DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-143

[redacted]

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on May 29, 2019, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated March 11, 2022, 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, a former Machinery Technician second class (MK2/E-5) who was medically retired on April 9, 1995, asked the Board to correct his record by changing Block 18 of his DD-214 to include the following language:

> Period of service was ordered under the authority of 14 U.S.C. § 367, and COMDTINST M1000.4. Retention was essential to public interest. Therefore, the service is exempt under USERRA's five-year service limitation (38 U.S.C. § 4312(c)).

The applicant argued that his DD-214 should be changed because he was involuntarily retained on active duty. He argued that his six extensions of active duty service, which covered a period of 2 years, 5 months, and 9 days, were involuntary service periods. As such, the applicant argued that his extensions should be exempt from the five-year limit under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[1] He argued that the current language included in Block 18 of his DD-214, "Extensions were at the request and for the convenience of the government," is insufficient to prove that his service was exempt from USERRA's five-year limit.

[1] Under USERRA, 38 U.S.C. § 4312, a military member has the right to be reemployed in his civilian job if he leaves that job to perform service in the uniformed service if certain criteria are met. One of the criteria is that the member has five years or less of cumulative service while with that particular employer. However, there are certain exceptions to the five-year limit.

The applicant explained that in March 1987, he began to work for a local construction company. After working for the company for nineteen months, he enlisted in the Coast Guard. The applicant stated that he was fully aware that his employer was required to reemploy him after his first term of enlistment. He stated that with this in mind, he left his employer on good terms with every intention of returning. The applicant enlisted in the Coast Guard on November 1, 1988, for a term of four years.

The applicant stated that with only twenty months left of his enlistment, he received transfer orders. However, members are usually required to commit to serving more than twenty months to transfer. The applicant stated that the Commandant wanted him to extend his enlistment to meet the obligated service time at his next duty station. However, the applicant refused to extend his enlistment. Instead, the Commandant waived the required service obligation and the applicant reported to his new unit.

While he was at his new unit, the applicant injured his left knee on January 2, 1992. He was treated for his injury and he returned to full duty two months later. The applicant stated that at this point, he had no desire to extend his enlistment. He attributed his desire to leave the Coast Guard to the "tyrannical leadership style" of his Commanding Officer (CO). In fact, the applicant stated that he expressed a desire to leave before the end of his enlistment.

In July 1992, the applicant began to make preparations to return to civilian life. For instance, the applicant filed a Coast Guard Reserve Assignment Request, which indicated his desire to join the Selected Reserve following his release from active duty. He stated that his reserve assignment request was approved on August 10, 1992. Then, on August 13, 1992, the applicant indicated that he was going to use his forty-six days of leave to depart his duty station early. He requested the time off to secure employment and housing prior to his discharge, which was scheduled for October 31, 1992.

On August 27, 1992, the applicant injured his left knee for a second time. A short while later, on September 26, 1992, he injured his left knee for a third time. The applicant stated that despite his injury, he submitted a Statement of Intent on September 28, 1992, indicating his desire to separate from the military at the end of October. However, the applicant argued, his CO involuntarily retained him without his consent for a total of two years, five months, and nine days.

The applicant stated that shortly after being discharged in April 1995, he returned to full time employment at his pre-service employer. He worked there for almost thirteen years. Then, in 2009, he became totally disabled and could no longer work. He subsequently applied for disability benefits through his union. However, the applicant alleged that he was incorrectly advised that due to funding problems, his union no longer offered disability pension benefits. In 2018, once the applicant became aware that he was incorrectly advised, he reapplied for his disability pension. The applicant was awarded the maximum benefit amount and nine years of back pay, but his union did not factor his military service time in calculating his pension benefit amount. The applicant's union pension fund administrator stated that the applicant's period of military service did not contribute any monetary value to his pension benefit amount.

The applicant argued that because his retention on active duty is exempt from USERRA's five-year limit, he is eligible to receive pension credit with monetary value for his entire period of uniformed service. He stated that the monetary value of including his military service in calculating his pension benefit amount would be somewhere between an additional $300 to $500 per month. The applicant argued that in order for him to receive pension credit for his period of service, the requested language needs to be added to Block 18 of his DD-214.

The applicant argued that his retention is exempt from USERRA's five-year limit because he was involuntarily retained on active duty. He put forth several arguments in support of this assertion. First, the applicant argued that he was involuntarily retained on active duty as evidenced by his clear intent to only complete four years of active duty. He cited his refusal to extend his enlistment to meet an obligated service requirement and his desire to separate from the Coast Guard before the end of his enlistment.

The applicant also argued that he was involuntarily retained because his military record does not contain proper documentation of his consent for retention. In fact, the applicant argued that if he had consented to remain on active duty, there would have been over eighteen signed documents in his record indicating that he had consented to being retained. Specifically, he argued that for each extension, his military record would include an Administrative Remarks form ("Page 7"), a signed Statement of Intent form, and an Action for Retention form. However, the applicant argued, there are no such forms in his military record documenting his consent to extend.

The applicant also argued that he was involuntarily retained because his retention was essential to the public interest. According to Article 12.B.11.i. of the Coast Guard Personnel Manual, a CO may detain a member in service beyond their enlistment term for up to thirty days when the member's service is essential to the public interest. A member's service could be considered essential to public service if the member's records and accounts have not been received when their enlistment would normally expire. The applicant argued that his CO failed to ensure that very important administrative actions were completed in accordance with the Coast Guard Personnel Manual. Most notably, the applicant argued that his CO failed to ensure that a physical examination was completed before his separation. The applicant argued that his CO's failure to ensure that he received a physical examination justified his involuntary retention since his records and accounts had not been received. To support this assertion, he cited a Page 7 dated November 9, 1992, in which his CO stated that the applicant was serving under an involuntary medical extension. The applicant argued that it was not until the end of his third involuntary extension that he received a physical examination. He argued that it was at this point that a medical board was properly initiated.

Finally, the applicant argued that he was involuntarily retained as evidenced by his medical board report. According to the Coast Guard Personnel Manual, if a member remained in the Service with his written consent beyond his enlistment expiration, the medical board report shall clearly indicate the following: 1) patient's status; 2) date of admission to sick list; and 3) whether the member concerned is physically qualified for discharge. The applicant argued that he was involuntarily retained because his medical board report does not clearly indicate the required information.

The applicant provided numerous documents in support of his request. The relevant information contained in the documents is included in the summary of the record below.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on November 1, 1988, for a term of four years.

On February 20, 1991, the applicant indicated that he did not desire to extend his enlistment to meet an obligated service requirement prior to his transfer to a new duty station.

On January 2, 1992, the applicant injured his left knee in a motorcycle accident. Two months later, on March 10, 1992, he was found fit for full duty.

On April 30, 1992, the applicant received a Page 7 regarding his behavior. The applicant's CO wrote the following:

> [The applicant] shows absolutely no sign or pride or loyalty to this unit or to the Coast Guard. He has expressed on several occasions that he has no desire to remain a part of the Coast Guard. He outwardly complains about this unit and has expressed a desire to be separated before his enlistment expires. With the exception of the last week of this marking period, he has said the only way he will extend in the Coast Guard is involuntarily.

On July 26, 1992, the applicant completed a Coast Guard Reserve Assignment Request and Orders form. On the form, the applicant requested a delayed assignment to the Selected Reserve for January 1, 1993.

On August 28, 1992, the applicant reinjured his left knee while he was performing official duties.

The applicant submitted an undated leave authorization request. He requested leave from September 11, 1992, until October 26, 1992. The applicant requested leave so that he could find work and a place to live prior to his discharge. The approving authority wrote the following note on the applicant's request form:

> If he wants terminal leave that's fine. He can wait 5 days and take terminal starting 16SEPT92. Day after SAR season ends. I recommend this because [the applicant] has indicated he does not intend to stay in the CG. His performance, in my opinion does not justify reenlistment. There has been minimum improvement on his part, but overall his performance is below what is expected from a second class P.O. He sets a negative example for the junior personnel in his department and this unit. If he is eligible for an early separation I would recommend it.

On October 7, 1992, a Statement of Intent was submitted in the applicant's record, in which he extended his enlistment for a period of six months effective November 1, 1992. In the block for the member's signature, his name was typed. The remarks on the form state: "member retained for medical reasons."

On November 9, 1992, the applicant received a Page 7 regarding his performance. The Page 7 identified certain leadership and military factors that he needed to improve. Regarding the

applicant's loyalty, the Page 7 stated: "[The applicant] is currently serving under an involuntary medical extension. His enlistment was to expire on 31 Oct 92 but has been delayed 6 months due to a knee injury. He shows no sign of commitment to the Coast Guard or to this unit."

In February 1993, the applicant's station sent a memorandum to the Commandant regarding an additional four-month extension for the applicant. The applicant's station stated that the additional extension was needed because the applicant was having surgery in March 1993 for separated and torn ligaments in his left knee. Shortly thereafter, the Commandant approved the extension request in accordance with 12.B.11.f. of the Coast Guard Personnel Manual.

On April 30, 1993, a Statement of Intent was submitted in the applicant's record, in which he extended for a period of four months effective May 1, 1993. In the block for the member's signature, the applicant's name was typed.

On July 13, 1993, a Statement of Intent was submitted in the applicant's record, in which he extended for a period of two years effective September 1, 1993. In the block for the member's signature, the applicant's name was typed.

On August 2, 1993, the applicant's station sent a memorandum to the Commandant regarding an additional six-month extension for the applicant. The applicant's station stated that the applicant was having surgery on August 3, 1993, to address a separated and torn anterior cruciate ligament (ACL) in his left knee. Shortly thereafter, the Commandant approved the extension request in accordance with Article 12.B.11.f. of the Coast Guard Personnel Manual.

On August 5, 1993, a Statement of Intent was submitted in the applicant's record, in which he extended for a period of six months effective September 1, 1993. In the block for the member's signature, the applicant's name was typed.

On September 1, 1993, a form was placed in the applicant's record that showed that he was retained beyond the normal expiration of his enlistment in accordance with Article 12.B.11.i. of the Coast Guard Personnel Manual. The form stated that the applicant consented to being retained until he had been found physically qualified for release.

On January 7, 1994, the applicant's CO requested a medical board for the applicant.

On January 11, 1994, the Commander of the applicant's Group approved the CO's request to initiate a medical board for the applicant. The Commander stated that the applicant had not been fit for full duty since January 1992, and that this represented an unacceptable strain on the station's limited resources.

In January 1994, the applicant's station sent a memorandum to the Commandant regarding an additional six-month extension for the applicant. The applicant's station stated that the applicant had been involuntarily retained since November 1992. At this point, a medical board proceeding had been initiated and that the applicant was waiting for surgery to correct his left knee injury. However, no surgery had been scheduled and nonfederal health care funds had been denied. The applicant's station noted that based on the applicant's condition and the history of difficulty

obtaining surgery within the VA system, a resolution to the applicant's injury was not expected within six months.

On January 25, 1994, a Statement of Intent was submitted in the applicant's record, in which he extended for a period of six months effective March 1, 1994. In the block for the members' signature, the applicant's name was typed.

On January 31, 1994, the applicant underwent a separation physical. The Report of Medical Examination showed that the applicant did not meet the physical requirements for separation due to an unstable left knee.

On March 1, 1994, a form was placed in the applicant's record that showed that he was retained beyond the normal expiration of his enlistment in accordance with Article 12.B.11.f. of the Coast Guard Personnel Manual. The form stated that the applicant consented to be retained until he had been found physically qualified for release.

On May 18, 1994, the applicant's station sent a memorandum to the Commandant regarding an additional six-month extension for the applicant. The applicant's station stated the applicant had been involuntarily retained since November 1992. The applicant was scheduled to have surgery on June 27, 1994, to address a separated and torn ACL and torn meniscus in the left knee. Shortly thereafter, the Commandant approved the extension request in accordance with Article 12.B.11.f. of the Coast Guard Personnel Manual.

On May 25, 1994, a Statement of Intent was submitted in the applicant's record, in which he extended for a period of six months effective July 1, 1994. In the block for the member's signature, the applicant's name was typed.

On July 1, 1994, a form was placed in the applicant's record that showed that he was retained beyond the normal expiration of his enlistment in accordance with Article 12.B.11.f. of the Coast Guard Personnel Manual. The form stated that the applicant consented to be retained until he had been found physically qualified for release.

On November 16, 1994, a narrative summary of the applicant's medical history was submitted as an addendum to the medical board. The narrative summary stated that the applicant initially injured his left knee during a motorcycle accident on January 2, 1992. Three weeks later, on January 27, 1992, the applicant was diagnosed with a medial collateral ligament (MCL) sprain and treated with physical therapy. On March 10, 1992, the applicant was found fit for full duty. Later that year, on August 28, 1992, the applicant reinjured his left knee while running across a parking lot. The next month, an MRI of the applicant's left knee was performed, and the findings were consistent with a meniscal tear. On January 29, 1993, the applicant underwent a left knee arthroscopy in which part of the meniscus was removed. During the arthroscopy, it was revealed that the applicant had antero-medial instability, and a tear of the ACL. Then, on March 15, 1993, the applicant received ACL reconstruction surgery. During his follow-up appointment, the doctors noted medial/lateral instability. A second MRI was conducted on May 18, 1993, and revealed a bucket handle tear of the medial meniscus and a tear of the ACL. Starting in February 1994, the applicant attended physical therapy for his left knee. Then, on June 7, 1994, the applicant

underwent surgery and the diagnosis from this operation included the following: 1) Left ACL Deficiency, Status Post EXTRA Articular Augmentation of a Pes Plasty; 2) Bucket Handle Tear of Medial Meniscus; and 3) Grade II Chondromalacia of Medial Femoral Condyle and Medial Tibial Plateau. The applicant continued attending physical therapy through November 1994.

In November 1994, the applicant's station sent a memorandum to the Commandant regarding an additional six-month extension for the applicant. The applicant's station stated the applicant had been involuntarily retained since November 1992, and that he was fit for limited duty. Shortly thereafter, the Commandant approved the extension request in accordance with Article 12.B.11.f. of the Coast Guard Personnel Manual.

On November 30, 1994, a Statement of Intent was submitted in the applicant's record, in which he extended for a period of six months effective January 1, 1995. In the block for the members' signature, the applicant's name was typed.

On December 12, 1994, a medical board convened regarding the applicant's case. The applicant was found not fit for duty because of a physical disability, and was referred to the Central Physical Evaluation Board (CPEB). The applicant was diagnosed with the following:

1. Status Post ACL Reconstruction
2. Medial/Lateral Instability of the Left Knee
3. Grade II Chondromalacia
4. Patella Femoral Syndrome Right Knee

On December 14, 1994, the applicant submitted a Patient's Statement regarding the findings of the medical board. The applicant acknowledged that he felt that all of his impairments had been evaluated adequately by the medical board, and that his diagnoses would be considered by the CPEB for its independent evaluation. He further acknowledged that he understood that the medical board's opinions and recommendations were not binding on the Coast Guard and that his case would be subjected to review and final disposition by a higher authority. The applicant indicated that he did not desire to make a statement in rebuttal to the findings and recommendations.

On January 1, 1995, a form was placed in the applicant's record that showed that he was retained beyond the normal expiration of his enlistment.

On February 7, 1995, the CPEB diagnosed the applicant with Impairment of the Knees and assigned him a disability rating of 40%. The applicant was found unfit for to perform the duties of his grade or rate. He was recommended for permanent retirement.

On March 13, 1995, the findings and recommendations of the CPEB were approved. That same day, the applicant received a memorandum from the Commander of the Military Personnel Command. The applicant was notified that he had been found unfit to perform the duties of his rate by reason of permanent physical disability. He was further notified that he would be permanently retired from the Coast Guard.

On April 9, 1995, the applicant was medically retired from the Coast Guard in accordance with Article 12.C.10. of the Coast Guard Personnel Manual. Block 18 of his DD-214 states the following: "Enlistment extended for 6 months on 92NOV01 and for 4 months on 93May01 and for 6 months on 93SEP01 and for 4 months on 94MAR01 and for 6 months on 94DEC31 and for 6 months of 95JAN 01. Extensions were at the request and for the convenience of the government." The applicant signed his DD-214.

VIEWS OF THE COAST GUARD

On November 13, 2019, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC argued that the application was not timely filed. Regarding the merits of the case, PSC argued that the applicant failed to show that his DD-214 contained an error or injustice. Further, PSC argued that there is no policy in place to add the language requested by the applicant on his DD-214. According to the Certificate of Release or Discharge from Active Duty Manual, Block 18 should only include entries that are specified in the manual or in supplemental directives. PSC stated that there is nothing in the manual reflective of the applicant's request. Further, PSC stated that the manual specifically addresses the language to use in Block 18 for an extension of enlistment, whether voluntary or involuntary, as follows: "Enlistment/Active service term extended for (term) on (date). Extension was at the request of and for the Convenience of the Government." PSC stated that the applicant's DD-214 already contains this language.

The JAG reiterated that the application was not timely filed. Further, the JAG argued that the applicant's delay in submitting his request has prevented the Coast Guard from being able to address the alleged deficiencies in his record. The applicant's argument is predicated on the fact that his service records do not contain evidence of his consent to extend his enlistment. However, the JAG stated that the applicant was medically retired more than twenty years ago, and that the Coast Guard ceased to maintain physical custody of his personnel files shortly after his discharge. The JAG argued that the applicant's record as received from the National Archives was incomplete on its face and a number of documents that would typically be included in member's file were absent. For instance, the JAG stated that some of the documents supplied by the applicant in support of his application were not in his record. The JAG argued that it is impossible to know what additional documentation was lost due to the passage of time. The JAG argued that had the applicant timely filed for relief, the Coast Guard would have had several options to address the lack of documentation, such as searching locally maintained records or procuring testimony from service members.

Regarding the merits of the case, the JAG argued that the applicant failed to show that the Coast Guard committed an error or injustice. First, the JAG argued that the applicant failed to show that that portions of his service should have been deemed "essential to public service" and therefore excluded from USERRA's five-year limitation. The JAG stated that according to 14 U.S.C. § 2314, an enlisted member may be detained in the Coast Guard beyond the term of his enlistment, for a period not exceeding thirty days, when essential to the public interest. The JAG argued that given the thirty day time limit, the Coast Guard could not have relied on that section

of the code to extend the applicant's enlistment for more than two years. While certain documents in the applicant's record characterize his extensions as involuntary, the JAG argued that these erroneous notations came from the applicant's local command and were likely the result of a misunderstanding of statutory authority or policy. Moreover, the JAG argued that the Coast Guard's characterization of the applicant's extensions in internal documents do not determine relief under USERRA.

The JAG also argued that the applicant's enlistment was properly extended pursuant to Article 12.B.11.f. of the Coast Guard Personnel Manual. According to the manual, members could consent to extend their active duty service in order to receive medical care. The JAG argued that the applicant provided several Statements of Intent and other documents that verify that he desired to be retained for medical reasons. Further, the JAG argued that the applicant failed to provide any documentation that he objected to his retention. The JAG acknowledged that there is evidence in the applicant's record that show that he originally desired to leave the service upon completion of his enlistment. However, the JAG argued that there is no evidence that the applicant objected to being retained after he re-injured his knee in August 1992. For instance, the JAG stated that according to Article 12.B.11.f. of the manual, a member who desired to be separated, despite needing medical care, had to sign a Page 7, witnessed by an officer, stating their desire to be separated from the Coast Guard on their normal expiration of active duty.

The JAG concluded by arguing that a common-sense review of the circumstances regarding the applicant's extensions show that he was retained with his consent. First, the JAG argued that the applicant's extensions were solely for his benefit. The JAG stated that during the more than two years the applicant was retained beyond his initial enlistment, he received extensive medical care including surgeries and physical therapy to rehabilitate the injury to his left knee. Next, the JAG argued that the applicant's retention on active duty was a burden to the Coast Guard. During his extensions, the applicant was unfit for full duty, so he was not able to perform his required duties. According to the Commander of the applicant's Group, the applicant was an unacceptable strain on the station's limited resources. At the same time, the applicant continued to receive all pay and benefits afforded to members who were fit for full duty. Finally, the JAG argued that the applicant fully and voluntarily participated in the Physical Disability Evaluation System (PDES) process. According to Article 4.A.14.c.5. of the PDES Manual, a member could have "simply waived continued disability processing and requested administrative separation/retirement processing." However, when the applicant was presented with the CPEB findings, he accepted them without objection or rebuttal. The applicant's PDES case was processed to conclusion and he was medically retired with a 40% disability rating.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 18, 2019, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. After requesting an extension, the applicant submitted a response on November 24, 2020. In his response, through counsel, the applicant amended his relief sought by requesting a statement from the Coast Guard characterizing his six retentions as involuntary and performed under 14 U.S.C. § 367.[2] The applicant requested that the

[2] According to a memorandum published by a Rear Admiral on October 28, 2021, periods of service that qualify for an exemption should be noted on a service member's order stating that the period of service is exempt under

statement include USERRA's exemption verbiage categorizing his retention under one of the exceptions recognized by 38 U.S.C. § 4312(c)(4).

First, the applicant addressed the delay in his application. While the applicant knew that he had been involuntarily retained in the Coast Guard at the time of his discharge in 1995, he stated that he believed his extensions were properly executed and recorded on his paperwork. Specifically, the applicant noted that Block 18 of his DD-214 includes the following remark: "Extensions were at the request and for the convenience of the government." Then, in October 2016, he was notified that his civilian pension would not account for his service in the Coast Guard. The applicant argued that it was not until this point that he discovered that his involuntary retention was improperly documented on his DD-214. He stated that he applied to the BCMR in May 2019, which he argued was clearly within three years of discovering the alleged error.

The applicant reiterated that the Coast Guard involuntarily retained him without his consent. He argued that from November 1, 1992, until his discharge on April 5, 1995, the Coast Guard issued six involuntarily extensions. To support his allegation, the applicant argued that the Coast Guard failed to provide a single document indicating that he consented to the extensions. Instead, the applicant argued that his record shows the extensions were involuntary. The applicant addressed each extension in turn. Regarding the applicant's first extension that began on November 1, 1992, he argued that two pieces of evidence support his assertion that the extension was involuntary. First, the applicant stated that he did not sign the Statement of Intent, which he argued was required. Next, the applicant cited the Page 7 dated November 9, 1992, that stated that he was serving under a 6-month involuntary medical extension due to a knee injury. Regarding the applicant's second and third extensions that began on May 1, 1993, and September 1, 1993, respectively, he again stated that he did not sign the Statements of Intent. Regarding the applicant's fourth extension that began on March 1, 1994, the applicant stated that he did not sign the Statement of Intent and he cited a memorandum from his station that stated that he had been involuntarily retained since November 1992. Finally, regarding the applicant's fifth and sixth extensions that began on July 1, 1994, and January 1, 1995, respectively, he again stated that he did not sign the Statements of Intent.

Finally, the applicant addressed the Coast Guard's assertion that he benefited from the being retained on active duty. He argued that whether he benefited from his extensions is irrelevant because he did not consent to being retained. Further, the applicant contested the notion that he benefited from being retained. First, he stated that spending more than two additional years on active duty was a significant strain on his personal life. Additionally, the applicant argued that as of now, his military service does not contribute any value to his civilian pension benefit amount, so it is unclear whether he benefited from the extensions.

USERRA's five-year limit, 38 U.S.C. § 4312. If this statement should have been but was not included in a member's qualifying activation orders, the statement must be included in a separate document and retained in the member's personnel file.

APPLICABLE LAW AND POLICY

The Commandant Instruction for the Release or Discharge from Active Duty Manual, DD-214, COMDTINST M1900.4D, states the following regarding Block 18 of a member's DD-214:

> Block 18. Remarks. Entries in this block consist of information not shown elsewhere on the form. Only the entries specified below or in supplementary directive will be made in this block. (See Chapter 10, Section A, CG PAYMAN, COMDTINST M7220.29 (series)). Repetition of information included in other blocks adds nothing and obscures essential data. Any unused space will be filled in by diagonal "X's".
>
> ...
>
> 7. Extension of Enlistment/Active Service. When a member's enlistment or active duty commitment was extended, except for the purpose of making up lost time under Title 10, U.S.C. 972, the term of such extension shall be entered in block 18 as shown below. For purposes of reemployment rights under PL 90-491, any extension of enlistment or active service, whether voluntary or involuntary, is considered to have been for the Convenience of the Government and shall be so noted on the DD Form 214 as follows: "Enlistment/Active service term extended for (term) on (date). Extension was at the request of and for the Convenience of the Government."

Chapter 12.B.11. of the Coast Guard Personnel Manual in effect at the time of the applicant's discharge discusses the expiration of a member's enlistment in relevant part:

> 12.B.11.f. Undergoing Medical Treatment or Hospitalization
>
> 1. Incident to Service.
>
> a. An active duty member whose enlistment expires while he or she suffers from a disease or injury incident to service and not due to his or her own misconduct and who needs medical care or hospitalization may remain in the Service after the normal enlistment expiration date with his or her consent, which should be in writing and signed by the ill member on Form CG-3312A in his or her PDR. ☛ Personnel and Pay Procedures Manual, PPCINST M1000.2 (series). He or she may remain until recovered to the point he or she meets the physical requirements for separation or reenlistment or a medical board ascertains the disease or injury is of a character that prevents recovery to such an extent. Tacit consent may be assumed if mental or physical incapacity prevents informed consent. A member in this category ordinarily will remain up to six months after the enlistment expiration date; however, the Commandant may authorize further retention on proper recommendation accompanied by the supporting facts. ☛ 14 U.S.C. 366 and Article 12.B.6.
>
> b. If the member desires separation, it shall be effected, provided the member signs this entry on an Administrative Remarks, CG-3307, in the PDR, witnessed by an officer, when examined for separation: I, [Member's name], desire to be separated from the Coast Guard on my normal expiration of active obligated service date. I understand I will not be eligible for further follow-up studies or treatment at a U.S. Uniformed Services medical facility or disability benefits under laws the Coast Guard administers, and any further treatment or benefits would be under the Veterans' Administration's jurisdiction.
>
> ...
>
> 12.B.11.i. Retention When Essential to Public Interest
>
> Commanding officers may detain a member in service beyond the enlistment term for up to 30 days when the member's service is essential to the public interest, in the circumstances below. Complete

form CG-3312A in accordance with the Personnel and Pay Procedures Manual, PPCINST M1000.2 (series).

1. The member is required as a witness in a proceeding pending when enlistment normally expires. Hold the member in an extended enlistment status until the proceeding has been completed.

2. The member's records and accounts have not been received when the enlistment normally would expire. Hold the member in an extended enlistment status pending receipt of such records.

3. If the pre-separation physical examination finds a disqualifying physical or mental defects.

4. The member is performing flood, hurricane, or any other emergency duty when enlistment expires.

Title 38 U.S.C. § 4312(c) discusses who is eligible for reemployment rights and benefits in accordance with USERRA as follows:

(c) Subsection (a) shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—

(1) that is required, beyond five years, to complete an initial period of obligated service;

(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

(3) performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or

(4) performed by a member of a uniformed service who is—

(A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, 12304a, 12304b, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 [1] of title 14;

(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;

(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or

> (F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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.

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.[3]

3. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.[4] Although the applicant alleged that he discovered the error on his DD-214 in 2016, he received and signed his DD-214 in 1995. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in 1995, and his application is untimely.

4. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.[5] In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review"[6] to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review."[7] Pursuant to these requirements, the Board finds the following:

a. Regarding the delay in applying to the Board, the applicant stated that until October 2016, he believed his involuntary extensions were legally documented by his command on his DD-214. He argued that it was not until October 2016 that he learned that his civilian pension would not account for his service in the Coast Guard. However, USERRA became law on October 14, 1994. According to USERRA, reemployment rights and benefits apply if the cumulative length of service that causes a person's absence from a position does not exceed five years. However, there are eight categories of service that are exempt from the five-year limitation. In this case, the applicant believed that he should have been exempt from the five-year limitation because his service was considered involuntary. Given that the applicant's service exceeded the five-year limitation, he should have known to request documentation of the alleged exception

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[3] *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).
[4] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.
[5] 10 U.S.C. § 1552(b).
[6] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).
[7] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

when he was discharged. The Board is not persuaded that until 2016, the applicant believed that his alleged involuntary extensions were properly recorded on his DD-214 for purposes of USERRA. Block 18 of the applicant's DD-214 states: "Extensions were at the request and for the convenience of the government." However, this language is not at all similar to the exception language in 38 U.S.C. § 4312(c). Further, the fact that the applicant waited to request such documentation until after he learned that his Coast Guard service would not be included in his pension calculation is not persuasive. The Board finds that the applicant's explanation for the delay is not compelling because he failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly.

b. A cursory review of the merits of this case shows that the applicant's claim lacks potential merit. The applicant failed to provide sufficient evidence that he was involuntarily retained on the basis that his service was essential to the public interest in accordance with Article 12.B.11.i. of the Coast Guard Personnel Manual. First, the applicant failed to provide sufficient evidence that he was involuntarily retained. To support his assertion, the applicant stated that his record lacks documentation of his consent. However, as noted by the JAG, the applicant's record is incomplete due to the significant length of time since his discharge. While the applicant's record is missing several required documents, such gaps in the record are not evidence of the applicant's lack of consent to being retained. Further, had the applicant in fact been involuntarily retained in the Coast Guard for nearly three years, he surely would have been able to provide some documentation of his objection. Instead, the record shows that the applicant received extensive medical treatment, including surgeries and physical therapy, during his extensions to address the injury to his left knee. Moreover, the applicant received a medical retirement with a 40% disability rating, in which he continues to receive compensation. Second the applicant failed to show that his extensions were essential to the public interest. To support his assertion, the applicant cited documents in his record that show that he was extended in accordance with Article 12.B.11.i. of the Coast Guard Personnel Manual. While some of the documents in the applicant's record cite to Article 12.B.11.i., this is clearly a typographical error. First, many more documents in the applicant's record show that he was retained because he was undergoing medical treatment in accordance with Article 12.B.11.f. of the manual. Further, according to Article 12.B.11.i., a member could be retained in the service beyond his enlistment term for no more than thirty days. In this case, the applicant's extensions totaled more than two years. Therefore, the disputed record is presumptively correct,[8] and the record contains no persuasive evidence that substantiates his allegations of error or injustice in his official military record.

5. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations to conduct a thorough review of the merits. The applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

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[8] 33 C.F.R. § 52.24(b); *see Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

ORDER

The application of former [redacted] for correction of his military record is denied.

March 11, 2022

[redacted]

[redacted]

[redacted]