

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-091

**XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX**

FINAL DECISION ON FURTHER CONSIDERATION

This is a further consideration of BCMR no. 2011-152 conducted 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 for further consideration upon receipt of the applicant's submission of additional evidence outlined in the earlier BCMR decision. The application on further consideration was assigned a new docket no. BCMR No. 2012-091.

This final decision on further consideration dated December 7, 2012, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

PRIOR CASE SUMMARY (DOCKET NO. 2011-152)

The applicant, a chief [REDACTED], in the Coast Guard Selected Reserve (SELRES) asked the Board to correct his record so that the "[b]ad year [2007] for retirement be removed." A reservist is required to earn 50 points per anniversary year for that year to count toward the 20 years of satisfactory service necessary for retired pay at age 60. The applicant earned only 49 points for his anniversary year ending in April 13, 2007. The applicant stated at that time that he had 19 years of satisfactory service. He stated that he did not discover the alleged error until September 2010 when he received a statement of creditable service.¹

The applicant was injured in an automobile accident on December 26, 2006, and was unable to resume performing his reserve drills until March 12, 2007. He argued that he tried to complete a good year after his doctor cleared him to return to work by drilling on March 17, 18, 25, and again on April 7 and 14, and by performing annual duty for training (ADT) from April 16, 2007, to April 27, 2007. He fell short by one drill point.

As stated above, the applicant was injured in an automobile accident on December 26, 2006. Although the police report stated that no injuries were reported at that time, on January 3, 2007, an internist gave the applicant a disability certificate stating that he was under the doctor's

¹ What the applicant received was probably a Retirement Points Statement because a Statement of Creditable Service does not normally record drill points.

care and that he was totally incapacitated beginning on December 26, 2006. On January 8, 2007, an orthopedist diagnosed the applicant with cervical and lumbar strains and spasms and prescribed treatment with therapy. The orthopedist stated that the applicant could return to work in a full capacity on March 12, 2007.

On August 19, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in the previous application in which he recommended that the Board deny the applicant's request based on the analysis of the case provided in a memorandum from the Commander, Coast Guard Personnel Service Center (PSC). PSC argued that the application should be denied because the applicant's Coast Guard record is presumptively correct and he failed to substantiate any error or injustice with regards to his record. PSC stated that the applicant earned only 49 points for his anniversary year from April 14, 2006 to April 13, 2007.

The applicant responded on August 31, 2011, and disagreed with the Coast Guard's advisory opinion that his application should be denied.

The Board made the following findings and conclusions in BCMR No. 2011-152 on the basis of the applicant's military record and submissions, the Coast Guard's submission and applicable law:

4. The Coast Guard correctly noted that the regulation requires that a reservist earn 50 points per anniversary year for that year to be creditable toward a 20-year retirement. The applicant does not allege that the Coast Guard committed an error. Therefore, the basis for his request is injustice because he was unable to participate in drills from December 26, 2006 through March 12, 2007 due to injuries sustained in an automobile accident. The applicant stated that after his medical release to return to work, he completed drills on March 17, 18, and 25, and on April 7 and 14, but he presented no corroborating evidence that he actually drilled on these specific dates nor does the military record before the Board contain such corroboration. The applicant also stated that he performed annual active duty for training (ADT) from April 16, 2007, to April 27, 2007. There is no evidence in the record corroborating these specific dates. However, even if there was corroboration for the ADT, it would not count toward the anniversary year ending April 13, 2007 because it was not completed by April 13, 2007. As stated above, as of April 13, 2007, the applicant had accumulated only 49 points.

5. Despite the unfortunate circumstances mentioned above, the Board is not persuaded by the current evidence of record that the applicant has suffered an injustice. For the purposes of the BCMRs, "[i]njustice", when not also "error", is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). Absences from scheduled drills are either excused or unexcused. If absences are excused they are rescheduled. In this regard, the applicant has offered no evidence that he informed his command about his motor vehicle accident or that he provided his unit with his doctor's statements that he was not able to work during a specific period. Nor does he state whether the command

excused his absences from scheduled drills in January and February 2007. The Board has no evidence that the command agreed that the applicant could not drill, even in a limited duty status. In this regard, Article 5.B.5. of the Reserve Policy Manual states that if a disability is expected to last less than 4 months, the reservist shall be retained in the SELRES and the command shall either schedule the reservist for IDT training in a limited duty status or shall reschedule drills for when the member is fit for full duty.

6. It would be inappropriate for the Board to correct the applicant's record based upon injustice without knowing whether he fulfilled his responsibilities to his command. There is no evidence before the Board whether the command was aware of his temporary injury and inability to drill, whether the command excused his January and February absences, or whether the command offered any other options for earning points during his temporary injury. The military record provided to the Board from Coast Guard Headquarters is incomplete and therefore not of any assistance to the Board in determining the applicant's or command's actions with regard to processing the applicant's temporary injury. The Board presumes that the information relating to the applicant's interaction with his unit about his injury is in his local unit record. Therefore, the Board will grant further consideration on this application if the applicant submits a true copy of his unit PDR to the Board (including any administrative remarks page (page 7) entries about the injury, what, if any, options were offered to the applicant to earn points, and what drills were excused and rescheduled) within 180 days from the date of the final decision in this case.

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8. Accordingly, the applicant's request should be denied, with further consideration granted in accordance with Finding 6.

CURRENT APPLICATION ON FURTHER CONSIDERATION (BCMR NO. 2012-091)

After receiving the final decision in Docket No. 2011-162, the applicant submitted a statement from Lieutenant V, who was the Assistant Chief, Sector [REDACTED] Prevention Reserves and the applicant's supervisor at the time under review. The applicant also submitted a copy of his drill performance history that shows the drills he performed after his doctor released him for return to reserve and civilian duty. Of particular note is the statement from his then-supervisor who stated the following in pertinent part:

From January 2006 to June 2010, I served as the assistant Chief, Sector [REDACTED] Prevention Reserves, and was supervisor to [the applicant]. I was the lead reserve officer reporting directly to the Chief, Prevention Reserves, and was responsible for scheduling, coordinating and supervising all periods of duty as well as monitoring and enforcing participation standards for the reservists assigned to the Prevention department.

During the period of December 2006 to March 2007, [the applicant] was not fit for duty due to injuries sustained in an off-duty motor vehicle accident. [The applicant] was excused by me and with my supervisor's approval, from all military service, to include inactive duty training (IDT) and active duty training-annual training (ADT-AT) because of this injury. He was not allowed to perform any work for the US Coast Guard Reserve during this time, and was excused by me from mobilization requirements and regular participation standards. I was in regular contact with [the applicant] via telephone, monitoring his status and fitness for duty, and I approved all his absences. Upon being authorized fit for full duty, I approved all of [the applicant's] completed IDT periods and his request for ADT-AT. During his absence and upon his return to duty, [the applicant] and I together developed a plan to make-up his missed IDT and ADT-AT. Together we worked diligently to develop a schedule that considered his Coast Guard requirements, while taking his civilian occupation and personal needs into account. [The applicant] made a concerted effort to return to "good standing" and should not be penalized due to an unfortunate and untimely injury.

VIEWS OF THE COAST GUARD ON FURTHER CONSIDERATION

On July 27, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in accordance with a memorandum from the Commander, Personnel Service Center (PSC).

PSC stated that the drill history from Direct Access substantiates that the member earned 49 points during his anniversary year April 14, 2006 to April 13, 2007. With regard to the letter from the applicant's then-supervisor, PSC stated that his letter does not dispute, nor provides evidence to show, that the applicant earned greater than 49 points for the anniversary years in question. PSC stated that the only way to remove a bad year from the applicant's record is to add one retirement point. The applicant has not claimed that he had earned any additional points for his anniversary year. PSC stated that the Coast Guard is presumptively correct, and the applicant has failed to substantiate any error or injustice with regard to his record.

APPLICANT REPLY TO THE VIEWS OF THE COAST GUARD ON FURTHER CONSIDERATION

On August 1, 2012, a copy of the views of the Coast Guard was sent to the applicant for a response. The BCMR did not receive a response from the applicant.

FINDINGS AND CONCLUSIONS ON FURTHER CONSIDERATION

The Board makes the following findings and conclusions on the basis of BCMR No. 2011-152, 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 section 1552 of title 10 of the United States Code. The application was timely.

2. A reservist must earn 50 points during an anniversary year for that year to count toward the 20 years necessary to earn reserve retired pay at age 60. The applicant's anniversary year was from April 14 of the current year to April 13 of the next year. When a member earns less than 50 points during an anniversary year, that year is usually referred to a "bad year" although the points earned are credited to the member and included in the retired pay calculation should the member earn the 20 qualifying years to be entitled to retired pay at age 60.

The applicant earned only 49 points during his anniversary year from April 14, 2006 to April 13, 2007. He could not perform drills or work his civilian job from December 26, 2006 until March 12, 2007 because of a temporary medical disability due to a motor vehicle accident. According to the applicant's then-supervisor, the applicant's missed drills for this period were excused and a schedule was developed for him to make-up the missed drills. The applicant stated that in an effort to make-up the missed drills after his medical release, he drilled on March 17, 2007, March, 18, 2007, March 25, 2007, April 7, 2007 and April 14, 2007 and he performed active duty training from April 16, 2007 to April 27, 2007. In September 2010, he learned that he had only 49 points for the anniversary year ending April 13, 2007.

3. In the applicant's previous case BCMR No. 2011-152, the Board was concerned whether the applicant had informed his command of his situation, whether the command excused him from performing drills, and what advice the command provided to the applicant about his situation. Finding 6 of the previous final decision states the following:

It would be inappropriate for the Board to correct the applicant's record based upon injustice without knowing whether he fulfilled his responsibilities to his command. There is no evidence before the Board whether the command was aware of his temporary injury and inability to drill, whether the command excused his January and February absences, or whether the command offered any other options for earning points during his temporary injury. The military record provided to the Board from Coast Guard Headquarters is incomplete and therefore not of any assistance to the Board in determining the applicant's or command's actions with regard to processing the applicant's temporary injury. The Board presumes that the information relating to the applicant's interaction with his unit about his injury is in his local unit record. Therefore, the Board will grant further consideration on this application if the applicant submits a true copy of his unit PDR to the Board (including any administrative remarks page (page 7) entries about the injury, what, if any, options were offered to the applicant to earn points, and what drills were excused and rescheduled) within 180 days from the date of the final decision in this case.

4. In response to the Board's concerns and to obtain further consideration, the applicant submitted a letter from his then-supervisor and a copy of his drill record. The supervisor stated that the applicant's command was aware of his temporary disability, excused his absences from drills, and worked with the applicant to reschedule his missed drills, although the supervisor did not provide the specific dates on which the applicant was scheduled to make-up the drills. A review of the record shows that because of the temporary disability, the applicant missed two months of drills for a total of 8 missed drills. Normally, drills occur one full weekend per month (although flexible drilling exists), with two drills performed each weekend day. One point is earned for each drill performed. Based upon the letter from the

applicant's then-supervisor, the unit worked with the applicant to develop a plan to make-up the missed drills. Apparently, this plan fell short of the drills necessary to compensate for the missed drills plus the regularly scheduled drills for March and April. According to the applicant's drill history, the only extra drills (make-up drills) during this period was the March 25, 2007 and the April 7, 2007 drills that amounted to 4 drill points. The April 14, 2007 drill and active duty training the applicant performed from April 16, 2007 to April 27, 2007 occurred during the subsequent anniversary year that began on April 14, 2007 and could not be included in the point total for the anniversary year ending April 13, 2007. Therefore, the unit failed to schedule a sufficient number of make-up drills to cover the applicant's missed January and February drills, causing the applicant to be one point shy of the 50 points required for the anniversary year ending April 13, 2007.

5. Article 5.B.5. of the Reserve Policy Manual states that if a disability is expected to last less than 4 months, the reservist shall be retained in the SELRES and the command shall either schedule the reservist for IDT training in a limited duty status or shall reschedule drills for when the member is fit for full duty. It appears that although the supervisor stated that a plan was developed for the applicant to make up the missed drills, only two extra weekend drill days were scheduled when the applicant actually needed to have 4 extra weekend drill days scheduled for make-up by the end of his anniversary year on April 13, 2007 to make up for the missed drills in January and February. Therefore, it appears that the applicant's unit failed in its obligation to properly reschedule the correct number of make-up drills by the end of his anniversary year ending April 13, 2007. Accordingly, the Board finds that this error led to the applicant having only 49 instead of 50 or more points at the end of his anniversary year ending April 13, 2007.

6. The Board finds that in light of this error, the applicant's retirement points statement should be corrected to show that he earned 50 points for the anniversary year ending April 13, 2007. Over the past 12 years, the applicant has earned satisfactory years (50 or more points) for each year except for the one under review. For anniversary year ending April 13, 2008, the applicant earned 96 points, when only 50 points are needed for a "good year."

7. The BCMR has corrected military records to grant additional points for retirement and to servicewide examination scores for enlisted advancement depending on the circumstances. In BCMR No. 193-92, the Deputy General Counsel for the Department of Transportation approved the Board's decision correcting the applicant's record to show that he "received sufficient points to make his 1979 [anniversary year] satisfactory and that he performed 20 years of creditable military service in order to receive retirement with pay." The applicant in BCMR No. 193-92 was a reservist and a New York police officer. He was injured in the line of duty and could not drill or perform active duty training. In granting relief, the Board found that that applicant's inability to acquire 50 points was through no fault of his own and that the Coast Guard committed an injustice when it failed in 1979 or at any time thereafter to inform him that his unsatisfactory year in his 1979 anniversary year would cause him to be unable to complete 20 years of satisfactory service for retirement purposes prior to his 62nd birthday. The Coast Guard admitted that it committed an error when it allowed the applicant to reenlist for four years in 1988 when the applicant would exceed the maximum 62 years of age before his expiration of enlistment and therefore be ineligible for retirement with pay. That Board found in BCMR No. 193-92 that the Coast Guard committed an injustice when it failed to inform the applicant at the time of his 1988 reenlistment that he could not qualify for retirement with pay because he would reach age 62 before earning 20 years of satisfactory service for retired pay.

8. In BCMR No 224-85, the Board granted the applicant additional time in service which added points to his servicewide examination score for advancement. The Board found that the applicant reasonably relied on the assurances of his yeoman that the incorrect amount of service time listed on his servicewide examination documents would not affect his final standing on the advancement list, which turned out not to be the case.

9. In BCMR No. 281-85, the Board corrected an applicant's record to grant him one point on his servicewide examination score because the Coast Guard failed to process an award in a timely manner that would have added sufficient points to his score to allow for his advancement. He was ordered advanced to the next higher grade.

10. In BCMR 2002-040, the Deputy General Counsel for the Department of Transportation approved the correction of a newly commissioned officer's record to show that he was an officer with enlisted service because he had relied to his detriment on counseling by a Coast Guard yeoman that he was eligible for the classification if he attended a specific officer candidate training school. The Deputy stated that "it is possible for the Coast Guard to commit an error or an injustice when a member has relied on misinformation by a Coast Guard employee to his or her detriment."

11. The applicant was temporarily disabled from December 26, 2006 to March 12, 2007. His missed drills for this period were excused and a schedule was developed by his unit for him to make-up the missed drills. The make-up missed drill schedule that he presented to the Board on his DD 149, and that was not disavowed by his then-supervisor, was not sufficient in number to account for all the missed drills by the end of his April 13, 2007 anniversary year. This miscalculation resulted in the applicant being one point shy of 50 points for a "good year." The applicant failed to earn 50 points because he relied to his detriment on a schedule created by his unit that failed to calculate and to reschedule the number of make-up drills required to cover those excused for January and February 2007. The unit's miscalculation resulted in the applicant not earning several points and being one point shy of 50 points, which constituted an error and caused an injustice to the applicant.

12. Accordingly, the applicant's record should be corrected to show that he earned 50 points instead of 49 points for the anniversary year ending April 13, 2007. The one point should be deducted from the 96 points the applicant earned for anniversary year ending April 13, 2008 and added to his point total for the anniversary year ending April 13, 2007. In addition, since the applicant will have 20 years of satisfactory service with the anniversary year ending April 13, 2012, not including the anniversary year ending April 13, 2007, the Coast Guard is not prejudiced by correcting this applicant's record to show that he has earned 50 points instead of 49 points for the anniversary year ending April 13, 2007.

ORDER

The application of XXXXXXXXXXXXXXXXXXXXXXXX, for correction of his military record is granted. His record shall be corrected to show that he earned 50 points instead of 49 points for his anniversary year ending April 13, 2007. The Coast Guard shall make this correction by moving one point from his total of 96 points for the anniversary year ending April 13, 2008, and adding that to the 49 points for the anniversary year ending April 13, 2007, for a total of 50 points for the anniversary year ending April 13, 2007. The correction will leave him with 95 points for the anniversary year ending April 13, 2008.

No other relief is granted.

