

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-186

████████████████████
██████████ LT/O-3

FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case upon receipt of the applicant's completed application on July 24, 2018, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated August 23, 2019, 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 lieutenant (LT) in the Reserve, asked the Board to either correct his Pay Entry Base Date (PEBD) from September 17, 2003, back to October 1, 2001, or correct his record to show that his overpayment debt of \$10,789.83 was waived and to direct that any payments on the debt recouped from him be reimbursed.

The applicant stated that in November 2017, he received a Statement of Creditable Service, which showed that his PEBD had been adjusted from October 1, 2001, to September 17, 2003. Because of this change in his PEBD, the Coast Guard found that he had been overpaid because of longevity increases for about eight years. And so in December 2017, the applicant received a Notice of Overpayment showing that he owed the government \$10,789.83.

The applicant stated that his PEBD was changed due to his temporary separation from active duty from September 16, 2007, to December 6, 2009. He stated that he had believed that he was in the Individual Ready Reserve (IRR) during this period, and that if he had been, his PEBD would not have been adjusted. The applicant stated that although he did not perform any drills during his temporary separation, his belief that he had been in the IRR during his temporary separation was supported by the following:

- About three months before the end of his temporary separation, on September 1, 2009, he signed an Oath of Office to become an officer in the Reserve with an effective date of July 16, 2007;

- When he returned to active duty in December 2009, he admitted to his unit’s administrative staff that he had not performed any drills during his temporary separation and was told that his PEBD would not change;
- When he was released from active duty to the Reserve in 2015, his DD 214 showed October 1, 2001, as his PEBD;
- The Coast Guard’s Direct Access database contained drill points statements for him up until his PEBD was changed in November 2017;
- Both his Member Information page in Direct Access and the Coast Guard Business Intelligence (CGBI) database show that he entered the IRR on September 16, 2007;
- A continuity OER (with no performance marks or comments) covering the duration of his temporary separation and showing that he had been in the IRR was entered in his personnel record; and
- “At no point throughout my record was there any indication of a break in service that would affect my PEBD.”

To support these allegations, the applicant submitted numerous records, which are included in the summary below.

SUMMARY OF THE RECORD

The applicant received his commission as an ensign on February 13, 2002. He advanced to lieutenant junior grade in 2003. The applicant attended dive school from February to May of 2004, and became a Dive Officer. On February 13, 2006, he was promoted to lieutenant.

In 2006, the applicant submitted a request to separate from active duty under the Coast Guard’s two-year Temporary Separation Policy as of September 15, 2007, and to receive a Reserve commission during his temporary separation. His request was approved. In a 1401 (memorandum) dated July 16, 2007, the Chief of the Reserve Personnel Management Branch (RPM) of the Coast Guard Personnel Command told the applicant that his request for a Reserve commission had been approved by the Secretary and that he had been appointed a lieutenant in the Reserve as of September 16, 2007.¹ Two unsigned Acceptance and Oath of Office forms with an effective date of September 16, 2007, were enclosed with the memorandum (enclosed), which included the following instructions:

If you accept this appointment, please completely fill out and sign two original Acceptance and Oath of Office forms (CG-9556). You must have both (CG-9556) forms witnessed by a commissioned officer of the Armed Forces, Judge of a Court of Record, Clerk of a Court of Record, Notary Public, or a Justice of the Peace. ... Return one original signed (CG-9556) to Coast Guard Personnel Command (CGPC-rpm-1) to coordinate scanning into your official Personnel Data Record (PDR) maintained at (CGPC-adm-3). ... You shall deliver the second signed original (CG-9556), along with a copy of this memorandum, to your current active duty Servicing Personnel Officer (SPO). **Your active duty SPO shall ensure you are accessed into the Reserve Component in accordance with**

¹ 10 U.S.C. § 12203 (“Subject to the authority, direction, and control of the President, the Secretary concerned may appoint as a reserve commissioned officer any regular officer transferred from the active-duty list of an armed force to the reserve active-status list of a reserve component ...”).

[Article 12.A.5 f. of the Personnel Manual]. ... Contact the servicing CG Integrated Support Command (ISC) (pf) staff in the area where you intend to reside to arrange assignment to a Selective Reserve (SELRES) billet. If there are no SELRES positions available or you do not desire an immediate assignment to an actively drilling SELRES position you must request your active duty SPO access you into the Reserve Component directly to the Individual Ready Reserve (IRR).” ... You have up to one year from the date of this letter to initiate your Acceptance and Oath of Office forms (CG-9556). However, if you do not return the completed (CG-9556) within 60 days from your separation date, it will be assumed that you do not desire this appointment If you execute the CG-9556 after 16 September 2007 you will incur a break in service [Emphases in original.]

On September 15, 2007, the applicant was honorably discharged from the Coast Guard, and the DD 214 documenting this discharge shows that he had no prior inactive (Reserve) service.

Almost two years later, on September 1, 2009, the applicant signed the Acceptance and Oath of Office form that had been sent to him on July 16, 2007. The form cites the July 16, 2007, memorandum as the source of the information. His signature was witnessed by a notary public.

On November 17, 2009, the Personnel Service Center advised the applicant that he had been approved to return to active duty from Temporary Separation as of December 7, 2009, but would return as a Reserve officer serving on an extended active duty contract until his regular commission was confirmed by the Senate. The applicant signed the contract and returned to active duty on December 7, 2009.

On June 20, 2013—a couple of months before the applicant was first considered for promotion to lieutenant commander—a continuity OER for the period September 16, 2007, to December 6, 2009, was electronically signed by a single officer and entered in the applicant’s record. It states that the applicant was in the IRR during his temporary separation but did not perform any drills.

A print-out from the CGBI database dated March 28, 2014, which the applicant submitted, shows that his Pay Base Date was October 1, 2001. It also shows that he was assigned to a Reserve Unbudgeted Position (the IRR) as of September 16, 2007, and that he was licensed as an officer in the U.S. Merchant Marine on March 10, 2008, during his temporary separation.

Because the applicant was not selected for promotion in 2013 or 2014, he was discharged from the Coast Guard on June 30, 2015. His DD 214 shows 2 years, 2 months, and 16 days of prior inactive service—the duration of his temporary separation. Upon his separation from active duty, the applicant was transferred to the Reserve.

A Statement of Creditable Service issued on November 13, 2017, shows that the applicant was discharged on September 15, 2007; had a break in his military service before he entered the IRR on September 1, 2009; and then returned to active duty on December 7, 2009.

On December 5, 2017, the applicant received a Notice of Overpayment, which states that he had been overpaid \$10,789.83 and that the amount would be recouped by deducting 15% of his available pay each month beginning on February 1, 2018. The notice advised him that he had a right to inspect the records and review all decisions related to the debt and that he could ask for a waiver or remission of the debt in accordance with Chapters 11.F. and 11.G. of the Pay Manual

and Chapter 9 of the Personnel and Pay Procedures Manual. And if he is separated before the full debt is paid, any remaining debt would be deducted as a lump sum from his final pay and allowances.

The applicant's Member Information page in Direct Access, printed on December 9, 2017, shows that he was in an unbudgeted position in the Reserve (the IRR) from September 16, 2007, to December 6, 2009, and returned to active duty on December 7, 2009. The Pay Allowance Date shown on this print-out is October 1, 2001, and the Pay Base Date is September 16, 2003. It also shows a Reserve Initiation Date of September 16, 2007, and Reserve Anniversary Date of September 1, 2009.

On January 12, 2018, the applicant submitted a debt waiver application. He stated that when he returned from active duty he told the unit administrative staff that he had not drilled while temporarily separated and asked them to validate that the correct pay base date was being used. And they told him that his PEBD would remain unchanged. He stated that he never suspected that he was being overpaid until he received the Notice of Overpayment in December 2017.

On February 20, 2018, the applicant's commanding officer endorsed his applicant favorably, stating that the "overpayments are clearly of such a nature that they would normally go undetected by the member ... and occurred through administrative error. There is no indication of fraud, misrepresentation, fault (in whole or in part), or lack of good faith on the part of the member."

On September 10, 2018, the applicant's request for a waiver was disapproved. The memorandum he received informed him that he could appeal the disapproval and explains the following in pertinent part:

2. In accordance with references ... CG-133 has the authority to waive collection of (or recommend waiver to the Defense Office of Hearings & Appeals (DOHA), if more than \$10,000) erroneous overpayments of pay and allowances to a Coast Guard member if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member ... The legal definition of "fault" does not imply any ethical lapse on the part of the member. It merely indicates that waiver is not appropriate if a member knew or should have known that he or she was receiving payments to which he or she was not entitled. The standard we employ to determine fault is whether a reasonable person would or should have known that he or she received a payment in excess of their entitlements. A waiver is not appropriate when a member is aware that he or she is in receipt of an overpayment or has no reasonable expectation of payment in the amount received. ... The fact that a payment arises due to administrative error, by itself, does not entitle a member to waiver. Additionally, as a general rule, the government is not bound by the erroneous advice or unauthorized acts of its officers, agents or employees, even though committed in the performance of their official duties. That the Coast Guard made a mistake in an overpayment is not a factor regarding the appropriateness of granting a waiver.

3. Your overpayment of Basic Pay was the result of an error that occurred when you separated from the Coast Guard (CG) on 9/16/2007 via TEMPSEP with an approved commission into the Coast Guard Reserve, effective the same day. Because there was a requirement for you to sign and submit a CG-9556 (Acceptance and Oath of Office) no later than 9/16/2007, you incurred a break in service by not doing so. Unfortunately, when you re-entered and your prior service time was calculated, to establish your Pay Entry Base Date (PEBD), your break in CG service previously mentioned was

not accounted for and not deducted from your total service time that would have adjusted your PEBD. Although you might not have suspected you were being erroneously paid based on an inaccurate PEBD, the absence of a signed CG-9556 in your record for this time period means that you have a break in service which subsequently establishes a new PEBD. PEBD determines benchmarks for Basic Pay longevity pay increases. When you were erroneously reaching these longevity benchmarks early, you were being overpaid due to your omission of the oath requirement. Because you did not properly execute your oath of office for appointment as a Reserve officer incident to TEMPSEP, you are at fault and therefore a waiver is not appropriate.

A Member Information page printed on December 12, 2018, which was submitted by the Coast Guard, still shows that the applicant was assigned to a Reserve unbudgeted position in the IRR on September 16, 2007, and that his Reserve Initiation Date is September 16, 2007.

VIEWS OF THE COAST GUARD

On March 15, 2019, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny the applicant's request.

The JAG recited the facts and noted that on or about January 13, 2017, an internal random review of actuarial records revealed that the applicant's PEBD had not been adjusted to account for his break in service. Because of his nearly two-year break in service from September 16, 2007, through August 31, 2009, the JAG stated, his PEBD was adjusted from October 1, 2001, to September 16, 2003.

The JAG noted that under the Coast Guard Pay Manual, COMDTINST M7220.29C, each member "has a responsibility to verify the accuracy and correctness of every pay, allowance, entitlement, and deduction that is processed or appears on their Semi-Monthly Statement of Income These include but are not limited to: Basic Pay for member's pay entry base date and pay grade In the case of a questionable or suspected overpayment, members must set aside those monies that are in question until notified in writing by higher authority (PPC or CGHQ) that the amount in question is correct and the member can retain the funds." The JAG also noted the rules for temporary separations and waivers of debts due to overpayments.

The JAG argued that under 37 U.S.C. § 205 and the Pay Manual, a service member accrues service time for purposes of pay longevity for all periods in which they were "enlisted or held an appointment as an officer" and "when a service member experiences a break in service, any such time does not count towards the computation of years of service. Accordingly, a break in service requires an adjustment of a service member's PEBD on a day-to-day basis for any lost time during the break in service."

The JAG stated that affiliation with the Reserve is not mandatory during a break in service. Officers wishing to affiliate with the Reserve during a temporary separation must request a Reserve commission. And when the request is approved, the officer has the option of accepting the appointment "predicated upon execution of the Acceptance and Oath of Office." The JAG noted that the applicant was notified that failing to execute the Acceptance and Oath of Office by September 16, 2007, would result in a break in service. But the applicant did not accept the appointment until September 1, 2009, and that is the effective date of his Reserve commission. Therefore, he incurred a break in service from September 16, 2007, through August 31, 2009.

The JAG stated that the applicant was notified in writing that he would incur a break in service if he did not execute the Acceptance and Oath of Office, and so he was “at fault for resulting erroneous calculation of his credible service for longevity and resulting overpayment” and a waiver of the debt was found to be inappropriate under the rules. The JAG stated that because of his break in service, his PEBD has been corrected, no correction is required, and a waiver of the debt is inappropriate. Therefore, the Coast Guard recommends denying relief.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 3, 2019, after receiving an extension of the time to respond, the applicant submitted his response to the views of the Coast Guard. He stated that he now understands why the Coast Guard “came to the conclusion that I did, in fact, incur a break in service and the recommendation for no relief due to the lack of a properly executed oath of office prior to the start of my TEMPESEP.” He stated that he firmly believes that he did execute the form before his temporary separation but cannot find a copy of it or explain why it is not in his record. Therefore, he stated, he no longer wants to have his PEBD restored.

The applicant argued, however, that “while the break in service is clearly my fault, there is a fair amount of evidence that led me to believe that I had not incurred a break in service and was not conscious that my PEBD was incorrect.” He claimed that before November 2017, he “was completely unaware that a break in service had actually happened that would result in a change to my PEBD. If I had known this, I would have brought it to the immediate attention of Coast Guard administrative support personnel to avoid gaining any kind of indebtedness to the Coast Guard.” He claimed that upon returning to active duty, he reviewed the applicable rules and sought guidance from administrative support personnel, none of which indicated a break in service.

The applicant listed the following as evidence that led him to believe that he had not break in service:

- The Acceptance and Oath of Office form citing the 1401 memorandum dated July 16, 2007, which he signed on September 1, 2009;
- His continuity OER showing September 16, 2007, as the start date of the reporting period;
- The lack of an adjustment to his PEBD when he returned to active duty;
- A Direct Access entry showing that he earned points for being affiliated with the Reserve;
- Erroneous entries in CGBI and on his Direct Access Member Information page that have yet to be corrected; and
- Multiple conversations he had with RPM, Coast Guard administrative personnel, and the Servicing Personnel Office at his unit.

The applicant also alleged that he now believes that there may be an error in the total amount of the debt. He noted that the Notice of Overpayment dated December 5, 2017, stated that his debt was \$10,789.83 and that interest and administrative charges had been waived. However, his April 30, 2018, pay slip lists his total debt amount as \$12,329.70, and his remaining debt as

\$10,064.69. The applicant stated that since the debt collection began in February 2018, a total of \$3,035.41 has been deducted from his pay toward the debt. The applicant stated that he does not understand why the debt has grown.

The applicant argued that a waiver of his debt is appropriate because the “overpayment[s] was of such a nature that they were unnoticed/undetected.” He was unaware of them for almost eight years as there “was not significant, unexplained increase in pay” and the erroneous payments resulted from administrative errors. He also argued that there was no indications of fraud, misrepresentation, fault, or lack of faith on his part; collection of the debt is against equity and good conscience; he relied on information in his records and the guidance of administrative personnel; approval would be in the interest of the United States and fair treatment of someone who committed no fault; and the Coast Guard had many opportunities to detect and correct the error in his PEBD earlier. He argued that “even when I was uncertain if a break in service had occurred, I believe any reasonable person would have come to the same conclusion as I did, based on the information available.”

APPLICABLE LAW & REGULATIONS

Coast Guard Pay Manual, COMDTINST 7200.29C

Chapter 11.F. of the Pay Manual, “Waiver of Claims for Erroneous Payment,” states the following about waiving a debt for overpayment in pertinent part:

1. General. A waiver is a written request from a member or former member for the cancellation of indebtedness to the U. S. Government which resulted from erroneous payments of pay and allowances made to or on behalf of the member or former member. Waiver applications may also be considered for erroneous payment of travel and transportation allowances paid on or after 28 December 1985.

2. Authority. 10 U.S.C. 2774 gives the Secretary of Department of Homeland Security authority to effect waiver of claims for erroneous payments of pay and allowances and travel and transportation allowances, when collection of the claim would be against equity and good conscience, and not in the best interest of the United States. The authority of the Secretary has been delegated to Commandant (CG-1332). Waivers of collection for debts that do not arise from an erroneous payment cannot be considered or granted under this authority.

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4. Limitations. Under the provisions of 10 U.S.C. 2774 and the standards prescribed by the Secretary of Defense (Waiver Procedures for Debts Resulting from Erroneous Pay and Allowances, DOD Instruction 1340.23), Commandant (CG-1332) may:

a. Waive claims that do not exceed \$10,000.

b. Deny an application for waiver of a claim in any amount, provided that in those cases where the claim is an amount aggregating more than \$10,000, the member is advised of the right to appeal the denial to the Defense Office of Hearings and Appeals (DOHA), Arlington, VA.

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5. Standards for Waiver of Erroneous Payments. Waiver or cancellation of erroneous payments will be granted by Commandant (CG-1332) only when it is determined that such action is in the best interest of the United States to do so. The decision to waive collection of erroneous payment or to waive debt requires a determination that to collect a lawful debt overrides the best interest of the United States. A waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant. In making this determination, the following are among the factors which will be considered:

a. "Not in the best interest of the United States" means that to collect the overpayment would be a determination by Commandant (CG-1332) that the fiduciary responsibility to ensure recoupment of erroneous payments or collect debts owed to the United States would be contrary to the larger interests of the Government (such as fair treatment of persons who are without fault in the errors of the government or its agents that led to the debt or overpayment) and overrides the imperative to properly manage public financial resources.

b. It is against equity and good conscience, provided there is no indication of fraud, fault (in whole or in part), misrepresentation, or lack of good faith on the part of the member. "Against equity and good conscience" generally means situations where a member, without any foreknowledge of applicable regulations or requirements, makes detrimental reliance on erroneous information, especially in travel allowances overpayments where a member reasonably relies on erroneous orders, and uses the payments for their intended purpose. See 67 COMP GEN 496 (B-226842) for relevant case law discussion.

c. Other considerations.

(1) Claims for erroneous payments which may be waived in whole or in part, must have resulted from an erroneous overpayment. The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the Government is not sufficient basis in and of itself for granting a waiver.

(2) Erroneous payments of pay and allowances, and travel and transportation allowances may be considered for waiver action provided the application is received by the Coast Guard within a three year period following date of discovery of the error which caused the erroneous payment.

(3) Overpayments must be of such a nature that they would normally go unnoticed or undetected by the member. A waiver usually is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. The recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the Government, even if the Government fails to act after such notification. Member must have reviewed semi-monthly pay slips or travel voucher summaries (TVS) to meet this criterion.

(4) A waiver generally is not appropriate when a recipient of a significant unexplained increase in pay or allowances, or of any other unexplained payment of pay or allowances, does not attempt to obtain a reasonable explanation from an appropriate official. The recipient has a duty to ascertain the reason for the payment and to set aside the funds in the event that repayment should be necessary.

(5) A waiver may be inappropriate in cases where a recipient questions a payment and is mistakenly advised by an appropriate official that the payment is proper, if under the circumstances the recipient knew or reasonably should have known that the advice was erroneous.

(6) Financial hardship or inability to repay is not a factor for consideration in determining whether a waiver is appropriate.

6. Claims Exceeding \$10,000. Claims which exceed \$10,000 and for which the Coast Guard recommends approval of the waiver or the member appeals agency action (or against which a Comptroller General exception has been issued) are forwarded for final resolution to DOHA.

7. Processing Requests for Waiver of Erroneous Payments. Waiver requests may be made by the member or a person acting in the member's behalf.

a. All requests by active duty personnel for waiver action must be submitted in accordance with procedures contained in Chapter 9, Personnel and Pay Procedures Manual, PPCINSTM1000.2 (series).

b. All requests for waiver by retirees/annuitants or out-of-service members must be submitted to the Coast Guard Pay and Personnel Center. PPC will provide retirees/annuitants with

waiver application instructions at the time the individual is notified of indebtedness other than a routine adjustment.

Chapter 11.G. of the Pay Manual, “Remission of Indebtedness,” states the following in pertinent part:

1. General. A remission is a written request from a Coast Guard member to cancel the uncollected amount of indebtedness to the U. S. Government. Debt remission may be approved for any amount, in whole or in part, according to the policy contained in this Section. Debt remission is not a right; rather, it is available to provide relief as a matter of equity, if the circumstances warrant.

2. Authority. A member’s uncollected indebtedness to the United States or any of its instrumentalities may, under authority of 14 U.S.C. 461, be remitted or cancelled when recovery would not be in the best interest of the United States. Commandant (CG-133) is delegated authority to remit or cancel debt. Remission determinations by CG-133 are final and conclusive, unless there is evidence of fraud or other good cause to reconsider.

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5. Standards for Remission of Indebtedness. Remission or cancellation of indebtedness will be granted by CG-133 only when it is determined that such action is in the best interest of the United States to do so. The decision to waive collection of erroneous payment or to remit debt requires a determination that to collect a lawful debt overrides the best interest of the United States. In making this determination, the following are among the factors which will be considered:

a. “Not in the best interest of the United States” means that to collect the overpayment would be a determination by CG-133 that the fiduciary responsibility to ensure recoupment of erroneous payments or collect debts owed to the United States would be contrary to the larger interests of the Government (such as fair treatment of persons who are without fault in the errors of the government or its agents that led to the debt or overpayment) and overrides the imperative to properly manage public financial resources.

b. It is against equity and good conscience, provided there is no indication of fraud, fault (in whole or in part), misrepresentation, or lack of good faith on the part of the member. ”Against equity and good conscience” generally means situations where a member, without any fore-knowledge of applicable regulations or requirements, makes detrimental reliance on erroneous information, especially in travel allowances overpayments where a member reasonably relies on erroneous orders, and uses the payments for their intended purpose. See 67 COMP GEN 496 (B-226842) for relevant case law discussion.

c. Other considerations.

(1) Injustice. Remission or cancellation of the indebtedness may be granted in order to correct obvious wrongs or misrepresentations on the part of the Government which are caused by individuals acting in an official capacity. When an enlisted person has received an overpayment in good faith, without fault or knowledge, but because of error on the part of the Government, enforced collection of the resultant indebtedness may amount to an injustice. However, as a general rule, the government is not bound by the erroneous advice or unauthorized acts of its officers, agents, or employees, even though committed in the performance of their official duties. Error on the part of the Government will not, of itself, be a basis for granting debt remission or cancellation.

(2) Undue hardship.

(a) Undue hardship in this sense may exist when collection of indebtedness would result in members not able to pay their just debts and unable to afford the cost of the necessities of daily living for themselves and their dependents, if with dependents, ...

(b) When undue hardship is advanced as the reason, in whole or in part, as the basis for debt remission or cancellation, it is the member’s responsibility to

include acceptable documentation to verify that undue hardship would be imposed.

(3) Member's Value to the Coast Guard. The investment in the training of the individual, technical skill and knowledge, and performance of duty as evidenced by marks, decorations, commendations, etc., will be considered in evaluating remission requests.

Paragraph 280901 of Chapter 7b of the Department of Defense Financial Management Regulation, states the following about waiver of indebtedness:

... A claim of the United States against a member or former member of the Uniformed Services, arising out of such erroneous payment, may be considered for waiver within 3 years from the date of discovery, when collection of the erroneous payment would be against equity and good conscience, and not in the best interest of the United States. Generally, these criteria are met by a finding that: (a) the erroneous payment occurred through administrative error; and (b) there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member or any other person having an interest in obtaining a waiver of the claim. Any significant unexplained increase in pay that would require a reasonable person to inquire about the correctness of pay would preclude a waiver when the member fails to bring the matter to the attention of the appropriate officials. ...

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 filed within three years of the date the applicant was notified that his PEBD had been adjusted and of the resulting debt.²

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.³

3. The applicant alleged that the adjustment of his PEBD, the debt, and the denial of a waiver are erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis in every case by presuming that the disputed information in an 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.⁴ 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."⁵

² 10 U.S.C. § 1552(b).

³ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board").

⁴ 33 C.F.R. § 52.24(b).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

4. The applicant has not proven by a preponderance of the evidence that he was an officer in the Reserve from September 16, 2007, through August 31, 2009, as he originally alleged. In the memorandum dated July 16, 2007, the applicant was clearly informed of what he had to do in order to accept the Secretary's appointment and avoid a break in service. The 1401 memorandum, which enclosed the Acceptance and Oath of Office (CG-9556) that the applicant belatedly signed on September 1, 2009, expressly told him that if he did not execute the Acceptance and Oath of Office by September 16, 2007, he would incur a break in service. Because the applicant was discharged from the Coast Guard on September 15, 2007, and signed the CG-9556 to accept the Reserve commission on September 1, 2009, he incurred a break in military service of almost two years, from September 16, 2007, through August 31, 2009.

5. In his response to the advisory opinion, the applicant newly alleged that he actually signed the CG-9556 back in 2007, but neither he nor the Coast Guard has any record of it. Moreover, the applicant submitted nothing to show that between September 16, 2007, and August 31, 2009, he was assigned to a Reserve unit; received or responded to any IRR correspondence; informed the Coast Guard of his changes in address, status, or physical condition as required; or attempted to drill or earn points so that his service would be deemed satisfactory.⁶ Therefore, the applicant has not proven by a preponderance of the evidence that he signed and submitted the CG-9556 before September 1, 2009. And that is the effective date of his appointment because that is the date he accepted the appointment and took the oath of office. The Board is not persuaded that the applicant was confused from September 16, 2007, to August 31, 2009, about whether he was in the IRR. Nor is the Board persuaded that on the day he executed the CG-9556, September 1, 2009, he was confused about the effective date of his appointment and whether he had incurred a break in service.

6. The applicant has not proven by a preponderance of the evidence that his PEBD was erroneously corrected from October 1, 2001, to September 16, 2003. Because the applicant was not a member of the military at all from September 16, 2007, through August 31, 2009, he is not entitled to be credited with military service during that period for pay or longevity purposes.⁷

7. The applicant has not proven by a preponderance of the evidence that he was not at fault for accepting pay for longevity based on military service that he knew he had not performed. Although the applicant alleged that, when he returned to active duty in December 2009, he was uncertain about his entitlement to the longevity pay and was assured by administrative personnel that he was entitled to it, the language in the memorandum dated July 16, 2007, is *not* ambiguous. Given that language and the long delay in his execution of the CG-9556, no reasonable Coast Guard officer in the applicant's position could have been unaware that he had incurred a long break in service when he signed the CG-9556 to accept the Reserve appointment on September 1, 2009.

⁶ Reserve Policy Manual, COMDTINST M1001.28A, Chapters 4.A.6., "IRR Satisfactory Participation," and 4.B., "Failure to Participate."

⁷ Coast Guard Pay Manual, COMDTINST M7220.29C, Chapter 2.A., "Creditable Service," states, "Under the authority of 37 U.S.C. 205, compute a member's cumulative years of service for the purpose of determining the member's rate of Basic Pay by adding all periods of active and inactive service as a commissioned officer, warrant officer, or enlisted member in any Regular or Reserve component of a Uniformed Service."

8. As evidence that he was unaware of the error in his PEBD, the applicant pointed to all of the subsequent errors that resulted from the original error—the backdating of his acceptance of the appointment and his oath of office. He has shown that the original error was subsequently reproduced and reflected in several other Coast Guard records, but when the applicant signed the CG-9556 on September 1, 2009, those records did not yet exist and he could not reasonably have been unaware that he had incurred a long break in service. Nothing that he or his unit’s yeomen did thereafter could erase that break in his military service. Because the evidence that the applicant submitted to support his claim that he was ignorant of the problem—database entries, the OER, and the DD 214—did not yet exist on September 1, 2009, it could not have confused him about whether he had a break in service. Nor is the CG-9556 confusing, as the applicant alleged, because it cites the 1401 memorandum dated July 16, 2007, as the source of information about the appointment only, not as the effective date of his appointment and oath of office.

9. Because the preponderance of the evidence shows that the applicant knew on September 1, 2009, that he had incurred a break in his military service of almost two years’ duration and so subsequently knew that he was not entitled to all the longevity pay he received after he returned to active duty, the applicant was at fault for accepting that pay. Therefore, the Board finds that the denial of his request for a waiver or remission of the debt is neither erroneous nor unjust. His requests to change his PEBD or to correct his record to show that the debt was waived or remitted should be denied.

10. As the applicant pointed out, although some of his records have been corrected to show that he was not in the Reserve from September 16, 2007, through August 31, 2009, many of his records have not. For example, the applicant’s Member Information page in Direct Access and CGBI continue to show that he was assigned to an unbudgeted position in the Reserve during his break in service from September 16, 2007, through August 31, 2009. In addition, his Reserve Initiation Date is erroneously shown as September 16, 2007. His Continuity OER and his DD 214 also fail to reflect the break in service. The applicant did not expressly request that these errors be corrected, but in his response to the advisory opinion, he admitted that he incurred a break in his military service from September 16, 2007, through August 31, 2009, and was not an officer in the Reserve. Therefore and because inconsistent records could cause the applicant continuing administrative problems, the Board will direct the Coast Guard to correct these records.

11. In his response to the advisory opinion, the applicant alleged that his debt has erroneously increased despite deductions from his pay. He submitted no evidence supporting this allegation and the Coast Guard has had no opportunity to address it. The Board recommends that the applicant contact the Coast Guard Personnel and Pay Center about the alleged increase in the amount of his debt. If he is dissatisfied with the explanation of the increase in his debt, he may reapply to the Board regarding this issue and should submit copies of all of his pay slips showing the Coast Guard’s recoupment of his debt.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of LT [REDACTED], USCGR, for correction of his military record is denied, but he may reapply to the Board regarding the amount of his debt, as noted in finding 11, above, and the Coast Guard shall correct his records to reflect and be consistent with the fact that he had a break in service from September 16, 2007, through August 31, 2009, including his Continuity OER, his DD 214, and entries in the Direct Access and CGBI databases, such as his Reserve Initiation date, his positions, and assignments.

August 23, 2019

