

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-132



FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the completed application on June 19, 2013, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 27, 2014, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct the amount of time in service reflected on his DD 214 dated March 30, 2011. He stated that the amount of time shown is inaccurate because it fails to reflect periods of active duty that he served while a member of the Army and Army Reserve. He also alleged that because of the inaccuracy, he did not receive proper counseling about his "retirement option." He alleged that when he was discharged, he had accumulated more than 18 years of active duty and so should have been counseled about how to get a medical retirement or how to continue on active duty until he could retire with 20 years of service. If he had been properly counseled, he alleged, he would have been medically retired instead of discharged due to his disability with severance pay. In support of these allegations, the applicant submitted many documents, including the following:

- His Army DD 214 showing 2 years, 10 months, and 4 days of active duty from October 24, 1985, to August 27, 1988, but also stating in the Remarks section that he was in the Reserve Delayed Entry Program from June 20, 1985, through October 28, 1985, which would correspond to an active duty enlistment date of October 29th, not October 24th;
- Pages from an Army form DA 2-1 showing an original date of rank as a private of October 29, 1985, which supports the date in the Remarks section of the DD 214;
- A Coast Guard enlistment document dated January 30, 1996, showing that the applicant reported prior active duty in the regular Army from October 1985 to August 1988 and service in the active Army Reserve from July 1992 to October 1993;

- A report from a Medical Evaluation Board to the Personnel Service Center dated June 8, 2010, stating that the applicant should be retired from the Coast Guard because he was not fit for duty due to lumbago;
- A report from an Informal Physical Evaluation Board (IPEB) dated December 29, 2010, stating that the applicant's disability was 20% disabling and that he should be separated with severance pay;¹
- A memorandum signed by the applicant on January 19, 2011, acknowledging the findings and recommendation of the IPEB; acknowledging that he had served 17 years and 10 months on active duty and that once he had 18 years, he could request retention until attaining 20 years so that he could retire; acknowledging that by accepting a 20% disability rating with severance pay he might be foregoing a medical retirement and lose more than \$2 million in retirement pay and benefits; waiving his right to contest the outcome of the IPEB at a hearing before a Formal Physical Evaluation Board (FPEB); acknowledging that if he exercised his right to appear before an FPEB, it was expected to take at least two to four months and could take longer; and acknowledging that after discussing the issues with his attorney "at length," he was going against his attorney's advice, accepting the IPEB recommendation, and making the decision not to demand his right to a formal hearing "with full knowledge of the consequences"; and
- His Coast Guard DD 214 dated March 30, 2011, indicating that he enlisted on April 1, 1993, completed 17 years, 11 months, and 30 days of active duty in the Coast Guard, and had previously completed 2 years, 10 months, and 4 days of prior active duty in the Army (totaling more than 20 years of overall military service), but was being discharged from the Coast Guard with \$156,340.80 in severance pay due to a disability:

12. Record of Service	Years(s)	Month(s)	Day(s)
a. Date Entered [Active Duty] This Period	1993	04	01
b. Separation Date This Period	2011	03	30
c. Net Active Service This Period	17	11	30
d. Total Prior Active Service	02	10	04
e. Total Prior Inactive Service	00	00	00

VIEWS OF THE COAST GUARD

On January 6, 2014, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant alternative relief in this case. In making this recommendation, the JAG adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that the applicant's DD 214 is incorrect. PSC submitted a copy of the applicant's original Coast Guard enlistment contract, which is dated January 30, 1996—not April 1, 1993. PSC also submitted copies of other enlistment documents showing that the applicant first

¹ Military members with disability ratings of 20% or less are discharged with severance pay, whereas those with disability ratings of 30% or more are medically retired with retirement pay. 10 U.S.C. §§ 1201, 1203.

enlisted in the Coast Guard on January 30, 1996. The Coast Guard also noted that the applicant was not discharged from the Army Reserve until June 22, 1993, so it was impossible for him to have enlisted on the date shown in block 12.a. of his DD 214. PSC alleged that the applicant's DD 214 should actually show the following information:²

12. Record of Service	Years(s)	Month(s)	Day(s)
a. Date Entered [Active Duty] This Period	1996	01	30
b. Separation Date This Period	2011	03	30
c. Net Active Service This Period	15	02	01
d. Total Prior Active Service	02	09	29

PSC stated that with 15 years, 2 months, and 1 day of active duty in the Coast Guard and 2 years, 9 months, and 29 days of active duty in the Army Reserve, the applicant had exactly 18 years of active service on the day he was discharged.

PSC based the proposed correction to block 12.d., Total Prior Active Service, on a Statement of Creditable Service prepared in 1997, which shows that the applicant enlisted in the Army Reserve on June 20, 1985; served on active duty in the regular Army from October 29, 1985, to August 27, 1988; and continued serving on inactive duty in the Army Reserve from August 28, 1988, to June 22, 1993.

Regarding the applicant's claim that he was erroneously counseled by his attorney and that he would have opted to retire had he been accurately counseled, PSC stated that the record shows that on January 19, 2011, the applicant was accurately counseled about his right to a formal hearing, the possibility of receiving a disability retirement if rated 30% or higher, the option of requesting a waiver, once past the 18-year mark, to remain until retirement eligible if rated 20% or less, and the fact that if he requested an FPEB, the process would take long enough for him to reach the 18-year mark and request retention until he became retirement eligible. However, the applicant went against his attorney's advice, voluntarily accepted the IPEB's findings and recommendation, and did not request an FPEB so that he could contest the percentage of his disability rating or request retention until he could retire with 20 years of active duty. Therefore, PSC concluded, the applicant's claim that he was improperly counseled is without merit, and his request for relief should be denied. However, PSC stated, to avoid further confusion, the applicant's DD 214 should be corrected as shown in the table above.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 7, 2014, the applicant responded to the advisory opinion and disagreed with it. He alleged that all of his active duty time is not accounted for and that he was under duress at the time and "was not in good conscience to make an informed decision." He explained that he was "under financial and emotional strain" because he was serving in a "geobachelor assignment" since his family was living in another region and was unsure of his career status due to his medical condition. (The applicant was serving at a unit in Portsmouth, Virginia.) He stated that

² PSC did not address the fact that the applicant's Coast Guard DD 214 erroneously shows zero prior inactive service in block 12.e.

he is now unable to find work and has lost his home due to bankruptcy and beseeched the Board to “take the entire situation into consideration when making a final decision.”

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant’s military record and submissions, the Coast Guard’s submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.³

2. The applicant alleged that he was erroneously counseled about his time in service in January 2011 and was therefore unjustly deprived of a medical retirement or retirement with 20 years of service. When considering allegations of error and injustice, the Board begins its analysis 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.⁴ 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.”⁵

3. The applicant’s Army DD 214 shows that he enlisted on October 24, 1985, and was discharged on August 27, 1988, with no lost time (days of unauthorized absence). Therefore, the Army calculated his active duty time in service as 2 years, 10 months, and 4 days, as shown below.⁶ The Coast Guard appears to believe that the applicant did not enlist until October 29, 1985, which is supported by the end date for his period in the Army Delayed Entry Program of October 28, 1985, shown in block 18 of the Army DD 214, and the original date of rank of October 29, 1985, shown on his DA form 2-1. If the applicant enlisted in the Army on October 29, 1985, he had 2 years, 9 months, and 29 days of active duty in the Army.⁷

Date of separation	1988	08	27	1988	08	27
Date of enlistment	—	1985	10 24	—	1985	10 29
		02	10 03		02	09 28
“Inclusive day”			+ 01			+ 01
Total active duty in Army	02	10	04	02	09	29

³ 10 U.S.C. § 1552(b).

⁴ 33 C.F.R. § 52.24(b).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁶ See U.S. Coast Guard, PPCINST M1000.2B, Personnel and Pay Procedures Manual, App. C (Oct. 2012) (hereinafter PPCINST M1000.2B) (instructions for calculating creditable time in service for pay purposes by subtracting the date of enlistment from the date of separation and adding one “inclusive day”).

⁷ The Board notes that it is possible that the applicant performed short periods of active duty for training while in the Army Reserve following his release from active duty in August 1988. However, he did not submit evidence sufficient to prove any additional periods of active duty, such as a Statement of Creditable Service from the Army. Therefore, for the purposes of this decision, the Board assumes that the applicant’s only period of active duty prior to his enlistment in the Coast Guard was his Army enlistment ending on August 27, 1988.

4. If the applicant served 2 years, 10 months, and 4 days of active duty in the Army, then his adjusted active duty base date (ADBD) upon enlisting in the Coast Guard on January 30, 1996, was March 26, 1993, as shown below.⁸ If the applicant served 2 years, 9 months, and 29 days of active duty in the Army, his adjusted ADBD upon enlisting in the Coast Guard was April 1, 1993:

Date of USCG enlistment	1996 01 30	1996 01 30
Active duty in Army	<u>— 02 10 04</u>	<u>— 02 09 29</u>
Adjusted ADBD	1993 03 26	1993 04 01

5. Therefore, when the applicant was counseled by his attorney about his rights following the IPEB on January 19, 2011, he had close to 17 years, 10 months of total active duty, whether he enlisted in the Army on October 24 or 29, 1985, as shown below:

Date of counseling	2011 01 19	2011 01 19
Adjusted ADBD	<u>— 1993 03 26</u>	<u>— 1993 04 01</u>
	17 09 23	17 09 18
“Inclusive day”	+ 01	+ 01
Total active duty on 1/19/11	17 09 24	17 09 19

6. These calculations show that the waiver document the applicant signed on January 19, 2011, stating that he had served 17 years and 10 months, was reasonably accurate. The applicant alleged that he had actually served much more time on active duty and so based his decision to accept discharge and severance pay on inaccurate information and advice. The waiver document shows, however, that the applicant received accurate legal advice about his time in service and rights in January 2011. (It is the applicant’s DD 214 prepared upon his discharge on March 30, 2011, that is very inaccurate in the amount of total active duty it reflects.) As noted in the waiver document, if the applicant had exercised his right to an FPEB, he could have become entitled to retirement pay either in the form of a medical retirement, if the FPEB had assigned him a 30% or higher disability rating, or by asking to remain on active duty another two years until his 20th anniversary to earn a regular retirement. For personal reasons, the applicant chose to go against his attorney’s advice by opting not to pursue either avenue toward retirement and by instead accepting a medical discharge with \$156,340.80 in severance pay.

7. The preponderance of the evidence shows that the applicant received accurate counseling about his time in service and legal rights in January 2011 but chose to go against his attorney’s advice for personal reasons. He has not shown that the Coast Guard deprived him of any significant factual or legal information that might have changed his decision. The applicant attributed his decision to financial stress caused by the fact that his family had not moved to Portsmouth, Virginia, with him upon his most recent transfer. Military members must be available for worldwide assignment,⁹ however, and such personal matters are not grounds for finding

⁸ PPCINST M1000.2B, App. C (instructions for calculating an ADBD by subtracting the years, months, and days of prior active duty from the enlistment date).

⁹ U.S. Coast Guard, COMDTINST M1000.8A, Military Assignments and Authorized Absences, Chap. 1.A.5.a. (October 2013).

that his discharge was a product of coercion or duress¹⁰ or that he should receive two years of constructive service and a regular retirement.¹¹ Therefore, the Board finds that he has failed to prove by a preponderance of the evidence that his medical discharge with severance pay was erroneous or unjust.¹² His request for relief should be denied.

8. The Coast Guard recommended that the Board correct the applicant's Coast Guard DD 214 to reflect his true Coast Guard enlistment date and the correct amount of active duty, which is less than that currently shown on his DD 214. However, these corrections were not requested by the applicant and are not clearly in his favor.¹³ Moreover, because the applicant's Army DD 214 reflects two possible dates of enlistment in the Army—October 24 or 29, 1985—the exact amount of the applicant's prior active duty to be entered in block 12.d. is unknown, as is the amount of prior inactive service that should be entered in block 12.e. Because the Board cannot order preparation of an accurate DD 214 with the ambiguous information in the record, the Board will not order any corrections unless the applicant requests them and submits official, unambiguous documentation showing his total active duty in the Army and inactive duty service in the Army Reserve.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁰ BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "coercion" as "compulsion by physical force or threat of physical force" or an improper use of power to compel someone to submit, and defining "duress" as "any wrongful act or threat which overcomes the free will of a party"); see *Wright v. United States*, 81 Fed. Cl. 369, 375 (2008); *Sammt v. United States*, 780 F.2d 31, 32 (Fed. Cir. 1985) (holding that a decision to accept separation cannot be considered coerced just because the member's alternative option is somehow less desirable).

¹¹ See *Peterson v. United States*, 104 Fed. Cl. 196, 206 (2012); *Barnick v. United States*, 591 F.3d 1372, 1379–80 (Fed. Cir. 2010) (discussing the "construct service doctrine" under which a member cannot receive credit for a period of active duty not actually performed unless the member was illegally or improperly involuntarily separated).

¹² *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (defining "injustice" as "treatment by the military authorities that shocks the sense of justice but is not technically illegal").

¹³ See 10 U.S.C. § 1552(b) (stating that the claimant or his or her representative must request the correction); see *Friedman v. United States*, 141 Ct. Cl. 239, 252-53 (1958) (holding that "[t]he Correction Boards were established for the purpose only of reviewing, on application of a member of the military personnel, a military record to correct errors or injustices *against* such personnel and not to review and reverse decisions of other established boards *favorable* to such personnel").

ORDER

The application of former [REDACTED], USCG, for correction of his military record is denied.

February 27, 2014

