

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2016-016**



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**FINAL DECISION**

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the applicant's completed application on November 6, 2015, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 16, 2016, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST AND ALLEGATIONS**

The applicant asked the Board to correct his date of initial entry into military service (DIEMS), active duty base date (ADBD), and pay base date (PBD) from January 6, 1994, to July 6, 1992. He alleged that the correction is warranted pursuant to the provisions of 14 U.S.C. § 727 in effect when he entered military service<sup>1</sup> and a Coast Guard policy memorandum dated April 27, 2001. The applicant argued that § 727 provided that a Reserve officer appointed for the purpose of assignment or designation as a law specialist would be credited with at least three years of active service, and he was credited with only 18 months of active service. Therefore, he argued, upon his commissioning, his DIEMS should have been set at July 6, 1992.

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<sup>1</sup> When the applicant accepted his commission in 1995, 14 U.S.C. § 727 stated the following:

§ 727. Constructive credit upon initial appointment

Under regulations prescribed by the Secretary, a person, appointed as a Reserve officer, may be assigned a date of rank and precedence which reflects that person's experience, education, or other qualifications. For the purpose of this subchapter only, a person appointed for the purpose of assignment or designation as a law specialist in the Reserve shall be credited with a minimum of three years' service in an active status. A person holding a doctor of philosophy, or a comparable degree, in medicine or in a science allied to medicine as determined by the Secretary, may be credited with a minimum of three years' service in an active status if appointed for an assignment comparable to that of an officer in the Navy Medical Department.

The applicant stated that he only recently discovered the error while preparing for his retirement on February 1, 2016. He received a memorandum about the issue in 2001 but was unaware that the error had not been fixed. He stated that he asked the Personnel & Pay Center (PPC) to make the correction, but his request was denied on November 3, 2015.

The applicant explained that he accepted a Reserve commission as a lieutenant junior grade on July 6, 1995, and integrated into the regular Coast Guard on April 7, 1998, following his selection for promotion to lieutenant. On April 27, 2001, he alleged, the Coast Guard sent him a memorandum stating that he was inadvertently credited with only 18 months of active service and so his LTJG DOR would be reset to January 6, 1994, which was the date 18 months before his actual commissioning. The applicant noted that the definitions of a member's DIEMS, ADBD, and PBD appear in Appendix C of the Personnel and Pay Procedures Manual (PPPM), COMDTINST M1000.2B, and argued that pursuant to those definitions, all three should be corrected to July 6, 1992.

In support of his allegations, the applicant submitted the following documents:

- Prior to his commissioning, the applicant signed a Notice of Intention for Direct Commission Lawyer. He signed the paragraph indicating that he intended to accept the direct commission at an LTJG he had been offered; that he understood he would be obligated for four years of active duty; and that he could report for active duty as early as July 1, 1995.
- On July 6, 1995, the applicant signed an Acceptance and Oath of Office to accept a commission in the Coast Guard Reserve as an LTJG.
- On August 18, 1995, the applicant executed his four-year extended active duty contract, which obligated him to serve on active duty for four years beginning on July 28, 1995, and ending on July 27, 1999.
- On April 9, 1998, the applicant signed an Acceptance and Oath of Office to integrate into the regular Coast Guard as an LTJG with a DOR of July 6, 1995.
- On April 27, 2001, Commander, Coast Guard Personnel Command (CGPC) sent the applicant a memorandum titled "Constructive Credit for Direct Commission Attorneys," which cites 14 U.S.C. § 727 and a memorandum of the Chief Counsel dated April 23, 2001. CGPC's memorandum states the following:
  1. In accordance with [14 U.S.C. § 727] a Reserve officer appointed for the purpose of assignment or designation as a law specialist shall be credited with a minimum of three years [of] service in an active status. As explained in [the Chief Counsel's memorandum dated April 23, 2001], upon appointment in the Coast Guard as a lieutenant (junior grade) you were inadvertently credited with only 18 months in an active status as a result of an administrative error. Your date of rank (DOR) is being adjusted to reflect a total of three years [of] service in an active status upon commissioning. ... You are authorized any back pay and allowances due as a result of this correction. Upon notification from this office, HRSIC will calculate all authorized back pay and allowances. You should allow 60 days [of] processing for HRSIC to complete authorized payments. You will not need to sign a new oath of office.
  2. Although the correction will be applied uniformly, it will affect officers in different ways, depending on their status. ...

3. You were commissioned in the Coast Guard Reserve as a lieutenant (junior grade) with a DOR of 6 July 1995. In order to reflect a total of three years [of] service in an active status, your LTJG DOR will be adjusted to 6 January 1994. Your DOR as a LT will be adjusted to 6 January 1997. This adjustment will place you in zone for promotion to lieutenant commander in August 2001, approximately two years sooner than you would have been without the correction.
  4. The correction of this administrative error is an entitlement, which cannot be refused or delayed. ... Should you have questions concerning this matter, please contact ...
- A November 4, 2015, print-out from a Coast Guard database shows that the applicant's DIEMS date is July 6, 1995, and his ADBD and PBD are July 28, 1995. In addition, his LTJG DOR is January 6, 1994, and his LT DOR is January 6, 1997. Under "Position History," the dates January 6, 1994, and July 28, 1995, appear with entries of "unknown" for both position description and department.
  - A series of emails exchanged between the applicant and PPC personnel in October and November 2015, show that on October 27, 2015, the applicant inquired about his constructive credit as a direct commission attorney. On November 3, 2015, he received an email stating that he was "being credited for the Reserve time spent on orders. The Date of Rank was adjusted solely for promotion, so the time will not be added. I show your retirement will be based on 20 years and 6 months."

### VIEWS OF THE COAST GUARD

On March 22, 2016, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief.

The JAG argued that the application is untimely and should therefore not be considered by the Board. Moreover, the JAG argued, the applicant's "request is based on a misinterpretation of 14 U.S.C. § 727." The JAG pointed out that the statute states, "*For the purpose of this subchapter only*, a person appointed for the purpose of assignment or designation as a law specialist in the reserve shall be credited with a minimum of three years' service in an active status." (Emphasis added.) The JAG stated that the subchapter contains only statutes concerning promotions, dates of rank, and precedence, and so the three years of credit applied only to the applicant's rank, not his pay and allowances. The JAG noted that in *Phillips v. United States*, 230 Ct. Cl. 1011, 1016 (1982), the Court of Claims held that "the 3-year credit is unquestionably limited by law to the organization and rank aspect of ... employment. The credit has no application to the separate pay and allowances aspect." The court stated that the three years of credit is for "promotional purposes only."

The JAG argued that the court's interpretation of 14 U.S.C. § 727 in *Phillips* is consistent with 14 U.S.C. § 723, which states "[e]xcept as provided in subsection 746(b) of this title [which concerns the pay grade of a retiree recalled to active duty], nothing in this subchapter authorizes the retirement of a Reserve officer or the payment of retired, retainer, or severance pay to a Reserve officer; or affects in any manner the law relating to the retirement of, or the granting of retired or retainer pay or other benefits to a Reserve officer." Therefore, the JAG stated, no part of the subchapter, including § 727, can directly affect an officer's retired pay other than § 746(b).

The JAG stated that “[a]pplying the three years of active service credit for date of rank for promotion purposes only is also consistent with the position taken [by] the Department of Defense and other branches of the military. Under 10 U.S.C. § 533, active service credit is authorized for commissioned officers of the Army, Navy, Air Force, and Marine Corps for each year of advanced education in a professional field but ‘*only* for determining the officer’s 91) initial grade as a regular officer; (2) rank in grade; and (3) service in grade for promotion eligibility.’” (Emphasis added.) The JAG cited other Defense Department policies that also authorize or address the equitable determination of an officer’s rank and precedence upon appointment.

The JAG concluded that “[t]he practice of crediting service to commissioned officers is clearly for the purposes of promotion eligibility and not to give them credit for retirement. The Memorandum 1300 received by the applicant in 2001 only discussed correction the applicant’s DOR so that he would be eligible for promotion sooner. This is consistent with the Coast Guard’s interpretation of 14 U.S.C. § 727 as well as DoD policy regarding constructive service credit. At no point did the Memorandum 1300 discuss adjusting the applicant’s DIEMS, affecting his retirement, or appear anything more than a measure to correct the applicant’s place in promotion eligibility.”

The JAG argued that although the Coast Guard initially erred by crediting the applicant with only 18 months of service regarding his DOR as an LTJG, in 2001, the Coast Guard corrected the error by backdating his LTJG DOR another 18 months. Therefore, the JAG recommended denying relief.

In support of these arguments, the JAG submitted copies of the case law, statutes, and policies he cited.

#### **APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On April 19, 2016, the applicant responded to the views of the Coast Guard. The applicant disagreed with the JAG analysis and recommendation.

The applicant repeated his allegation that he did not discover the error in his record until preparing for retirement in 2015 and argued, therefore, that his application is timely.

Regarding 14 U.S.C. § 727 (1995), the applicant stated that he does not concede that the provision for constructive service is for promotion purposes only. He noted that the memorandum dated April 27, 2001, did not state that three years of constructive service was for promotion purposes only. He argued that the “Coast Guard should be bound by the assertions it makes to its members, who rely in good faith on those assertions.” He also noted that the Coast Guard backdated his LTJG DOR to January 6, 1994, and that is the date that appears as his “position entry date” in the Coast Guard’s database. Therefore, he argued, at a minimum, his retirement should be computed based on the January 6, 1994, position entry date in the database.

The applicant argued that the *Phillips* case cited by the JAG “is factually distinguishable from my case because Phillips did not receive a memo from the Coast Guard with similar language” to the one he received from the Coast Guard in 2001, and there is no evidence that his

military records “reflect[ed] a ‘position entry date’ that actually gave him constructive credit prior to the actual first date he first reported for duty.”

The applicant also argued that the DoD policies cited by the JAG are inapplicable because DoD has “a different statute and clearer policy regarding the limitation of constructive credit for promotion purposes than the Coast Guard.”

Therefore, the applicant repeated his claim that he is entitled to a fully three years of constructive active duty for pay purposes, his LTJG DOR should have been adjusted to July 6, 1992, and his DIEMS, ADBD, and PBD should also be adjusted to July 6, 1992. At a minimum, he argued, his DIMES, ADBD, and PBD should be adjusted to January 6, 1994, based on the assertions in the 2001 memorandum and the first position history date in the Coast Guard’s database.

### FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application is considered timely because it was filed within three years of the applicant’s separation from active duty.<sup>2</sup>

2. The applicant alleged that his DIEMS, ADBD, and PBD are erroneous and unjust and should be corrected to July 6, 1992, three years before he accepted his commission, or at a minimum, January 6, 1994. In considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>3</sup> 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.”<sup>4</sup>

3. The Board finds that the applicant is not entitled to the relief he requests. As the JAG noted, title 14 U.S.C. § 727 states, “*For the purpose of this subchapter only*, a person appointed for the purpose of assignment or designation as a law specialist in the reserve shall be credited with a minimum of three years’ service in an active status.” (Emphasis added.) The subchapter contains only statutes concerning promotions, dates of rank, and precedence, and so the three years of active status credit applied only to the applicant’s rank and date of rank, not his DIEMS, ADBD, or PBD. The Coast Guard’s interpretation of the meaning of § 727 comports with the interpretation of the Court of Claims in *Phillips v. United States*, 230 Ct. Cl. 1011, 1016

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<sup>2</sup> *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers’ and Sailors’ Civil Relief Act of 1940, the BCMR’s three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member’s active duty service).

<sup>3</sup> 33 C.F.R. § 52.24(b).

<sup>4</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

(1982), which held that “the 3-year credit is unquestionably limited by law to the organization and rank aspect of plaintiff’s employment. The credit has no application to the separate pay and allowances aspect.” The court noted that the legislative history in H.R. Report No. 1026, 83d Cong., 1<sup>st</sup> Sess. 4, 20 (1953), supported this interpretation as did the opinion of the Comptroller General No. B-167666 (Aug. 22, 1969). The court found that the plaintiff “is entitled to 3 years of credit to his time in rank, for promotion purposes only. He received such credit; he therefore has no claim against the United States.”<sup>5</sup> Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that he is legally entitled to have his LTJG DOR, DIEMS, ADBD, or PBD backdated by three years under the statute.

5. Regarding the applicant’s DOR, the Board notes that in offering him an appointment as an LTJG/O-2, instead of an ensign/O-1, in July 1995, the Coast Guard initially accorded him 18 months of active service credit for promotion purposes. However, according to the memorandum in the record dated April 27, 2001, this error was corrected by backdating his LTJG DOR by 18 months to January 6, 1994, thus crediting him with three full years of active service for promotion purposes.

4. The applicant argued that his case is distinguishable from that of the plaintiff in *Phillips* because the applicant received a memorandum in 2001 about the three years of active service credit, which recently led him to believe he is entitled to three years of “constructive service” credit for pay purposes. However, nothing in the memorandum stated that the applicant was entitled to “constructive service” or that his DIEMS, ADBD, or PBD would be adjusted. The memorandum discusses the backdating of the applicant’s DOR and the fact that he would be due back pay and allowances eligible for promotion sooner because of the adjustment to his DOR. If the applicant thought, based on the first sentence of the memorandum, that his DIEMS, ADBD, and PBD should be backdated, he could have used the contact information provided to clarify the matter.

5. Moreover, a member’s or retiree’s pay is dependent on statutes, not on contracts.<sup>6</sup> Like the applicant, the plaintiff in *Phillips* argued that a letter he had received had created a binding contract that entitled him to additional pay. The court held that “the letter and plaintiff’s acceptance of his appointment cannot create rights to pay beyond those statutorily created, whatever the letter appears to promise.”<sup>7</sup> Therefore, even if the applicant had been misled by the April 27, 2001, memorandum (and there is no evidence that he was misled at the time) and even assuming that the memorandum could somehow be construed as a contract for three years of “constructive service,” which it cannot, he would not be entitled to relief because 14 U.S.C. § 727 does not entitle him to three years of “constructive service” for pay purposes—only to three years of active service credit for promotion purposes.

6. The Board finds that the applicant has not proven by a preponderance of the evidence that his LTJG DOR, DIEMS, ADBD, or PBD are erroneous or unjust. Therefore, the application should be denied.

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<sup>5</sup> *Phillips v. United States*, 230 Ct. Cl. 1011, 1016 (1982).

<sup>6</sup> *United States v. Larinoff*, 431 U.S. 864, 869 (1977), citing *Bell v. United States*, 366 U.S. 393, 401 (1961).

<sup>7</sup> *Phillips*, 230 Ct. Cl. at 1013.

**ORDER**

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

September 16, 2016

