

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

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 2002-094

FINAL DECISION

█ Chair:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed May 8 2002, upon the Board's receipt of the applicant's complete application for correction of his military record.

This final decision, dated June 19, 2003, is signed by the three duly appointed members who were designated to serve as the Board in this case.

Application for Relief

The applicant asked that his 1967 DD Form 214¹ (Certificate of Release or Discharge from Active Duty) documenting his disability retirement from the Coast Guard be amended to include his service with the Army Transport Service and the Merchant Marine totaling one year, four months, and 22 days, as creditable service for pay purposes. The applicant stated that this time was not included in block 24 (creditable service for pay purposes) of his Coast Guard DD Form 214.

On May 26, 1952, after five years, one month, and 26 days in the Naval Reserve, the applicant was appointed a lieutenant junior grade in the Coast Guard. On February

¹ Section 4.a. of COMDTINST M1900.4D states, "The DD Form 214 provides the member and the service with a concise record of a period of service with the Armed Forces at the time of the member's separation, discharge or change in military status (Reserve/active duty). In addition, the form is an authoritative source of information for both governmental agencies and the Armed Forces for purposes of employment, benefit and reenlistment eligibility, respectively."

2, 1967, he was temporarily retired from the Coast Guard by reason of physical disability, and on February 3, 1972, he was permanently retired by reason of physical disability in the rank of lieutenant commander (LCDR). At the time of his temporary disability retirement, the applicant had 14 years, eight months, and seven days of active duty, and five years, one month, and 26 days of other (Naval Reserve) service.

Prior to his Naval Reserve and Coast Guard service, the applicant worked in a civilian capacity for the Army Transport Service and the Merchant Marine during WWII. At that time, this civilian employment was not considered active duty service.

In 1977, pursuant to Public law 95-202, Congress gave veterans status to individuals in certain civilian occupations that rendered service to the United States during WWII.

Public Law 95-202 (1977) states in pertinent part:

Notwithstanding any other provision of law, the service of any person as a member of the Women's Air Forces Service Pilots (a group of Federal Civilian Employees attached to the United States Army Air Force during World War II), or the service of any person in any other similarly situated group the members of which rendered service to the Armed Forces of the United States in a capacity considered civilian employment or contractual service at the time such service was rendered, shall be considered active duty for the purposes of all laws administered by the Secretary of Veteran Affairs, if the Secretary of Defense [DoD], pursuant to regulations which the secretary shall prescribe __

(A) [D]etermines . . . that the service of such group constituted active military service, and

(B) In the case of any such group with respect to which such Secretary had made an affirmative determination that the service of such group constituted active military service, issues to each member of such group a discharge from such service under honorable conditions where the nature and duration of the service of such member so warrants.

The Congress left it to the Secretary of Defense (DOD) to prescribe regulations to be used in determining which group's service constituted active military service. In 1979, DOD adopted regulations implementing the law and delegated his function under the law to the Secretary of the Air Force. See Schumacher v. Aldridge, 665 F. Supp. 43, 44 (D.D.C. 1987)

The Secretary of the Air Force initially did not designate the Merchant Marine as such a group. However, the D.C. Circuit Court, in Schumacher, refused to uphold the Secretary's decision that certain Merchant Marine service should not be considered "active military service." On January 11, 1988, the Secretary of the Air Force issued a memorandum stating, "the service of the group known as the "American Merchant Marine" in Oceangoing Service [which included civil service crew members of the U.S. Army Transport Service] during the period of Armed Conflict, December 7, 1941, to August 15, 1945, . . . be considered active duty for the purposes of all laws administered by the Veterans Administration." See Memorandum for SAF/06 Thru SAF/MR, dated January 11, 1988. The Secretary further directed that those merchant mariners who met certain eligibility criteria would be issued

[a] Certificate of Release or Discharge from Active Duty and a discharge certificate, or an Honorable Service Certificate/Report of Casualty . . . Total active duty service shall be the summation of each foreign, near foreign, coastwise, and intercoastal voyage within the period of armed conflict of World War II. Inclusive dates of each creditable voyage shall be reflected on the DD Form 214.

On February 2, 1988, the Secretary of the Air Force designated the United States Coast Guard as the agency responsible for issuing Coast Guard discharge documents to eligible merchant seamen, as the custodian for merchant seaman records. See Air force Memorandum for Commandant, United States Coast Guard, dated February 2, 1988. (The Coast Guard did not issue the DD Form 214 documenting the applicant's service with the Army Transport service.)

Subsequently in 1988, the applicant received DD Forms 214 showing one month and 23 days of employment with the Army Transport Corps as active service and one year, two months, and 29 days of employment with the Merchant Marine as active service. The DD Form 214 documenting his Merchant Marine service states in block 18 (remarks) "THIS DOCUMENT ISSUED UNDER THE PROVISIONS OF PUBLIC LAW 95-202 (38 USC NOTE 106), ADMINISTRATIVELY ESTABLISHES ACTIVE DUTY FOR THE PURPOSES OF VETERANS BENEFITS." (EMPHASIS ADDED.) The DD Form 214 documenting the Army Transport Service contains similar language.

The applicant stated that he discovered the alleged error on January 24, 2001. He further stated the following:

On January 24, 2001, I became cognizant that legislation was pending in Congress that would have a definite impact on my retired pay. On that date a Bill was introduced in the U.S. Senate . . . that would correct the century-old injustice of requiring military retirees to forfeit from their military retired pay the amount received from the Veterans

Administration as Disability Compensation. Upon determining that this correction applied only to military retirees with 20 or more years of service creditable for basic pay purposes, it became immediately obvious that the DD-214 issued to me on my retirement in 1967 did not correctly state . . . my total service creditable for pay purposes. Resolution of this problem could only be obtained by an amended DD-214.

This proposed legislation was not successful in its path through both houses of Congress, but sponsors have vowed to reintroduce it in each successive session until it is enacted into law. It is therefore imperative that I possess the required documentation, DD-214, to qualify for the benefits that will flow from this legislation.

Views of the Coast Guard

On November 1, 2002, the Chief Counsel of the Coast Guard recommended that the Board deny relief in this case for lack of jurisdiction or in the alternative for lack of merit.

With respect to lack of jurisdiction, the Chief Counsel stated that the applicant has not pointed to any error or injustice in his record, rather his allegation is in the nature of a claim because he is requesting that the time he spent with the Army Transport Corp and Merchant Marine be credited towards an active duty retirement and by extension the calculation of his retirement pay. The Chief Counsel stated that since the applicant's request amounts to a claim it should be settled by the Secretary of Defense under 31 U.S.C. 3702.

With respect to the merits of this application, the Chief Counsel stated that the applicant is not entitled to relief because 38 U.S.C. 106 Note states that civilian service that is determined to be active duty during WWII "would be considered "active duty" for the purposes of all laws administered by the Secretary of Veterans Affairs . . ." In addition, the Chief Counsel stated that 37 U.S.C. § 205² does not include Merchant Marine service as service creditable for basic pay purposes.

In a memorandum attached as Enclosure (1) to the advisory opinion, Commander, Coast Guard Personnel Command, stated that the applicant's application was not timely.

Response of the Applicant to the Views of the Coast Guard

On February 24 2003, the Board received the applicant's reply to the views of the Coast Guard. He disagreed with the recommendation of the Chief Counsel.

The applicant asserted that the Board has jurisdiction to decide the issue in this case, stating that the Board has jurisdiction to correct errors in official Coast Guard records, particularly where such alleged error will result in harm to the applicant. In addition, the applicant argued that his application was timely, having been filed on March 20, 2003, within three years of January 24, 2001, the date on which he stated he discovered the alleged error.

The applicant stated that the Coast Guard's refusal to issue a corrected DD Form

² Section 205 of Title 37 of the United States Codes lists the organizations "for the purpose of computing the basic pay of a member of a uniformed service." Service with the Merchant Marine is not included in this statute.

214 showing the years, months and days of active duty creditable under 38 USC 106 , as amended, is without regulatory or statutory authority. He stated this law requires the Coast Guard to issue an honorable discharge certificate and a DD Form 214 to those whose service had been determined to be active military service.

The applicant stated that the Coast Guard committed an error in preparing his DD Form 214 documenting his service with the Merchant Marine. He stated that instead of listing the length of his net active serve, his foreign service, and his sea service (blocks 12.c., f., and g.), the Coast Guard placed asterisks in these blocks. He stated that COMDINST M1900.4D (Completion of the DD Form 214) makes no provision for the use asterisks. Nor does the instruction make provisions for recording any active duty other than that creditable for basic pay purposes. He claimed that the Army properly completed the DD Form 214 for service in the Army Transportation Corps by documenting that he served one month and 29 days on active duty.

FINDINGS AND CONCLUSIONS

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

1. The BCMR has jurisdiction of the case, pursuant to section 1552 of title 10, United States Code, which states that the Secretary, acting through a Board of civilians, may correct any military record. Therefore, if the applicant is correct with regard to his allegation, the Board has the authority to correct his record.

2. The applicant requested an oral hearing. The Chair, under section 52.51 of title 33, Code of Federal Regulations, recommended disposition on the merits without a hearing. The Board concurred in that recommendation.

3. The application was not timely. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22.

4. The Board may still consider the application on the merits, however, if it finds it is in the interest of justice to do so. The interest of justice is determined by taking into consideration the reasons for and the length of the delay and the likelihood of success on the merits of the claim. See, Dickson v. Secretary of Defense, 68 F. 3rd 1396 (D.D.C. 1995).

5. Although the applicant listed January 24, 2001, as the date he discovered the alleged error or injustice, the Board finds that he has submitted insufficient evidence showing that he could not or should not have reasonably discovered the alleged error

sooner. He admitted he received the DD Forms 214 documenting his Army transport service and his Merchant Marine service in 1988. He should have reviewed those documents in conjunction with his 1967 DD Form 214 within three years of his receipt of the 1988 DD Forms 214. He only decided to review the matter after becoming aware of recent legislation that could possibly result in future monetary gain. The alleged error was present in 1988, 14 years before the applicant filed this application with the Board, and could have been discovered with reasonable diligence. Accordingly, the applicant's reasons for not filing his application sooner are not persuasive.

6. The Board further finds that it is not likely that the applicant would prevail on the merits of this claim, even if the Board were to waive the statute of limitations. Section 106 Note (a)(1) of title 38, United States Code, states, "the service of any group . . . which rendered service to the Armed Forces of the United States in a capacity considered civilian employment or contractual service at the time such service was rendered, shall be considered active duty for the purposes of all laws administered by the Secretary of Veterans Affairs." It is clear from the language of the law that the active service granted by Congress for certain civilian service during WWII was for the purpose of qualifying eligible individuals for veterans' benefits. If Congress had intended for this active service to be credited for all purposes, including basic pay, it certainly would have written the law without the words, "for the purpose of all laws administered by the Secretary of Veterans Affairs."

7. Even the DD Forms 214 that the applicant received recognizing his civilian time in the Army Transport Service and the Merchant Marine as active duty service stated that the active service was for the purpose of all laws administered by the Veterans Department. Accordingly, the applicant is only entitled to the benefits for which he is eligible under the laws and regulations of the Department of Veterans Affairs.

8. Moreover, basic pay for military service is determined by statute. See Bell v. United States, 366 U.S. 393, 81 S. Ct. 1230 (1961). Nowhere in section 205 of title 37 of the United States Code, does it state that service with the Army Transport Service or the Merchant Marine qualifies as creditable service for pay purposes. (In addition Article 12.C.2. of the Coast Guard Personnel Manual lists the kind of service creditable to qualify for retirement, which does not include service with the Merchant Marine.) The Board is not aware of any statute that authorizes civilian Army Transport Service and Merchant Marine service as being creditable service for basic pay purposes. Without such a statute, a finding that the applicant's time with the Army Transport Service and Merchant Marine should be creditable service for basic pay purposes would be unenforceable. In light of this conclusion, the 1967 DD Form 214 documenting the applicant's retirement from the Coast Guard is correct as it stands.

9. The applicant complained that the 1988 Merchant Marine DD Form 214 was

improperly prepared because it placed asterisks in block 12.c.(net active service) instead of a numerical amount. At the direction of DoD, the Coast Guard was given responsibility for preparing and issuing DD Forms 214 for the Merchant Mariners. The applicant should apply to that office for a corrected DD Form 214, if in light of this decision he still believes that his 1988 DD Form 214 is in need of correction. The address is National Maritime Center, NMC-4A, United States Coast Guard, 4200 Wilson Blvd., Suite 510, Arlington, VA 22203-1804. A revised DD Form 214 listing the applicant's approximately one year and two months of Merchant Marine service, as net active service would not be dispositive of the issue presented in this case. For this Board to direct the Coast Guard to include that service as creditable service for basic pay purposes on the applicant's 1967 discharge from the Coast Guard, it must find a statutory basis on which to do so. As stated earlier the Board is not aware of any such statute.

10. Based on the length of the delay, the lack of persuasive reasons for not acting sooner to correct his record, and the probable lack of success on the merits of his claim, the Board finds it is not in the interest of justice to waive the three-year statute of limitations in this case.

11. Accordingly, the application should be denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxx, USCG (Ret.) for correction of his military record, is denied.



