

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-024

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CDR

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 March 15, 2022, and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated July 31, 2024, 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 retired Commander (CDR/O-5) who was honorably discharged on June 30, 2021, asked the Board to correct his record by making the following changes:

- Changing his Expected Loss Date from June 30, 2021, to June 30, 2024, or June 30, 2028.
- Recalling him to active duty effective June 30, 2021.
- Removing all references of his non-selection for promotion to O-6.
- Promoting him to Captain with a date of rank of January 2, 2021, with back pay and allowances, or in the alternative that his record be submitted to a Special Selection Board (SSB).

SUMMARY OF THE RECORD

The applicant commissioned as an Ensign in the Coast Guard on September 28, 1990.

On October 1, 1994, the applicant was transferred to the Individual Ready Reserve where he remained until September 1, 2001. Between May 22, 1995, and May 22, 2001, the applicant

failed to achieve the 50 point minimum annual participation points as required by Article 4.A.3.d. of the Reserve Policy Manual (1997), COMDTINST M1000.28.¹

On June 24, 1998, the Coast Guard mailed, via certified mail-return receipt, the applicant his “Annual Screening for Participation/Transfer to Inactive Status,” letter. The contents of the letter are as follows:

1. This letter discusses your status in the Coast Guard Reserve. Because of the potential impact on your career, you are urged to read the following paragraphs very carefully to ensure you understand their content.
2. Reference (a)² sets forth a program of annual screening of Reserve officer for compliance with the 50-point minimum participation requirements. This screening is tied to your anniversary date. Your Coast Guard Reserve Annual or Terminal Statement of Retirement Points (CGHQ-4175) indicates that you have earned fewer than the required minimum of 50 points in your anniversary year ending 22 May 1998.
3. As a result of this screening, you have the following choices:
 - a. Request a waiver of the participation standard: A waiver may be requested if there is a reason for your inactivity and you plan to actively participate in the near future. A waiver would only cover the anniversary year addressed in paragraph 2 of this letter. A waiver request must be submitted through your commanding officer for a substantive endorsement. If you are interested in greater involvement in the Coast Guard Reserve, you should contact your Integrated Support Command (ISC) for information on opportunities available to you.
 - b. Submit documentation to this office in support of a claim for additional points earned but not credited: This would include copies of order or correspondence course completion letters showing points earned but not reported.
 - c. Resign you commission and receive an honorable discharge: A one sentence letter request with your name, social security number, and signature is sufficient to resign from the Coast Guard Reserve.
4. If you do nothing within 30 days of the date of this letter, you will be transferred to the Standby Reserve Inactive Status List (ISL) in approximately 45 days after your receipt of this letter.
5. If placed on the ISL (inactive status), you will not be eligible to accrue retirement points, participate in any Reserve training activities, or be considered for promotion. Once in that status, you may request return to an active status by letter to this office via your ISC. All requests for return to active status will be reviewed by a panel of at least three officers. All reinstatements will be based on the recommendations of the panel, the availability of active status vacancies, and the needs of the Coast Guard Reserve.
6. Officers transferred to the ISL are automatically considered by the Reserve Officer Mobilization Disposition Board after they have been on the ISL for three years. This Board reviews the service record of officers assigned to the ISL for their mobilization potential. The Board will either recommend your continued retention on the ISL or that you be discharged. In either case, you will be notified of the Board’s decision.

¹ Article 4.A.3.d of the Reserve Policy Manual, COMDTINST M1001.28, “Unsatisfactory participation is the failure to comply with any of the following contractual obligations or program requirements:

...

d. Attaining a minimum of 50 retirement points in an anniversary year by an officer.

² Reserve Policy Manual (1997), COMDTINST M1000.28.

On October 1, 1998, the Coast Guard sent the applicant a letter entitled, “Annual Screening for Participation/Transfer to Inactive Status List,” wherein the applicant was informed that he was assigned to the ISL. The letter also informed the applicant that while assigned to the ISL, he would not accrue retirement points, participate in any Reserve training activities or be considered for promotion, and that he could request a return to active status by sending a letter to his PSC office.³

On September 1, 2001, the applicant transferred to the Selected Reserves (SELRES), where he remained until returning to active duty on August 19, 2003.

In 2001 and 2002 the applicant failed selection to Lieutenant Commander (O-4). Because of these two non-selections, that applicant was released from service on June 30, 2003, but was recalled on August 19, 2003, as a Lieutenant Junior Grade (O-2).

On July 31, 2020, a Captain with the Coast Guard Personnel Service Center (CG-PSC) issued a memorandum, “Notice of Expected Loss Date (ELD),” wherein he notified the applicant that he would be released to inactive duty. The contents of the memorandum are as follows:

1. This is to notify you that article 5.F .1. of reference (a) directs that you “be released to inactive duty on *the last day of the month in which you complete 30 years of commissioned service*”⁴ unless you request retirement effective on the first day of the following month. Article 8.AA.b. of reference (b) states that, “[the] Date of Commission column of [reference (c)] is used as a guide for determining when officers may be removed from an active status.” The Date of Commission column in reference (c) shows that you were commissioned as a Reserve ensign on 28 September 1990, meaning that you will reach 30 years of continuous service in the Reserve on 28 September 2020. Therefore, article 5.F.1. of reference (a) suggests that you should be released to inactive duty on 30 September 2020, or retired on the following day. Please read the rest of this memorandum before you begin making plans for your future.

2. Article 8.A.4.b. of reference (b) states that Reserve officers “*will be removed on 30 June immediately following completion of 30 years of total commissioned service.*”⁵ As indicated by the language in italics, references (a) and (b) conflict on the question of how Reserve officers with 30 years of active service should be removed from an active status (or retired if authorized by law and requested by the officer). Reference (a) directs that you be removed on 30 September 2020, but reference (b) directs that you be removed on 30 June 2021 (e.g. the last day of the promotion year in which you reach 30 years of active service).

3. To resolve this conflict, I looked to other policy on involuntary retirement of officers with 30 years of active service. As you know, Permanent Commissioned Teaching Staff (PCTS) officers are like RPA officers in that both groups serve on active duty, but neither are included on the active duty promotion list (ADPL). Article 1.C.8.b. of reference (a) states that PCTS officers must be retired no later than “30 June of the promotion year in which they complete 30 years’ active commissioned service.” It appears that the weight of Coast Guard practice for Coast Guard officers serving on active duty, but who are not earned on the ADPL, is to separate or retire them on 30 June of the promotion year in which they reach 30 years of active service. For that reason, I conclude that your separation or retirement should be guided by article 8.A.4.b. of reference (b). This memorandum serves as notice that you must be released to inactive duty on 30 June 2021 unless you request to be retired on the following day.

³ Although the applicant was informed that he would be transferred to the ISL, the Coast Guard PSC office has no record that the applicant was in fact, transferred to the ISL as stated in this letter.

⁴ Article 5.F.1. of the Military Separations, COMDTINST MI000.4 (series).

⁵ Article 8.A.4.b. of the Reserve Policy Manual, COMDTINST MI001.28 (series).

4. I note that you will soon go before the O-6 RPA selection board, which will convene on 04 August 2020. Unfortunately, even if selected for O-6, you will not be authorized to serve in that grade beyond 30 June 2021 due to the requirements of 8.A4. of reference (b).

On August 2, 2020, the applicant sought counsel from a licensed attorney regarding his ELD and the implications this ELD would have on his upcoming Reserve Program Administrators (RPA) Captains Board. This attorney provided the applicant with the following relevant analysis:

Your unsatisfactory years and their significance. Your Coast Guard service may be summarized as follows:

You were sworn in as an Ensign on 28 September 1990 and served on active duty until 21 September 1994. Thereafter you were assigned to the Individual Ready Reserve. Through November 2001, you voluntarily drilled six times in 1996 and once in 2001. Except for those years, you earned only the automatic 15 points for each year from 1994 to 2001. After 9/11 you were involuntarily recalled to duty. Having predictably failed of selection for O-4 in 2001 and 2002 due to the absence of years' worth of OERs, your recall ended but you accepted ADSW-RC orders to the Office of Reserve Affairs. You were released because of your two failures of selection, but were recalled as a LTJG and a few months later were selected for LT on the IDPL. You then took a series of ADSW and EAD contracts and in 2006 were selected as an RPA. You have been on full time active duty ever since as an RPA and have risen to the rank of Commander. You were selected for postgraduate school in 2013 and received a master's in public policy from [redacted] University in 2016.

In December 2019 you asked to retire on 1 October 2020. That request was granted. Thereafter, the Captain in charge of the Personnel Service Center asked you why you were retiring. You responded that you were facing the end of your 30 years commissioned service. He stated that you were not in fact facing the 30-year end date and saw to it that a Statement of Creditable Service was generated. The Officer Personnel Management Division contacted you when the SOCS was complete and advised you that you could actually serve for approximately seven additional years. The head of OPM advised you of the same thing by telephone.

The central fact for present purposes is that from 1994 to 2001 you did not perform sufficient drills or other activities for any of those years to qualify as satisfactory participation, 50 points being the required minimum. You never received more than 21 points, and typically received only 15, which is the number automatically assigned for mere membership. For the lion's share of this seven-year period, therefore, you were entirely inactive. Indeed, by annual screening letter serial 1321 dated 24 June 1998, you were informed by CGPC-rpm that, unless you requested otherwise, you would be transferred to the Standby Reserve Inactive Status List (ISL). On the ISL, of course, a reserve officer cannot perform duty, receive pay, be promoted, or receive credit for years of service. See 10 U.S.C. §§ 10153, 12734(a). You did not exercise any of the three options. You therefore should have been transferred to the ISL, and on this basis alone your loss date should have been adjusted, when you returned to a duty status, for the three years from 1998 through 2001.

In my opinion, you should be deemed to have interrupted service for loss date purposes for a minimum of those three years, if not the full seven years. Either the entire period from 1994 to 2001, or, in the alternative, the period from 1998 to 2001 should be excluded under the PCTS analogy on which RPM's loss date analysis relies, because Article I.C.8.b explicitly refers to "active commissioned service" (emphasis added). There is no sense in which your service from 1994 to 2001 or from 1998 to 2001 can plausibly be considered "active." Your correct expected loss date is therefore not 30 June 2021, but either 30 June 2024 or 30 June 2028.

The O-6 board. You have informed me that three O-5 RPAs are eligible for consideration within the zone by the board that will convene on Coast Guard Day, this Tuesday. I further understand that the opportunity for selection will be 2/3, meaning that you and the other two in zone officers will stand an excellent chance of being selected. Barring an above- or below-the-zone selection, one of the three will fail of selection. Quite obvious[ly], if the board is under the impression that you or any other eligible officer (above-, in-, or below-the-zone) could never pin on (as paragraph 4 of RPM's memorandum notes). it is only natural that the members of the board would not waste a slot by recommending him or her for promotion. It is my understanding that selection boards are aware of the loss dates of officers who are under consideration for promotion. For this reason, putting your name before the PY21 board will be a pointless exercise, and the

remaining two eligible officers will enjoy a 100% opportunity for promotion. And your opportunity will be zero.

What is to be done? The Coast Guard should immediately recalculate your expected loss date to what it should be, i.e., by excluding all years during which your “service” was not “active.” That is the date that should be provided to the O-6 board. Failing to do this will be profoundly unfair. There is time, even now, to get this right. rather than putting you before a board where you will be roadkill condemning both you and Headquarters to having to sort out the resulting error and injustice after the fact.

On August 4, 2020, a Captain from the Coast Guard PSC responded to the applicant’s counsel with the following:

1. I have reviewed Mr. [redacted] letter of 2 August 2020 with the hope of finding a legal path for you to remain on active service, but, I have concluded that the last permissible day of active duty and active service in your case is 30 June 2021, the final day of the 2021 promotion year.

2. Mr. [redacted] correctly cites to references (a) and (b) as applicable to your case. Unfortunately, references (a) and (b) apply only to the question of how many years of service may be credited to you for purposes of receiving a Reserve (or regular) retirement. Mr. [redacted] memo correctly points out that not all of the years you were commissioned in the Coast Guard Reserve count as qualifying years of satisfactory service for purposes of calculating your retirement pay because you were not able to perform the minimum number of drills needed to accrue a “good year” in some cases. See article 8.I. of reference (c) for more information on this matter.

3. The calculation of your “total commissioned service” for purposes of implementing article 8.A.4. of reference (c) is not based on the number of good years you accumulated for retirement. Instead, your total commissioned service is calculated simply by determining the date you were first commissioned in the Coast Guard Reserve in a grade above commissioned warrant officer and then counting every year that you remained affiliated with the Reserves (regardless of whether you drilled) since that date in accordance with reference (d). This calculation is roughly the same calculation used for U.S. Navy Reserve officers when calculating their total commissioned service. See, for example, reference (e). See also references (f) and (g) which direct that U.S. Navy Reserve commanders (O-5) who are not carried on a list of officers selected for captain, (O-6) be removed from the Active Status List upon completion of 28 years of commissioned service. My review of your records shows that you have been continuously affiliated with the Coast Guard reserve in a grade above warrant officer since September 28, 1990. Therefore, you will have accumulated 30 years of total commissioned service as of September of 2020. After considering the information in Mr. [redacted] letter of 2 August 2020, my determinations in reference (h) remain unchanged. Again, I want to extend my sincerest appreciation to all that you and your family have done for the Coast Guard.

On August 5, 2020, the RPA Captains board convened. The results of this board were announced on October 1, 2020. CDR ST was selected as number one and CDR RH was selected for number 2. The board chose to reorder one officer for selection to O-6.

On December 21, 2020, the Coast Guard announced that CDR ST would be promoted to O-6 on January 2, 2021.

On June 30, 2021, the applicant retired from the Coast Guard Reserve.

On August 24, 2021, the Coast Guard announced that CDR RH would be promoted to O-6 on September 1, 2021.

APPLICANT'S REQUESTS

Through counsel, the applicant alleged that the Coast Guard terminated his service prematurely. The applicant alleged that his case presents three issues. The first is whether the Coast Guard failed to follow applicable law and policy with respect to his failure to satisfactorily participate during a continuous seven year period. According to the applicant, had the Coast Guard followed policy, the applicant's Total Commissioned Service (TCS) clock would not have continued to run. The second issue is whether the Coast Guard erred in treating June 30, 2021, as the date of the applicant's mandatory retirement. The third is whether the applicant's chances for selection to the PY21 RPA Captain Selection Board were adversely affected by his erroneous ELD, because the board was under the impression that had the applicant been selected, he would only have been permitted to serve a couple of months due to his pending ELD.

The applicant alleged that the RPA board had before it an incorrect ELD for the applicant. The applicant explained that there were three O-5 RPA Commanders (CDRs) considered for in-zone promotion to Captain (CAPT). According to the applicant, the promotion opportunity was two out of three, and the applicant was not selected, but the other two RPAs were. The applicant alleged that the RPA whose signal number was closest to his was promoted to Captain on January 2, 2021, and had he been selected, he would have been able to serve in the grade of Captain for at least six months, accruing O-6 pay and allowances authorized by law for that period. The applicant claimed that because he is subject to the "high-36" retirement calculation, this would have materially increased his retired pay.

The applicant claimed that the same three RPAs who competed in 2020 for promotion to CAPT had also competed against one another in 2015 for promotion to CDR. Similar to the 2020 promotion year, the 2015 promotion year was two out of three, which included the applicant, LCDR ST and LCDR RH. The applicant explained that in 2015, the applicant and LCDR ST were selected for CDR, but LCDR RH was not. The applicant argued that this plainly indicates that the applicant's record was stronger than CDR RH. However, in 2020, CDR RH was selected to CAPT and the applicant was not, even though the applicant had, over the intervening years, continued to amass outstanding Officer Evaluation Reports (OERs), and earned a Master's in Public Policy, following the applicant's selection by the Coast Guard for a highly competitive and prestigious graduate program. The applicant alleged that there is no reason to assume that CDR RH's overall record was any stronger than the applicant's during the five-year period between the CDR and CAPT RPA promotion boards. The applicant further alleged that what is known is that the applicant was selected for a prestigious, career enhancing graduate program and CDR RH was not. The applicant explained that although they do not have access to CDR RH's personnel record, what is known indicates that the applicant was a stronger candidate for promotion to CAPT than CDR RH was in 2020. In addition, the applicant claimed that during the five-year period between promotion from CDR to CAPT, the applicant's assignments were at a significantly higher level than CDR RH. This, according to the applicant, strongly suggests that the applicant would have been selected for CAPT over CDR RH, had the selection board not been under the mistaken belief that had the applicant been selected, he would only have been eligible to serve as a CAPT for a few months.

The applicant argued that he did not meet the Coast Guard's requirement that an officer's service be continuous. The applicant explained that his personnel records reveal that he only served on active duty for 23 years and seven months. For over seven consecutive years, between 1994 and 2001, the applicant stated that he did not participate anywhere near the annual 50 point minimum requirement required for satisfactory participation in the Coast Guard Reserve. The applicant argued that under Coast Guard policy, his lack of minimum participation mandated that he be transferred to the ISL or discharged. In the more than seven year time frame, the applicant explained that he drilled for only four days. The applicant alleged that his official personnel Reserve Member Balance Sheet confirms that he had multiple consecutive non-qualifying years of participation and that the Reserve Administration and Training Manual and the Reserve Policy Manual both confirm that he failed to participate prescribed by policy. According to the applicant, Reserve officers in active status with at least five years of service whose participation has been unsatisfactory must be reviewed for discharge by a board of officers, but he was never put before this board. The applicant alleged that had the Coast Guard followed its own policies, he would have been removed from active status at some point between 1994 and 1998, thus stopping his TCS clock from accruing years. The applicant further alleged that he never received the Coast Guard's certified letter dated June 24, 1998, informing him that he was being moved to the ISL.

The applicant claimed that the day before the RPA board convened, the Coast Guard cited 10 U.S.C. § 8373 to support their position that the applicant served continuously for 30 years. However, the applicant argued that this statute only applies to the Navy and Marine Corps Reserve officers, and only to those Reserve officers who are "in an active status," but the ISL is an "inactive status." The applicant alleged that despite the Coast Guard's June 24, 1998, letter stating that the applicant would be placed on the ISL, they never actually transferred the applicant to the ISL and provided no reason as to why they failed to do so.

The applicant argued that according to the Coast Guard's September 30, 2020, Member Guide for IRR and Standby Reserve Personnel, officers on the ISL "are considered to be in an "inactive status" and time on the ISL does not count towards a member's military service obligation. The applicant claimed that this manual further states that service members on the ISL who fail to adhere to participation requirements will be separated. The applicant further argued that under 10 U.S.C. § 10153, while in an inactive status, a Reservist is ineligible for pay or promotion and does not accrue credit for years of service. Therefore, the applicant claimed that 10 U.S.C. § 8373 undermines the Coast Guard's position. According to the applicant, given the Coast Guard's policy, the June 24, 1998, notice, and the standard presumption of regularity, it is unrealistic, and in the circumstances, unfair to deem that the applicant remained in continuous service throughout his career based solely on a claim of "affiliation." The applicant further claimed that an officer who had no duty assignment, received neither pay nor allowances, did not attend drills, had repeated years of unsatisfactory participation, was ineligible for promotion, cannot reasonably be treated as on continuous "service." The applicant argued that a non-active duty Reserve officer who is not participating in drills for years is hardly "performing" service as contemplated by 14 U.S.C. § 3751.

Accordingly, the applicant argued that because his ELD was later than June 30, 2021, he did not receive fair consideration when he came up for promotion in 2020. The applicant alleged that a member of the RPA board would have been fully justified in thinking that selecting the

applicant would waste a scarce promotion slot, given that the applicant would only have been able to serve in the rank of Captain for a few months. The applicant stated that to make matters worse, and contrary to paragraph 3 of their July 31, 2020, letter, the Coast Guard never changed the applicant's ELD from September 30, 2020, to June 30, 2021. In summary, the applicant alleged that the Coast Guard's error in determining his ELD, as well as the incorrect ELD shown in Direct Access during the proceedings of the RPA board, denied the applicant the right to compete fairly for promotion.

VIEWS OF THE COAST GUARD

On October 11, 2022, a judge advocate (JAG) of the Coast Guard submitted a memorandum in which he recommended the Board deny relief and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The JAG argued that the applicant failed to prove that the Coast Guard committed an error or injustice with the calculation of his TCS. The JAG claimed that the thrust of the applicant's arguments is that "[h]ad the Coast Guard applied its own policy, [the applicant] should have been removed from active status at some point between 1994 and 1998, thus stopping the TCS clock." Stated differently, the JAG explained that the applicant's argument is that because he failed to meet the minimum number of required points to have satisfactory years, he should have been transferred to the ISL, and that the failure to transfer him was material because a transfer to the ISL would have caused a break in the TCS clock. However, the JAG argued that the applicant's understanding of how the TCS clock is calculated is incorrect. According to the JAG, whether the applicant was in an active or inactive status is irrelevant to the calculation of the applicant's TCS. The JAG explained that the TCS is calculated pursuant to the guidance set forth in 14 U.S.C. § 3751(d), and is not based on whether the applicant had a good year for retirement. The JAG claimed that TCS is calculated by determining the date that the applicant was first commissioned in a grade above warrant officer and then calculating every year after that the applicant remained affiliated with the Coast Guard as a commissioned officer. The JAG argued that the statute does not differentiate between active or inactive status regarding calculation of TCS. The JAG explained that the applicant was commissioned as an Ensign on September 28, 1990, and remained as a commissioned officer (albeit in an inactive status for several years) in the Coast Guard continuously, reaching his 30 years of TCS on September 30, 2020.

Regarding the applicant's claim that the Coast Guard was required to discharge him due to his period of activity, thereby creating a break in service, the JAG argued that the applicant's contentions are incorrect. According to the JAG, Coast Guard policy regarding inactivity, while in an active status, did not require the applicant be discharged, but only required the Coast Guard to consider transferring the applicant to an inactive status component. The JAG claimed that halfway through the applicant's inactive period, the Coast Guard changed this transfer policy to be discretionary, using the language "will normally be processed for removal from active status." Accordingly, the JAG argued that the Coast Guard was never required to discharge the applicant. Therefore, the applicant's service as a commissioned officer was continuous, reaching his 30 years of TCS on September 28, 2020. The JAG explained that due to a discrepancy in policies, the Coast Guard allowed the applicant to remain in the Coast Guard until June 30, 2021, but this extension did not make the applicant's TCS calculation erroneous.

The JAG argued that the applicant's contentions that his ELD was erroneously calculated and that this error prejudiced him before the RPA board are also without merit. According to the JAG, the ELD is calculated based on the expectation of mandatory retirement or separation following 30 years of TCS, contemplated in policy. As previously argued, the JAG stated that the Coast Guard correctly calculated that the applicant reached 30 years of TCS on September 28, 2020, so his ELD was correctly listed as September 30, 2020. Accordingly, the JAG argued that the RPA board did not have any erroneous information before it when it made its O-6 promotion selections. The JAG further argued that the applicant's claims that his non-selection to O-6 cost the applicant six months of higher pay which would have been calculated toward his retirement, are based on assumptions which are unsupported by the applicant. The JAG explained that the deliberations of the board are privileged, so neither the applicant, nor anyone outside of the RPA board, would have known the applicant was not selected for promotion. The JAG argued that claiming the applicant's non-selection was the result of his ELD is conjecture. The JAG stated that while the applicant alleges that his record was stronger than CDR RH's, the applicant was not privy to the RPA board's deliberations and did not see the records of either of the other two candidates. Regarding the applicant's claims that he should have been promoted above CDR RH, the JAG argued that CDR RH was not authorized to be promoted until September 2021, several months after the applicant was separated. Therefore, the JAG argued that even if the applicant had been selected above CDR RH, the applicant's promotion to O-6 was unlikely given his June 30, 2021, separation date. The JAG argued that the applicant has failed to prove an error or injustice and his requests for relief should be denied.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 25, 2022, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. On January 17, 2023, the Chair received the applicant's response.

The applicant stated that the heart of the Coast Guard's case is that his service was uninterrupted, but he contends that his service must be treated as noncontinuous since the pertinent regulation provided at the time that he would be removed from active status if he did not adequately participate as required by policy. The applicant claimed that the Coast Guard reads "would" in the pertinent Coast Guard policy as if it were a "may," and since the Coast Guard did not exercise that alleged option, the applicant must be deemed to have remained in an active status. The applicant stated that this is wishful thinking. The applicant alleged that the pertinent version of the regulation employed mandatory, rather than permissive, terms. This, according to the applicant, is evidenced by the Coast Guard's June 24, 1998, letter to the applicant. The applicant stated that the only part of this letter that was imprecise was the specific date that the applicant's transfer to the ISL would take place, only stating that it would happen approximately 45 days after the applicant's receipt of the letter. In reality, the applicant alleged that it took until October 1, 1998, to transfer the applicant to the ISL.⁶

⁶ Part of the second sentence of this letter was redacted by the Coast Guard. The applicant urged the Board to obtain a fully legible copy of the October 1, 1998, letter to the applicant because the Coast Guard redacted this letter without providing any justification for the redactions. However, the Board did not request an unredacted copy because it was unnecessary and would not have changed the outcome of this case.

The applicant argued that his transfer to the ISL was not subject to any other condition if he did not respond to the June 24, 1998, notice, a notice the applicant alleged he had never seen until it was shown to him in August 2020. The applicant stated that the Coast Guard completely failed to transfer him to the ISL and thus neglected to enter that transfer on the “Member Information” page. However, the applicant argued that the Coast Guard’s failure to transfer him to the ISL is of no moment because, applying the presumption regularity afforded to the Coast Guard and often invoked by this Board, the applicant’s transfer to the ISL should be presumed to have occurred based on the Coast Guard’s 1998 correspondence to the applicant.

The applicant argued that Coast Guard PSC (PSC) improperly puts the fault on him for “not acting for 19 years to report the purported break in service.” However, according to the applicant, the Coast Guard points to nothing that required him to identify the break in service required by Coast Guard regulations. The applicant explained that it wasn’t until the 11th hour, before the 2020 RPA selection board, when the Coast Guard suddenly switched signals with respect to his ELD, that he had no occasion to take any action, since the Coast Guard’s failure to abide by its own regulations had no adverse consequences. Moreover, the JAG acknowledged that the applicant’s application was timely, so PSC’s input on the applicant’s untimeliness is fundamentally misconceived. Regarding PSC’s claims that the applicant’s delay allowed him to avoid negative consequences in pay and reentry at a lower rank, the applicant explained that in 2003, after having twice failed selection to LCDR, he was reduced in rank.

The applicant alleged that his application has been carefully set for the circumstances surrounding his claims, and the Coast Guard’s only answer is to simply hide behind blanket claims that the RPA board proceedings are privileged and to assert that he has engaged in speculation. The applicant claimed that the fact that, if selected, he would only have been able to serve as a Captain for virtually no time at all would have leapt out to the RPA board in their scrutiny of each applicant’s service records, and would obviously have been highly prejudicial. The applicant alleged that nothing the Coast Guard has submitted detracts from his evidence, showing that he was disadvantaged in the competitive process for Captain. According to the applicant, this is anything but speculation.

The applicant argued that the Coast Guard’s attempt to support its claims with the fact that the Coast Guard changed its regulations in the middle of the timeframe at issue is unavailing. The applicant explained that at the pertinent time, Article 4.E.9. of the Reserve Administration and Training Manual, COMDTINST M1001.27A, provided that “Officers in the Ready Reserve or Standby Reserve (Active Status) who fail to earn the minimum retirement points required...*will* be processed for removal from an active status.” (Emphasis Added.) The applicant alleged that this change to inactive status should have occurred on May 22, 1996, after he failed to drill for the entire anniversary year. The applicant argued that if the Board looks instead to the separate midstream rule change, upon which the Coast Guard relies, and that regulation change called for discharge, “no ifs, ands, or buts,” before it was changed, the applicant must be deemed to have been discharged. However, the applicant alleged that even if that were not the case, the revised regulation still provides that a Reserve officer in the applicant’s position, “will normally” be discharged. The applicant alleged that the Coast Guard offered nothing to suggest that the “normal” process would not have been followed in his case. In short, the applicant alleged that whichever way this Board looks at the facts, the Coast Guard failed to take appropriate action at any point

between May 22, 1996, and November 2001, when he returned to active duty. For reasons that have gone unexplained by the Coast Guard, the applicant alleged that he fell through the cracks during a 7-year period of non-participation.

The applicant alleged that the Coast Guard's last line of defense is 14 U.S.C. § 3751(d), but this regulation does not aid the Coast Guard for two reasons. First, the applicant argued that § 3751(d) explains total commissioned service for officers who have "served continuously in the Reserve following appointment in the grade of ensign." The applicant contends that the words that do not fit is the verb "serve" and the adverb "continuously." The applicant argued that there is no plausible way to view an officer whose name is on the ISL as "serving" and an officer who, at some point, should have been discharged, as having done so "continuously." The applicant alleged that officers on the ISL have no military duties and are ineligible for recall to active duty. The applicant argued that this is further supported by the advisory opinion, which notes that such officers are ineligible for pay and promotion, lose precedence, and cannot accrue additional years of credible service. The applicant further argued that to treat someone on the ISL as "serving" does not comport with the plain meaning of the word "serve."

Lastly, the applicant argued that under a Defense Department regulation that was in effect in 2020, when the Coast Guard recalculated the applicant's ELD, § 3751 should not have been applied to him at all. According to the applicant, Department of Defense Instruction (DoDI) 1235.09, concerns the management of the Standby Reserve and expressly applies to the Coast Guard when not operating as a service in the Navy. According to the applicant, under § 6.6 of DoDI 1235.09, officers on the ISL had to be removed within two years after fulfilling their eight year military service obligation. The applicant argued that the Coast Guard should have taken this regulation into account because under this regulation, the applicant should have been discharged on September 28, 2000. This would have interrupted the applicant's service for the 14 months that elapsed between then and when he was involuntarily recalled on November 26, 2001. The applicant alleged that § 3751 should not apply and he would have been eligible under 14 U.S.C. § 2154(a) to serve until the first day of the month following his 62nd birthday, or September 1, 2028. The applicant argued that if he had been selected to Captain in 2020, he would have been promoted at the latest in June 2021, thus allowing him to serve for seven full years as a Captain. Therefore, the applicant alleged that the RPA selection board was under a significant and highly prejudicial misconception as to how long he could have served as Captain. Accordingly, the applicant argued that he is entitled to be made whole, by restoring him to active duty and promoting him, or at least affording him a fresh look before the RPA Captain selection board, and whether as an O-5 or an O-6, he should be permitted to remain on active duty until mandatorily retired in accordance with title 14 of the U.S.C.

FURTHER PROCEEDINGS

On March 28, 2023, a BCMR staff attorney assigned the applicant's case, reached out to the applicant's attorney informing him that if relief were to be granted, it would require an adjustment in the applicant's record that may result have negative financial implications for the applicant. The BCMR staff attorney asked the applicant's attorney if he would still like to continue with his case.

On March 31, 2023, the applicant's attorney responded to the BCMR and stated that he had spoken with the applicant and that the applicant wanted to proceed with his application.

APPLICABLE LAW AND POLICY

Federal Regulations

10 U.S.C. § 10152. Standby Reserve: Inactive Status List. An inactive status list shall be maintained in the Standby Reserve. Whenever an authority designated by the Secretary concerned considers that it is in the best interest of the armed force concerned, a member in the Standby Reserve who is not required to remain a Reserve, and who cannot participate in prescribed training, may, if qualified, be transferred to the inactive status list under regulations to be prescribed by the Secretary concerned. These regulations shall fix the conditions under which such a member is entitled to be returned to an active status.

10 U.S.C. § 101053. Standby Reserve: Status of Members. While in an inactive status, a Reserve is not eligible for pay or promotion and (as provided in section 12734(a) of this title) does not accrue credit for years of service under chapter 1223 of this title.

10 U.S.C. § 12734(a). Time Not Creditable Toward Years of Service. Service in an inactive status may not be counted in any computation of years of service under this chapter.

Coast Guard Manuals & Instructions

The Coast Guard Reserve Administration and Training Manual, COMDTINST M1001.27A (1991), provides the following guidance on Reserve officers:

Article 1.B.3.c. Standby Reserve (Inactive Status). In this subcategory, also known as the Inactive Status List (ISL), members may not earn retirement points, compete for promotion, or receive pay. (10 U.S.C. 273) The Standby Reserve (Inactive Status) consists of members assigned for the following reasons:

...

3. The Commandant may transfer officers to this category who fail to earn the minimum retirement points for a given year.

...

4.E.9. Failure of Officer to Earn Minimum Required Retirement Points. Officers in the Ready Reserve or Standby Reserve (Active Status) who fail to earn the minimum retirement points required by 4.C.2 will be processed for removal from an active status per 14-I.

...

Article 14.I.1. General.

a. Reserve officers in the grades of ensign and above are required to earn a minimum of 27 points each anniversary year per 4-C-2 or 4-D-1 to be retained in an active status.

b. Reserve officers in an active status, not serving on extended active duty, will be screened annually for compliance with the minimum point requirements of 4-C-2 and 4-D-1.

c. Officers who have not been in an active status for their complete anniversary year and who do not meet the minimum participation standard, will be granted waiver and allowed to remain in an active status. This waiver is not considered as an officer's onetime waiver under 2.a.(1) below.

d. Annual screening of Reserve officers will be done at the end of their anniversary year. Officers who do not earn the minimum points required for their anniversary year will be notified by Commandant (G-RSM) approximately 3 months after the month in which their anniversary year ends.

Article 14.I.2. Procedures.

a. Non-obligated officers notified that they have not earned the required minimum points in an anniversary year have 30 days from receipt of notification to transmit to Commandant (G-RSM) via their district commander (r):

(1) a request for a waiver of the minimum point requirement (officers may be granted only one waiver of the minimum participation standard in the grade currently held)

...

g. If no response is received, transfer to an inactive status will be made 45 days from the date of the notification letter.

...

Article 14.G. Reserve Officer Mobilization Disposition Board.

1. Mobilization disposition boards are convened by Commandant (G-R) as needed to screen the Standby Reserve (Inactive Status). The purpose of this screening is to recommend for separation or transfer to the Retired Reserve those officers who have been in an inactive status for over one year, have not completed 20 satisfactory years of service for retirement with pay and have limited potential for mobilization due to age, physical condition or other reasons.

...

Appendix A. Reserve Terminology.

Anniversary Year (AY). Anniversary date is the date the member entered into active service or into active status in a Reserve component. This date changes only if the member has a break-in-service through transfer to an inactive status list, transfer to a temporary disability retired list, transfer to the Retired Reserve, or discharge to civilian life for a period greater than 24 hours. When a member with a break-in-service returns to an active reserve status or to active status, the revised anniversary date shall be the date of return or reentry.⁷

Inactive Status List (ISL). A list of officer and enlisted personnel who are in the Standby Reserve (Inactive Status). Personnel in an inactive status may not earn points for retirement or qualify for, or be promoted, and may not receive pay and allowances. (10 U.S.C. § 10152).

Satisfactory Federal Service. A year of satisfactory federal service is any anniversary year during which a reservist earned a minimum of 50 retirement points. The accumulation of 20 such years is required for retirement with pay.

⁷ This same definition is provided in Appendix A of the Reserve Personnel Manual, COMDTINST M1001.28 (1997).

The Reserve Personnel Manual, COMDTINST M1001.28 (1997), provides the following guidance on the Standby Reserve (Inactive Status).

1.C.2.b. Standby Reserve (Inactive Status). In this category, also known as the Inactive Status List (ISL), members may not earn retirement points, compete for promotion or advancement, or receive pay. (10 U.S.C. 273). Members may be assigned to the Standby Reserve (Inactive Status) per the following:

- (1) An unobligated officer may be transferred to this category at any time upon request.
- (2) The Commandant shall assign officers to this category who:
 - (a) Have failed selection for promotion to the next higher grade two or more times,
 - (b) Have not been recommended for continuation in an active status,
 - (c) Have not requested retirement, if eligible, or
 - (d) Have not been discharged.
- (3) CGPC-rpm may also transfer officers to this category who fail to earn the required minimum of 50 retirement points in an anniversary year.

...

8.C.9.a. Retirement Points. Fifteen retirement points are earned each anniversary year for membership in the Ready Reserve or Standby Reserve (active status). These points are pro-rated in the case of partial years due to a break in service (i.e., a member is assigned to an inactive status or retired during the anniversary year).

Article 2 of the Individual Ready Reserve & Standby Reserve Member Guide provides the following guidance on officers on the ISL:

Article 2.2. Standby Reserve. The Standby Reserve consists of reservists in the ASL and ISL. Members in the Standby Reserve are liable for involuntary recall to active duty under 10 USC 12301 and 12306 when authorized by Congress. Time in the Standby Reserve does not count towards a members military service obligation.

...

ISL. Members in the ISL are considered to be in an “inactive” status and are not eligible for promotion/advancement, to earn retirement points or to perform voluntary duty of any type. The mobilization ability of these members is extremely limited, they are only recalled if there are not enough members in the Ready Reserve. ***Although an effective component for officers to suspend their promotion eligibility,*** however, there are little to no benefits extended to members in this component category. (Emphasis Added.)

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 over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33

C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

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.⁸

3. The application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

4. The applicant alleged that the Coast Guard erroneously included approximately seven years of inactive service in its computation of the applicant's total commissioned service. According to the applicant, the Coast Guard's errors resulted in him being non-selected for Captain (O-6) and caused him to be forcibly retired. 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 the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.⁹ 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."¹⁰

5. The applicant explained that for over seven consecutive years, between 1994 and 2001, he did not earn the minimum 50 participation points required for each of those years of service. According to the applicant, his failure to satisfactorily participate, mandated that he be transferred to the ISL, which would have caused a break in service, thereby extending his allowable time to serve for another seven years. However, the Coast Guard argued that the applicant's understanding of how his time in service is calculated is incorrect. According to the Coast Guard, the applicant's total time in service is calculated pursuant to the guidance set forth in 14 U.S.C. § 3751(d), which states:

For the purpose of this section, the total commissioned service of an officer who has served continuously in the Reserve following appointment in the grade of ensign shall be computed from the date on which that appointment to the Reserve was accepted. A Reserve officer initially appointed in a grade above ensign is considered to have the actual total commissioned service performed in a grade above commissioned warrant officer or the same total commissioned service as an officer of the Regular Coast Guard who has served continuously from an original appointment as ensign, who has not lost numbers or precedence, and who is, or was, junior to the Reserve officer, whichever is greater.

The Coast Guard argued that based on 14 U.S.C. § 3751(d) time in service is calculated by determining the date that the applicant was first commissioned in a grade above warrant officer and then calculating every year after that the applicant remained affiliated with the Coast Guard as a commissioned officer. The Coast Guard further argued that the statute does not differentiate

⁸ *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).

⁹ 33 C.F.R. § 52.24(b).

¹⁰ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

between active or inactive service in the paragraph regarding calculation of time in service and that the applicant did in fact serve continuously for 30 years. Therefore, the question before the Board is whether or not the applicant's time on the ISL constituted time "served continuously" as outlined in 14 U.S.C. § 3751(d). For the following reasons, the Board agrees with the Coast Guard and finds that the applicant maintained a continuous affiliation with the Coast Guard and therefore did not have a qualified break in service:

- a. Continuous Service. The record shows that the applicant enlisted in the Coast Guard Reserve on September 28, 1990, and continued to remain affiliated with the Coast Guard, despite his non-drilling, until his separation on June 30, 2021, except for a 50 day lapse in affiliation in 2003 after he was twice non-selected for promotion. Although the applicant received a letter from the Coast Guard on October 1, 1998, that he would be transferred to the ISL for failure to satisfactorily participate as required by policy, and for failing to respond to a June 24, 1998, certified letter informing the applicant of his pending transfer to the ISL, the Coast Guard never actually transferred the applicant to the ISL as it stated it would do.

As argued by the Coast Guard, 14 U.S.C. § 3751(d) states, "For the purpose of this section, the total commissioned service of an officer who has served continuously in the Reserve following appointment in the grade of ensign shall be computed from the date on which that appointment to the Reserve was accepted." Here, despite the applicant's failure to drill as required, he still maintained a continuous affiliation with the Coast Guard. This fact would not have changed whether the applicant remained in the IRR or the ISL. The applicant explained that his personnel records reveal that he only served on active duty for 23 years and seven months, but regulations do not require "active" service for the purpose of calculating a member's expected loss date, only continuous affiliation. The applicant has confused an inactive status as being non-affiliated with the Coast Guard, but the applicant's contentions are incorrect. Whether in the Standby Ready Reserve, which includes the ISL, or the Individual Ready Reserve, the applicant was still affiliated with the Coast Guard. For this affiliation to have been severed, or for a break in service to have occurred, the applicant would have had to be separated from the Coast Guard, not simply transferred to the ISL. The applicant has also confused and intermingled the statutes that apply to calculating retirement pay with the statutes that are used to calculate continuous affiliation with the Coast Guard. Although the applicant's inactive status does not count for the purposes of calculating retirement pay, it does count for the purposes of calculating Total Commissioned Service.

- b. Failure to Transfer to ISL. The applicant claimed that had the Coast Guard actually transferred him to the ISL as it stated it would do in its June 24, 1998, his total commissioned service clock would have stopped and he would have had additional years of service available. However, once again the applicant's contentions are incorrect. Article 8.I.5. of the Reserve Policy Manual, COMDTINST M1001.28C, states that service in the ISL may not be counted in determining retirement entitlements, clearly establishing that being on the ISL is still considered "service." If the ISL was somehow considered a break in service that did not count towards credible or continuous service, there would be no need

for policy to carve out an exception to time spent on the ISL not counting toward retirement pay because breaks in service are already not included in the calculation of retirement pay.

Arguably, the Coast Guard should have transferred the applicant to the ISL after he failed to drill in accordance with policy, but it did not, which allowed the applicant to remain affiliated with the Coast Guard throughout this time. The Coast Guard's failure meant the applicant was able to return to active duty as a Reservist without having to be recommissioned or reappointed. The applicant therefore benefited from the Coast Guard's failure to transfer him to the ISL.

The applicant argued that the Coast Guard was mandated to transfer him to the ISL, but the Board finds his arguments unpersuasive. Article 1.C.2.b.3. of the Reserve Personnel Manual, COMDTINST M1001.28, states that CGPC-rpm *may* also transfer officers to this category who fail to earn the required minimum of 50 retirement points in an anniversary year. Therefore, the Board finds that transfer to the ISL for failure to earn the required minimum 50 retirement points is permissive and not mandatory. Accordingly, the Board finds that the Coast Guard calculated the applicant's total commissioned service in accordance with policy, and that the applicant achieved his 30 years of continuous service on September 28, 2020.

6. For the reasons outlined above, the applicant has not met his burden, as required by 33 C.F.R. § 52.24(b), to overcome the presumption of regularity afforded the Coast Guard that its administrators acted correctly, lawfully, and in good faith.¹¹ He has not proven, by a preponderance of the evidence, that the Coast Guard erroneously included seven years of applicable service when calculating his required retirement date. Accordingly, his requests for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹¹ *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

ORDER

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

July 31, 2024

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