:

Members of the SELRES who have fulfilled their statutory MSO under 10 U.S.C. 651 and whose participation has been unsatisfactory, may be transferred to the IRR for the balance of their current enlistment if they still possess the potential for useful service if mobilized. Personnel Command (CGPC-rpm) is the approving official for all requests for transfer to the IRR. They may also be discharged as outlined above if they do not possess the potential for useful service if mobilized.

Chapter 4.B.2.a.3. of the RPM states the following:

Enlisted members may be discharged for unsatisfactory participation. Unless the member requests a hearing before an Administrative Discharge Board, the discharge process does not require convening a board to consider the circumstances and recommend appropriate action when the appropriate commander has recommended that the person be discharged under honorable conditions and that he or she does not possess the potential for useful service if mobilized. See Personnel Manual, COMDTINST M1000.6 (series), Article 12.B.

Chapter 4.B.5.b. of the RPM states the following:

Members in the Ready Reserve or Standby Reserve, Active Status who are qualified for retirement under 10 U.S.C. 12371, except for having reached sixty years of age, and who fail to earn 50

points each anniversary year will be processed by the Personnel Command (CGPC-rpm) for removal from an active status. Requests for waivers may be forwarded to CGPC-rpm via the chain of command.

Chapter 8.C.12.a. of the RPM states that “[m]embers may request transfer to RET-2 status at any time after receipt of notification of completion of 20 years satisfactory federal service.” Chapter 8.C.12.e. states that “[m]embers who request retirement must cease drilling as of the day prior to the requested retirement date, regardless of receipt of retirement request approval. No payments or point credit will be given to a member for drilling on or after the day of requested retirement.”

Article 12.C.11.c.1. of the Personnel Manual states that “[t]he decision to submit a retirement memorandum is a serious one because the projected separation triggers transfer and advancement actions that, if reversed, cause hardship to other members. Therefore, Commander (CGPC-epm-1) normally will not honor a request to cancel or delay an already approved retirement date unless a specific Service need exists and only under these conditions.”

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 10 U.S.C. § 1552. The applicant was timely filed.
2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.¹
3. The applicant alleged that his retirement on March 1, 2007, was coerced, that he was not provided sufficient time to pass his retest in October 2006 and that he should be reinstated in the SELRES. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.² Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”³

¹ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that “whether to grant such a hearing is a decision entirely within the discretion of the Board”); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) (“The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process.”); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

² 33 C.F.R. § 52.24(b); see Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the “clear and convincing” evidence standard recommended by the Coast Guard and adopting the “preponderance of the evidence” standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

4. Members assigned to a PSU must pass the physical fitness test, and the applicant admitted that he failed the PSU's test three times, first in the spring of 2006, then in the fall of 2006, and finally in the spring of 2007. The applicant alleged that his test in the fall of 2006 took place less than six months after his first test in May 2006. However, he also failed the test in March 2007, ten months after he first failed the test. The applicant complained that he was not provided remedial fitness training, but a reservist's physical fitness cannot depend upon training provided by the Reserve because reservists drill only one weekend a month. The applicant's explanations of why he failed the test three times do not persuade the Board that his command committed error or injustice in expecting him to pass the test or in concluding, when he did not pass the test in the fall of 2006, that he was not physically fit to continue his assignment at the PSU. The applicant has not submitted anything to the Board to show that he was able to pass the running portion of the test between May 2006 and his retirement on March 1, 2007.

5. Under Chapter 4.A.2. of the RPM, satisfactory participation in one's Reserve unit is defined to include meeting the required level of physical fitness, and a reservist's failure to meet his unit's physical fitness standard constitutes unsatisfactory participation. Under Article 4.B.2.b. of the RPM, reservists whose participation has been unsatisfactory are normally transferred to the IRR, upon approval by the Personnel Command, if the unit command finds that "they still possess the potential for useful service if mobilized." Otherwise, they may be separated.

6. The applicant alleged that the Coast Guard should have transferred him to another unit, but he has not shown that there was a SELRES billet open for him at another unit or that it was unjust for the Coast Guard to apply the rules for unsatisfactory performance to his situation. Under the rules, when he did not pass the physical fitness test, he could go into the IRR—assuming the Coast Guard found that he possessed the potential for useful service if mobilized—or he could request retirement. The record shows that he requested retirement and that his request was approved.

7. The applicant alleged that he submitted his request for retirement in lieu of a transfer to the IRR only because a YN3 told him that if he went into the IRR, he would be quickly discharged with an other than honorable (OTH) or general discharge.⁴ The applicant submitted no evidence supporting this allegation of coercion. Even assuming the YN3 made such a farfetched claim, the Board does not believe that someone with more than twenty years of military experience could accept such an absurd claim without investigating the matter further. Any inquiry would have revealed that the Coast Guard Reserve is not in the habit of awarding OTH or general discharges to retirement-eligible members simply because they cannot run fast enough. The applicant has not overcome the presumption of regularity or proved that he was coerced into retirement.

⁴ The Board notes that the applicant's allegations are somewhat inconsistent and one such inconsistency is that in his original application, he alleged that the YN3 told him he would receive an other than honorable (OTH) discharge, whereas in his response to the advisory opinion, he alleged that the YN3 told him he would receive a general discharge.

8. The applicant asked the Board to procure his pay statements and statements from various members he mentioned to find evidence to corroborate his claims. The Board does not conduct investigations. Under 33 C.F.R. § 52.24(a), “It is the responsibility of the applicant to procure and submit with his or her application such evidence, including official records, as the applicant desires to present in support of his or her case.”

9. The applicant has failed to prove by a preponderance of the evidence that his retirement from the Reserve was coerced, unjust, or erroneous. Therefore, his request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, Retired, for correction of his military record is denied.

Jeff M. Neurauter

Lynda K. Pilgrim

Kenneth Walton