

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2016-109**



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**FINAL DECISION**

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the completed application on April 26, 2016, and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated February 17, 2017, 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 record to show his Pay Entry Base Date (PEBD) as May 3, 1994. If granted, the applicant also requested back pay for the difference in longevity pay.<sup>1</sup> He stated that his Date of Initial Entry into Military Service (DIEMS) and PEBD had both been May 3, 1994, which is the date he signed an Oath of Office and a Statement of Understanding (SOU) under the Maritime Academy Reserve Training Program (MARTP). The applicant received a Notice of Overpayment on July 6, 2016. This Notice followed a DHS-ordered actuarial audit. The applicant was found to have had an incorrect PEBD, therefore the Coast Guard administratively changed the PEBD from May 3, 1994, to August 13, 1994. August 13, 1994, is the date that the applicant began his Reserve Enlisted Basic Indoctrination (REBI).

The applicant argued that, in changing his PEBD, the Pay & Personnel Center (PPC) failed to take into account the applicant's enrollment into the MARTP program. The applicant stated that PPC cited Chapter 2.A.13. of the Coast Guard Pay Manual (PAYMAN), COMDTINST M7220.29B, which states that for delayed entry program, service performed as an enlisted member in a reserve component, other than a period of active duty, is not creditable

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<sup>1</sup> Longevity pay refers to pay increases military members receive depending upon how many years of military service they have based on their PEBD. For example, an E-5 or O-3 with 10 years of total military service earns more than if he or she had just 6 years.

service. The applicant argued that this section of PAYMAN is not applicable to members who enter through the MARTP, because the MARTP is not a delayed entry program.

According to COMDTINST 1131.22A, which governs the MARTP, the applicant pointed out that members are eligible for Montgomery G.I. Bill benefits and Maritime Administration Student Incentive Pay (SIP). As a result, the applicant argued that the MARTP is not a delayed entry program, as SIP and GI benefits are immediately available and because the applicant began drawing upon these benefits in his summer sea term, immediately after enlistment on May 3, 1994.

Additionally, in BCMR Docket No. 2010-040, a case that also considered the MARTP, the Board stated that it was not clear that the applicant in that case was enlisted under a delayed entry program, and therefore the Board in that decision restored his PEBD to the same date as his DIEMS. The applicant stated that he understands that the Board is not bound by prior decisions, but argued that the fundamentals are similar and that the logic from BCMR Docket No. 2010-040 is sound. He requested that the Board follow suit with that decision and restore his original PEBD.

In support of his application, the applicant provided two Notices of Overpayment, an email chain from July of 2015, COMDTINST 1131.22A, a MARTP contract signed by another member, and a copy of the decision in BCMR Docket No. 2010-040. The first Notice of Overpayment was dated July 2, 2015, and stated that the applicant had been overpaid \$12,823.88. The second Notice of Overpayment was dated November 25, 2015, and stated that the applicant had been overpaid \$3,993.86.

A summary of the email chain that the applicant provided is below (all email dates are in 2015):

- July 6, from applicant to PERS3: The applicant stated that he received a notice of overpayment and that his PEBD changed to August 13, 1994. He stated, per his rights noted in the overpayment notice, that he would like to inspect documents related to the debt. He stated that he did not understand how his PEBD could be changed, as it was established as part of the MARTP, and was one of the “selling points towards later coming active duty.” The applicant inquired about a waiver for erroneous payment.
- July 7, from PERS3 to applicant: PERS3 stated that he requested the documents used for the applicant’s Statement of Credible Service (SOCS) review. PERS3 gave the applicant information regarding a waiver request.
- July 7, from applicant to PERS3: Applicant submitted documents for waiver, and asked a follow-up question regarding the waiver.
- July 7, from PERS3 to PERS2: PERS3 asked PERS2 to look into the applicant’s PEBD adjustment, as there was no explanation for changing it by three months. PERS3 also noted that the calculations used in the Notice of Overpayment stated an incorrect base pay for the applicant’s promotion to Lieutenant in 2008.
- July 8, from PERS2 to CIV 1: PERS2 asked CIV 1 to respond to PERS3.

- July 8, from CIV 1 to CIV 2: CIV 1 asked CIV 2 to provide a detailed explanation of the SOCS review and the PEBD correction, per their telephone call. CIV 1 asked that he include an explanation regarding how changing the PEBD results in all prior longevity pay increases being incorrect, which affects the overpayment amount.
- July 9, from CIV 2 to applicant and PERS3: CIV 2 explained that DHS had directed the Coast Guard to conduct an extensive internal audit, specifically reviewing members' service dates and pay. One of the queries used was to look at members' PEBD, DIEMS, and their Active Duty Base Date. For members who had discrepancies, a ticket was created and sent to the Service Validation team. CIV 2 then explained that the applicant had an enlistment contract effective on May 3, 1994. However, the system did not show that the applicant was paid, i.e., performed duty, until August 13, 1994. Per PAYMAN Chapter 2.A.13., the correct PEBD should have been August 13, 1994, when he performed active duty training. CIV 2 stated that there were no records that indicated the applicant performed any type of duty prior to August 13, 1994. CIV 2 further stated that on two other occasions, an SOCS review should have been requested for the applicant's record, but was not. When the SOCS was carried out, it was PPC's responsibility to carry out the laws and regulations regarding the overpayment.
- July 9, from PERS3 to CIV 2: PERS3 mentioned again his concern regarding the incorrect base pay for the applicant's promotion to Lieutenant in 2008. PERS3 provided specific details regarding the error and what the calculations should be, and noted that the difference in overpayment was over eight thousand dollars. PERS3 requested that PPC recalculate the amounts and reissue the debt.
- Remaining emails: The remainder of the emails discuss the applicant's 2008 promotion, confirm that the promotion date used had been incorrect, and that the applicant needed to be issued a new Notice of Overpayment with the correct calculations.<sup>2</sup>

The applicant stated that all of his military documentation had been lost in a flood, and that his electronic record does not contain all of his enlistment paperwork. Therefore, he included a MARTP contract signed by another member on April 30, 1994. Because the applicant signed his MARTP contract on May 3, 1994, the applicant presumably submitted this contract to show what he signed upon enlistment.

Lastly, the applicant included a copy of BCMR Docket No. 2010-040. The applicant highlighted the following paragraph, which is in the Findings and Conclusions:

According to the PPC's email, the applicant's pay entry base date is unclear. Under Chapter 2.A. of the Pay Manual, all of the applicant's regular and Reserve service was creditable time for pay purposes unless he spent "time served as a member of a Reserve component under a delayed entry program prior to entry on active duty or ADT."<sup>3</sup> The applicant stated that he cannot recall performing any type of duty or receiving any pay or allowances until he began REBI and that he believes he began REBI on August 14, 1995. However, it is not clear to the Board that he was

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<sup>2</sup> The applicant received a new Notice of Overpayment on November 25, 2015, and stated that he had been overpaid by \$3,993.86 instead of by \$12,823.88.

<sup>3</sup> PAYMAN Chap 2.A.

enlisted under a delayed entry program; his enlistment contract shows that his pay entry base date was April 24, 1995; and the SOU indicates that upon enlistment he would immediately be a member of the SELRES. Therefore, the Board finds that the preponderance of the evidence shows that the applicant's initial pay entry base date, prior to his break in service in 2006, should have been April 24, 1995.

### VIEWS OF THE COAST GUARD

On October 20, 2016, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. The Coast Guard stated that the applicant's PEBD had originally been established as May 3, 1994, despite the fact that he began REBI on August 13, 1994. During the actuarial audit, the PPC changed the applicant's PEBD to August 13, 1994. The overpayment has been since waived, although the PEBD remains August 13, 1994.

The Coast Guard argued that 37 U.S.C. § 205 defines when service is creditable for pay purposes. Section 205(e) excludes any service that is before a member performs active duty, inactive duty for training before beginning active duty, or an initial period of active duty for training. This section refers to enlistments authorized by 10 U.S.C. § 12103(b) and (d). The Coast Guard claimed that 10 U.S.C. § 12103(d) is the authority under which the applicant, and other reservists, are enlisted into the Coast Guard Reserve. Title 37 U.S.C. § 205 has been implemented in PAYMAN Chapter 2.

The Coast Guard stated that the main question is whether the applicant's enlistment date and MARTP agreement established his PEBD. The Coast Guard argued that they do not. For service to be creditable under 37 U.S.C. § 205, a member must perform active duty, inactive duty for training prior to active duty, or an initial period of active duty for training. Therefore, the applicant's PEBD should have been determined by when he began his two weeks of training at REBI on August 13, 1994.

The Coast Guard stated that some of the applicant's documents, including his MARTP contract, were not located in his records. However, according to the applicant's pay information, the applicant did enlist on May 3, 1994, and did enter his first period of active duty on August 13, 1994. The Coast Guard also mentioned that it has no reason to doubt that the applicant's MARTP contract was similar to the contract the applicant submitted with his application.

The applicant argued in his application that he was not enlisted under the Delayed Entry Program, and the Coast Guard agreed. The Coast Guard stated, however, that both 37 U.S.C. § 205 and 10 U.S.C. § 12103 apply to many other types of enlistment beyond delayed entry. The applicant's training drill for REBI is what triggered the requirements of 37 U.S.C. § 205(e) for purposes of establishing his PEBD. The JAG argued that receipt of Student Incentive Pay (SIP) and GI Bill benefits do not meet the requirements for beginning creditable time for pay purposes.

In regards to BCMR Docket No. 2010-040, the Coast Guard argued that prior decisions do not establish precedent for future Board decisions. The Coast Guard also pointed out that the decision did not appear to consider the impact of 37 U.S.C. § 205 and 10 U.S.C. § 12103 on

establishing a member's PEBD date, and instead relied solely on that applicant's enlistment date in the Reserve. The Coast Guard further claimed that in that case, PPC had provided the Board with incorrect information regarding that applicant's DIEMS and PEBD. The decision did, however, note that the applicant's first period of active duty training was his REBI.

The Coast Guard noted that the applicant received a waiver of the overpayment that resulted from the incorrect PEBD. Therefore, the applicant benefitted from the mistake, which was no fault of his own. However, the Coast Guard stated, the PEBD is now correct and his pay based on longevity is now accurate. The Coast Guard therefore recommended that the applicant's application be denied.

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

The applicant submitted a response to the Coast Guard's advisory opinion on October 27, 2016. The applicant disagreed with the Coast Guard's advisory opinion. The applicant agreed with the Coast Guard's statement regarding 37 U.S.C. § 205(e) and when service is creditable. There are two applicable subsections under (e), however, and the applicant argued that neither apply to him. Title 37 U.S.C. § 205(e)(2)(B) applies only to delayed entry programs which, the applicant agreed with the Coast Guard, did not apply to him. Title 37 U.S.C. § 205(e)(2)(A) applies to 10 U.S.C. § 12103(b) and (d). The applicant argued that he did not enter under either 10 U.S.C. § 12103(b) or (d), and therefore 37 U.S.C. § 205(e) does not apply to him. The applicant further argued that the intent of 37 U.S.C. § 205 is to "ensure that a person does not receive creditable service time while not performing a role that is beneficial for the U.S. government."

The applicant argued that 46 U.S.C. § 51509 applies to him, which governs Student Incentive Payment Agreements. The applicant explained that 46 U.S.C. § 51509(c) requires a student to accept enlisted reserve status prior to receiving payment under the agreement. The applicant further claimed that this was incorporated into the MARTP contract he signed. He asserted that he was engaged in creditable service because he was entered into a SIP program, enrolled in a State Maritime School, was fulfilling the obligations listed in 46 U.S.C. § 51509, and was receiving payment from the government under his SIP agreement. The applicant stated that the Coast Guard did not substantiate its claim that 10 U.S.C. § 12103 applies to many other enlistment types beyond delayed entry programs. Therefore, the applicant argued that his enlistment was covered under 46 U.S.C. § 51509, and not 10 U.S.C. § 12103.

Regarding BCMR Docket No. 2010-040, the applicant agreed that 37 U.S.C. § 205 was not specifically cited. However, he argued that there is no way to know if the Board took this statute into account in its deliberations. He also pointed to the fact that this decision discussed delayed entry, which is a component of 37 U.S.C. § 205. The applicant therefore claimed that the Board did take 37 U.S.C. § 205 into account "on some level," and requested that this Board "appropriately weigh that decision while making this one."

The applicant disagreed with the Coast Guard's conclusion that he had benefitted from an incorrect PEBD. The applicant reasserted that his original PEBD, May 3, 1994, was correct. He further claimed that all members who were enlisted under an MARTP contract were given a

PEBD on the date of their enlistment. This is evidence that the intent of the program was to assign a PEBD on the date of enlistment, and that this was not an error, the applicant argued.

The applicant further stated that he has received over 22 years of service with a PEBD of May 3, 1994. He stated that, after over 20 years of service, he should have a right to expect that this matter is settled and that the Coast Guard “should not be able to reach back over the length of [his] career and reestablish a new PEBD.” Therefore, the applicant argued that it is in the interest of justice to adjust his PEBD to May 3, 1994, and award him appropriate longevity pay.

### **APPLICABLE LAWS**

Title 37 U.S.C. § 205 defines when service is creditable for the purposes of pay. Title 37 U.S.C. § 205(e)(2)(A) states that the following may not be counted under this section as creditable time: “Service performed while a member of a reserve component under an enlistment under section 12103(b) or 12103(d) of title 10 before the member begins service on active duty under such section (including a period of active duty for training) unless the member performs inactive-duty training before beginning service on active duty or active duty for training.”

Chapter 2.A.1. of the Reserve Policy Manual defines inactive duty as “training or other duty performed by reservists not on active duty. The primary purpose of inactive duty is to provide individual and/or unit readiness training.”

Title 10 U.S.C. § 12103 is the authority to enlist members into Reserve components. Specifically, 10 U.S.C. § 12103(d) states that a person who is qualified for induction into active duty “may be enlisted in the...Coast Guard Reserve, for a term of not less than six years nor more than eight years.”

Title 46 U.S.C. § 51509 regulates SIP agreements. It states that “if a State maritime academy has an agreement [with the Coast Guard, then] the Secretary may make an agreement with a student at the academy...to make student incentive payments to the individual.”

### **FINDINGS AND CONCLUSIONS**

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

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

2. The applicant alleged that the Coast Guard’s decision to change his PEBD from May 3, 1994, to August 13, 1994, is erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous

or unjust.<sup>4</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>5</sup>

3. The Board finds that 10 U.S.C. § 12103 is the authority under which all reservists enlist. This statute authorizes the branches of the military to enlist members into their Reserve components. Title 46 U.S.C. § 51509 authorized Student Incentive Payments, to which the applicant was also subject. However, a statute authorizing Student Incentive Payments with a condition that the recipient be enlisted is not a statute that actually authorizes enlistment. The Coast Guard’s authority to enlist him came from 10 U.S.C. § 12103. Therefore, the Board finds that both statutes apply to the applicant.

4. Therefore, 37 U.S.C. § 205(e) also applies to the applicant to determine his creditable service for pay purposes, which is counted from his PEBD. The Board agrees with the Coast Guard and the applicant that he was not enlisted under a delayed entry program, and thus 37 U.S.C. § 205(e)(2)(B) is inapplicable. Title 37 U.S.C. § 205(e)(2)(A), however, which applies to members enlisted under 10 U.S.C. § 12103(b) and (d), does apply. As a result, for purpose of computing pay, the applicant’s service was not creditable until he performed active duty, inactive duty for training before beginning active duty, or an initial period of active duty for training.

5. The Board finds that the applicant did not meet the requirements of 37 U.S.C. § 205 until he began REBI training on August 13, 1994. The fact that the applicant was entered into an SIP program, enrolled at an eligible State Maritime School, was fulfilling the obligations of 46 U.S.C. § 51509, and receiving payments based on his SIP program does not meet the requirements of creditable service under 37 U.S.C. § 205. While the applicant may have been “performing a role that was beneficial for the U.S. government,” the Board does not find that the intent of 37 U.S.C. § 205 is to ensure that a person receives creditable time upon performing a function that benefits the government. To the contrary, the statute lists three ways for a member to begin creditable service, and performing a beneficial role for the government is not one of them.

6. The applicant pointed out that in BCMR Docket No. 2010-040, the Board did change that applicant’s PEBD to match his DIEMS, even though that applicant did not begin receiving pay until he started REBI four months later. However, as the Coast Guard pointed out, 37 U.S.C. § 205 was not considered in that decision, and it clearly states when service becomes creditable. The applicant began his initial period of training on August 13, 1994, therefore fulfilling the requirements of 37 U.S.C. § 205.

7. Based on the applicable statutes and the record before it, the Board finds that the applicant’s PEBD is August 13, 1994. Although he argued that the Coast Guard should not be

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<sup>4</sup> 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the “clear and convincing” evidence standard recommended by the Coast Guard and adopting the “preponderance of the evidence” standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

<sup>5</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).

allowed to correct his record years after the error was made, the Board disagrees. The Board notes in this regard that a military member's entitlement to pay is determined by statute, not contract. Therefore, the applicant's request for correction of his record should be denied.

**(ORDER AND SIGNATURES ON NEXT PAGE)**



**ORDER**

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

February 17, 2017

