

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-223

██████████
██████████; CWO3 (Retired)

FINAL DECISION

This proceeding was conducted according to the provisions of section 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on July 13, 2017, and assigned it to staff attorney ██████████ to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated June 22, 2018, 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 chief warrant officer ██████████ who retired on August 31, 2008, asked the Board to correct his time in service and to award him all back pay and allowances that he is owed as a result of the error in his record. He explained that he served in the U.S. Marine Corps before entering the Coast Guard. He stated that he recently learned when working with the Department of Veterans Affairs (VA) that there was an error on his Marine Corps DD 214.¹ Before he applied to this Board, he applied to the Marine Corps' Board for Corrections and had his DD 214 corrected to account for an additional 28 days of active duty service. He then had his Coast Guard DD 214 corrected to show the additional 28 days of prior active duty service.

The applicant is now requesting that his retired pay be properly calculated to capture all of his active duty time. He also requested that he receive all of his back pay and allowances given the Marine Corps' error for his time in service calculation. Regarding the timeliness of his application, the applicant stated he discovered the alleged error on March 1, 2017, when he was completing paperwork for the Department of Veterans Affairs. He stated that it is in the interest of justice to consider his application because the "error effected [his] time in service pay raises during [his] second tour in the USCG ... and [his] USCG retirement pay calculation." In support of his application, the applicant provided several relevant documents and they are discussed below in the Summary of the Record.

¹ A DD 214 is prepared to document a member's release or discharge from a period of active duty.

SUMMARY OF THE RECORD

Before serving in the Marine Corps, the applicant served for exactly 4 years in the Coast Guard from 1979 to 1983. The applicant's Marine Corps DD 214 originally stated that he entered active duty on September 30, 1986, and separated on May 31, 1990, and erroneously showed that this period amounted to 3 years, 4 months, and 2 days of active duty in the Marine Corps, even though it actually amounts to 3 years, 8 months, and 1 day. The Marine Corps recently corrected his date of entry from September 30, 1986, to September 3, 1986, and corrected his net active duty in the Marine Corps to 3 years, 8 months, and 29 days.²

A Statement of Creditable Service issued by the Coast Guard on January 14, 1992, shows that the Coast Guard credited him with his 4 years of prior active duty in the Coast Guard and with 3 years, 8 months, and 1 day of creditable service in the Marine Corps from September 30, 1986, through May 31, 1990, but not with the 27 days from September 3 to 29, 1986.

The applicant's second, and final, Coast Guard DD 214, issued upon his retirement, states that he reenlisted in the Coast Guard on February 19, 1991, and retired 17 years, 6 months, and 13 days later on August 31, 2008. His total *prior* active duty service shown on this retirement DD 214 was 7 years, 4 months, and 2 days (4 years of prior active duty in the Coast Guard plus the 3 years, 4 months, and 2 days of active shown on his original, erroneous Marine Corps DD 214). His retirement DD 214 has since been corrected to state that his prior active duty service totaled 7 years, 8 months, and 29 days.

VIEWS OF THE COAST GUARD

On January 12, 2018, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief in this case.

The JAG stated that when the applicant retired from the Coast Guard on September 1, 2008, his retired pay was calculated in accordance with the Coast Guard Pay Manual, COMDTINST M7220.29. Based on the applicant's records as they existed at the time, the applicant had served for a total of 25 years, 2 months, and 13 days (21 years, 6 months, and 12 days in the Coast Guard plus 3 years, 8 months, and 1 day in the Marine Corps), and therefore was given a multiplier of 62.93% (only full months can count towards the computation of retired pay). The correction of the date of entry on the applicant's Marine Corps DD 214 added 28 days of active duty to his record for a total of 25 years, 3 months, and 11 days.

The JAG noted that the applicant's application was not filed within three years of the alleged error or injustice because he was retired from the Coast Guard in 2008. The JAG argued that he did not provide evidence that he was prevented from discovering the Marine Corps' error in the 27 years between when he received his Marine Corps DD 214 and when he submitted this application. However, the JAG stated that the Board should consider the reason for his delay and the likelihood of his success on the merits. The JAG did not dispute that the applicant is entitled to an additional 28 days of active duty credit. Therefore, the JAG did not request that the Board

² The Coast Guard noted that the original DD 214 must have included a typo by stating 4 months.

deny the application outright based on its untimeliness. The JAG did argue, however, that the delay has severely limited the Coast Guard's ability to determine how the applicant's active duty pay and allowances were impacted while he served on active duty.

The JAG stated that because the applicant has been credited with another 28 days of active duty service, his retired pay multiplier should increase from 62.93% to 63.13% (see enclosed). The JAG explained that the Coast Guard will be able to award him back retired pay for up to 6 years. However, the JAG argued that the time that has passed since the applicant received his DD 214 "makes it extremely difficult, if not impossible, for the Coast Guard to determine what back pay and allowances he would be due for his active duty back payments if he is credited with an additional 28 days of active duty time." The Coast Guard's ability to obtain documentation and evidence has been prejudiced by the delay, as the Coast Guard Global Pay System was "extremely different" at the time. The pay tapes, microfiche, and other documentation used may not be readily available or available at all, the JAG argued. Therefore, the JAG recommended that the Board find that the doctrine of laches has barred the applicant's request for back payment and allowances. The JAG also stated that the Board should consider whether any back payments past six years would be prohibited by 31 U.S.C. 3702(b), commonly known as the Barring Act.

The JAG emphasized that the Coast Guard made no error in completing the applicant's DD 214 at the time of his retirement. However, when the applicant brought his corrected Marine Corps DD 214 to the Coast Guard it was clear that an error had existed in his record and the Coast Guard was able to correct it. The JAG recommended that the Board waive the statute of limitations due to the fact that an error does exist and correct the applicant's retired pay. However, the JAG recommended that the applicant's request for back pay and allowances be denied under the doctrine of laches.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 22, 2018, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond. On January 29, 2018, the applicant sent an email stating that he does not object to "the U. S. Coast Guard's recommendations to correct my retirement pay multiplier, adjust my retirement pay and processing my back pay due for the six year period authorized for the monetary difference due because of my adjusted retirement multiplier."

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.
2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.³ The applicant's Marine Corps DD 214 shows that he was discharged from the Marine Corps in 1990 and received, reviewed, and signed the DD 214 at the time. He also knew at the time that he had enlisted in the Marine Corps in early September 1986,

³ 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

instead of the last day of September 1986, but he did not seek to correct his Marine Corps DD 214 for more than 25 years. The applicant also must have known while in the Coast Guard that his basic pay, as well as any reenlistment bonuses, certain allowances, advancement eligibility, etc., was based in part on his longevity—the duration of his military service—but he did nothing to ensure that his longevity pay increases and other longevity-based benefits were correct when he passed the “over ten” year mark, for example. Although the applicant recently rediscovered the error on his Marine Corps DD 214 and realized the significant impact of the error on his pay and benefits over time, the preponderance of the evidence shows that his application is untimely.

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

4. Regarding the delay of his application, the applicant claimed that he discovered the error on March 1, 2017. He asserted that it is in the interest of justice to consider his application on the merits so that he receives proper retirement payment for the time he served on active duty and any owed back pay. For reasons explained below the Board will excuse the untimeliness of his application with regard to his retired pay only.

5. Given the varying calculations of the applicant’s active duty, the Board will first calculate his creditable active duty. Creditable service for pay purposes is computed in accordance with Appendix C of the Coast Guard’s Personnel and Pay Procedures Manual, which provides that the creditable service performed during an enlistment is determined by subtracting the enlistment date (arranged as year, month, day) from the date of discharge while always using 30-day months so that if “your ending date is the last day of the month and other than the 30th, (as in the 31st or 28th/29th Feb) change it to the 30th”; adding one “inclusive day”; and subtracting any “time lost.”⁷ For example, the applicant’s initial four years of service in the Coast Guard from April 16, 1979, through April 15, 1983, are calculated as follows:

$$\begin{array}{r}
 \begin{array}{r}
 1983 \quad 04 \quad 15 \text{ (date of first separation from the Coast Guard)} \\
 - 1979 \quad 04 \quad 16 \text{ (date of enlistment in the Coast Guard)} \\
 \hline
 = \quad 03 \quad 11 \quad 29 \\
 \hline
 + 01 \text{ (inclusive day)} \\
 \hline
 = \quad 04 \quad 00 \quad 00 \text{ (years, months, and days of active duty during first enlistment)}
 \end{array}
 \end{array}$$

⁴ 10 U.S.C. § 1552(b).

⁵ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁶ *Id.* at 164, 165; see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

⁷ The record does not show that the applicant had any unauthorized absences, or “time lost.”

The applicant’s service in the Marine Corps from September 3, 1986, through May 31, 1990, is 3 years, 8 months, and 28 days, calculated as follows:

$$\begin{array}{r}
 1990 \quad 05 \quad 30 \text{ (pursuant to the rule that changes the last day of the month to the 30}^{\text{th}}) \\
 - 1986 \quad 09 \quad 03 \text{ (corrected date of enlistment in the Marine Corps)} \\
 \hline
 = \quad 03 \quad 08 \quad 27 \\
 \hline
 + 01 \text{ (inclusive day)} \\
 \hline
 = \quad \mathbf{03} \quad \mathbf{08} \quad \mathbf{28} \text{ (years, months, and days of active duty in the Marine Corps)}
 \end{array}$$

The applicant’s subsequent active duty in the Coast Guard from February 19, 1991, through his retirement on August 31, 2008, is 17 years, 6 months, and 12 days, calculated as follows:

$$\begin{array}{r}
 2008 \quad 08 \quad 30 \text{ (pursuant to the rule that changes the last day of the month to the 30}^{\text{th}}) \\
 - 1991 \quad 02 \quad 19 \text{ (date of reenlistment in the Coast Guard)} \\
 \hline
 = \quad 17 \quad 06 \quad 11 \\
 \hline
 + 01 \text{ (inclusive day)} \\
 \hline
 = \quad \mathbf{17} \quad \mathbf{06} \quad \mathbf{12} \text{ (years, months, and days following reenlistment in the Coast Guard)}
 \end{array}$$

Added together, the applicant’s total active duty amounts to 25 years, 3 months, and 10 days, as shown below:

$$\begin{array}{r}
 04 \quad 00 \quad 00 \text{ (years, months, and days of first Coast Guard enlistment)} \\
 + 03 \quad 08 \quad 28 \text{ (years, months, and days of Marine Corps enlistment)} \\
 + 17 \quad 06 \quad 12 \text{ (years, months, and days of subsequent Coast Guard service)} \\
 \hline
 = 24 \quad 14 \quad 40 \text{ (unadjusted totals of years, months, and days)} \\
 = \mathbf{25} \quad \mathbf{03} \quad \mathbf{10} \text{ (adjusted total years, months, and days of active duty)}
 \end{array}$$

6. The Statement of Creditable Service dated January 14, 1992, shows that because of the erroneous date of entry on the applicant’s Marine Corps DD 214, the Coast Guard had credited him with 3 years, 8 months, and 1 day of prior service in the Marine Corps, instead of 3 years, 8 months, and 28 days—a 27-day difference. Therefore, it appears that while on active duty, his longevity-based pay increases may have been slightly delayed by the 27-day error, and other longevity-based benefits and allowances may have been affected. As the Coast Guard explained, however, the long delay in this case has prejudiced the Coast Guard’s ability to determine how much the applicant might be owed because of changes in electronic systems and the loss of documentation in the interim. Given these difficulties, the Board finds that the applicant has not shown that it is in the interest of justice to waive the statute of limitations with respect to his active duty pay, allowances, and other benefits prior to the date of his retirement.

7. The applicant has proven by a preponderance of the evidence, however, that his retired pay has been erroneously calculated, and the amount due as a result of this error since his retirement on September 1, 2008, is not impossible to determine. The JAG admitted that the applicant has been receiving a retired pay multiplier of 62.93% based on the erroneous belief that his total active duty exceeded 25 years and 2 months, when in fact it exceeded 25 years and 3 months. The additional full month of active duty means that the applicant’s retired pay should have been calculated with a multiplier of 63.13%. The Board therefore finds that it is in the interest

of justice to waive the statute of limitations with respect to the applicant's retired pay. His record should be corrected to show that he is entitled to a retired pay multiplier of 63.13% because he served on active duty for more than 25 years and 3 months.

8. The JAG argued that pursuant to the Barring Act, the Board should not award the applicant more than six years of retroactive retired pay. According to 31 U.S.C. § 3702, a claim against the Government must be received "within 6 years after the claim accrues." A cause of action accrues "when all the events which fix the government's alleged liability have occurred and the [applicant] was or should have been aware of their existence."⁸ The JAG's argument accords with the decision *Gordon v. United States*, 134 Ct. Cl. 840, 843 (1956), in which the United States Court of Claims found that a retiree was owed only the six years' worth of retired pay he would have received before filing suit as "a new claim would accrue at each successive pay period." In reaching this conclusion, however, the court found that a retiree's claim accrues when the payment is legally due if "the claim is dependent only upon the law as written independent of any action by a board or agency."⁹ In this case, however, the applicant's claim to retired pay with a 63.13% multiplier is not "dependent only upon the law as written independent of any action by a board" because the applicant had to file applications for record corrections with both the Marine Corps and this Board to make himself legally entitled to the 63.13% multiplier. Therefore, the JAG's argument is not persuasive.

9. The Federal Court of Claims dealt with a question very similar to the one at hand in *Pride v. United States*, 40 Fed. Cl. 730 (1998). In *Pride*, the Defense Finance and Accounting Service had refused to pay an annuity to the widow of an Air Force retiree after the Air Force BCMR waived the statute of limitations and corrected the retiree's record in 1994 to show that he had elected spousal coverage under the Survivor Benefit Plan upon his retirement in 1978 and that his widow had filed an annuity claim upon his death in 1979.¹⁰ The Government argued that the widow's claim for the annuity had accrued on the day her husband died, but the court granted summary judgment for the widow.¹¹ The court found that 10 U.S.C. § 1552(c) becomes a money mandating statute when a correction board orders a correction to be made to a military record that mandates a Secretary to pay an applicant.¹² The court held that the cause of action accrued when the correction board ordered the Secretary to make the correction to the applicant's military record and *not* when the error was actually made. The Board finds that it must follow the same logic here. The applicant's claim for the back retired pay due as a result of the Board's correction of his record accrues on the date of this decision, and the Barring Act will therefore not bar him from collecting all of the retired pay he is owed as a result of the Board's correction of the error in his record.

⁸ *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988).

⁹ *Gordon v. United States*, 134 Ct. Cl. 840, 843-44 (1956).

¹⁰ *Pride v. United States*, 40 Fed. Cl. 730, 732 (1998)

¹¹ *Id.* at 735-36.

¹² *Id.* at 734; *see also Garcia v. United States*, 223 Ct. Cl. 114-15 (1980) (finding that a retired reservist's claim for back retired pay accrued not upon attaining age 60 but upon notification that his record had been corrected to show that he had served 20 years of satisfactory service and was eligible for retired pay); *Stewart v. United States*, 1999 WL 13396 *2 (Fed. Cir. 1999) (noting that the applicant's claim against the Government for back pay accrued in 1979 when the Coast Guard BCMR issued a decision granting a correction that made him entitled to the back pay).

10. Accordingly, the Board will waive the statute of limitations for the issue of the applicant's entitlement to retired pay with a 63.13% multiplier. His record should be corrected to show that he retired with more than 25 years and 3 months of creditable service and so his retired pay multiplier should be corrected from 62.93% to 63.13%. In addition, he should receive all unpaid retired pay since the date of his retirement, which he is owed as a result of this correction. No other relief is warranted.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of retired [REDACTED], USCG, for correction of his military record is granted in part. The Coast Guard shall correct his record to show that he had more than 25 years and 3 months of creditable service upon his retirement on September 1, 2008, and so his retired pay multiplier shall be corrected from 62.93% to 63.13%. The Coast Guard shall pay him all unpaid retired pay due since his date of retirement as a result of this correction.

June 22, 2018

