

**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. 2010-197**

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XXXXXXXXXXXXXXXXXX**

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**FINAL DECISION**

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receipt of the applicant's completed application on June 15, 2010, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 10, 2011, 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 that the time he spent as a midshipman at the U.S. Naval Academy [REDACTED] is counted in calculating his Reserve retirement points.

The applicant stated that on [REDACTED] he enlisted in the Naval Reserve for 6 years and that on [REDACTED] he received an appointment to the Naval Academy. A copy of a DD 214 shows that he was not discharged from the Reserve upon receiving his midshipman appointment, but continued in a dual status. On [REDACTED], he was discharged from the Naval Academy due to academic reasons and returned to enlisted status in the Naval Reserve. A DD 214 shows that he had 2 years, 1 month, and 17 days of total active service, with a note that the service "includes midshipman service from [REDACTED]". Subsequently, on [REDACTED] the applicant was discharged from his enlisted status to accept a Naval Reserve commission. On [REDACTED], he was discharged from the Naval Reserve and transferred to the Coast Guard. A February 5, 2010 retirement points statement shows that the applicant has 29 years, 2 months, and 2 days of satisfactory service. The time he spent as a midshipman was not included in his retirement point calculation.

The applicant stated that he discovered the alleged error when reviewing his retirement points statement on February 5, 2010. He stated he noticed at that time that his retirement points calculation did not include the period he spent as a midshipman.

The applicant's record shows that upon his transfer from the Navy to the Coast Guard, the Navy provided the Coast Guard with a statement of his Navy service. The statement shows the applicant's periods of active and inactive duty, but does not include his time at the U.S. Navy Academy in either category. The Navy notes in a separate paragraph that the applicant was a midshipman at the Naval Academy from [REDACTED]

The applicant's military record also shows that he was transferred to the Coast Guard Reserve Retired List without pay (RET-2) on June 22, 1998. The applicant's retirement points statement dated April 24, 1998, included with the letter transferring him to RET-2, does not include the time he spent as a midshipman in calculating his retirement points or years of service.

### **VIEWS OF THE COAST GUARD**

On October 27, 2010, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny relief, in accordance with a memorandum from the Commander Personnel Service center (PSC).

PSC stated that the application is not timely because the applicant's last drill with the Coast Guard occurred in April 2005, which exceeds the Board 3-year statute of limitations.

With respect to the merits of the claim, PSC stated that according to 10 U.S.C. § 971, time spent as a midshipman cannot be counted in computing a member's length of service. PSC quoted the pertinent provision of the law as follows:

- a. The period of service under an enlistment or period of obligated service while also performing service as a cadet or midshipman or serving as a midshipman in the Navy Reserve may not be counted in computing, for any purpose, the length of service of an officer of an armed force or an officer in the Commissioned Corps of the Public Health Service.
- b. In computing length of service for any purpose, service as a cadet or midshipman may not be credited to any of the following officers:
  - (1) An officer of the Navy or Marine Corps.
  - (2) A commissioned officer of the Army or Air Force.
  - (3) An officer of the Coast Guard.
  - (4) An officer in the Commissioned Corps of the Public Health Service.

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

On December 8, 2010, the Board received the applicant's reply to the views of the Coast Guard. He disagreed with the Coast Guard that his application was not timely. In this regard, he stated that on or about February/March 2010, he received his retirement package from the Coast Guard, which included his retirement points summary. He stated that pursuant to the instruction on page 2 of the summary, he immediately informed the Coast Guard on March 15, 2010, and April 8, 2010, about the alleged problem. Therefore, his application is not untimely.

The applicant argued that pursuant to Vol 7A, Chap.1.010101.D.4., of the DoD Financial Regulation, he is entitled to have his retirement points calculation include the period he spent as a midshipman. This provision states that service as a cadet or midshipman at a military academy is always creditable service for an enlisted member. The provision refers to Table 1-1 of the instruction to determine whether such service is creditable for commissioned or warrant officers. Table 1-1 states the following two pertinent rules: “When a member currently serving as an officer has had service as a cadet or midshipman in any of the military academies to which appointed and the member held no concurrent enlisted and/or Reserve status then the period involved is not creditable.” However, Table 1-1 goes on to state that “When a member currently serving as an officer has had service as a cadet or midshipman in any of the military academies to which appointed after June 25, 1956, and [t]he member had an enlistment contract or period of obligated service that was not terminated then the period involved is not creditable.” The applicant argues that he held a dual status while serving as a midshipman and therefore his time counts.

### 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.
2. The application was not timely. To be timely, an application for correction of a military record must be submitted within three years after the alleged error or injustice was or should have been discovered. *See* 33 CFR 52.22. The applicant stated that he discovered the alleged error on February 5, 2010 and acted diligently to have the alleged error corrected after receiving his retirement package in February 2010. However, the alleged error should have been discovered when he received his April 24, 1998 retirement points statement because it shows that he was not given credit for his time at the Naval Academy. The Board agrees with the Coast Guard that at the very least, the applicant should have discovered the alleged error within three years of the time he performed his last drill, which according to the Coast Guard was in April 2005 (apparently he was recalled to duty or given permission to perform additional drills). The applicant did not explain why he was not aware of the error any earlier than 2010. Therefore, the application was untimely.
3. The Board may still consider the application on the merits, if it finds it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that in assessing whether the interest of justice supports a waiver of the statute of limitations, the Board “should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review.” *See also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995). The Board is not persuaded to excuse the untimeliness based upon the applicant’s reason or lack thereof for not filing his application sooner. However, the Board must still review the merits to determine whether it is in the interest of justice to excuse the untimeliness.
4. Regarding the merits, 10 U.S.C. § 971(a) states that service under an enlistment period or period of obligated service while also performing service as a cadet or midshipman or serving

as a midshipman in the Navy Reserve may not be counted in computing, for any purpose, the length of service of an officer of an armed force.<sup>1</sup> Subsection (b) makes clear that the law applies to Coast Guard officers. The applicant is an officer in the Coast Guard Reserve and is not eligible to have his midshipman service included in his retirement points calculation.

5. The applicant disagrees with the above and relies on Table 1-1 to Vol 7A, Chap.1.010101.D.4., of the DoD Financial Regulation (January 2010), which states in part: “When a member currently serving as an officer has had service as a cadet or midshipman in any of the military academies to which appointed and the member held no concurrent enlisted and/or Reserve status then the period involved is not creditable.” The applicant argued that he is entitled to credit under this provision because he held an enlisted status concurrent with his appointment as a midshipman. However, the subsequent rule in Table 1-1 makes the applicant ineligible for credit. This portion of the Table states that “When a member currently serving as an officer has had service as a cadet or midshipman in any of the military academies *to which [the member was] appointed after June 25, 1956 and the member had an enlistment contract or period of obligated service that was not terminated then the period involved is not creditable.*” (Emphasis added.) Even under the DOD instruction, the applicant’s service is not creditable because he was appointed as a midshipman after June 25, 1956 and his enlistment was not terminated. Therefore, under the rule applicable to the period of time in which the applicant was a midshipman, he is ineligible to receive credit for his midshipman service in his reserve retirement points.

6. Accordingly, the applicant’s request should be denied because it is untimely and because it lacks merit.

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<sup>1</sup> A note to 10 U.S.C. 971 states that “Section 652(a)(1)(B) of Pub.L. 101-189 provided that: “the limitation in section 971(a) of title 10, United States Code . . . shall not apply with respect to a period of service referred to in that section while also serving under an appointment as a cadet or midshipman accepted before June 26, 1956.”

**ORDER**

The application of XXXXXXXXXXXXX, USCGR (Ret.), for correction of his military record is denied.

