DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-008

[redacted]

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 after receiving the applicant's completed application on October 15, 2012,[1] and assigned it to staff member [redacted] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated July 12, 2013, 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 reservist, asked the Board to correct his record by crediting him with drill points and pay and a travel allowance for participating in a deposition on September 9, 2009. The applicant alleged that about a month after his release from active duty on July 4, 2009, a Coast Guard attorney contacted him and asked him to participate in the deposition, which concerned a search and rescue case he had participated in as a boarding team member while on active duty in [redacted]

In support of his allegations, the applicant submitted a transcript of the deposition, which shows that he was deposed for a lawsuit between private parties on September 9, 2009. The applicant was living in [redacted] and the deposition occurred about 22 miles away in [redacted] The deposition concerned a [redacted] and lasted from 3:35 to 5:10 p.m. The applicant also submitted copies of emails showing that on August 18, 2009, the attorney of the defendants in the lawsuit sent court deposition notices to the applicant through a Coast Guard attorney, who in turn asked the applicant if being deposed at 3:30 on September 9th would "work for you." The Coast Guard attorney noted that the location of the deposition was 7 miles from the applicant's place of work in [redacted] and asked whether "30 minutes [was] enough time for you to get to [redacted] after work." The applicant replied that it would be "no problem"

[1] The applicant's DD 149 was signed on September 8, 2012, and received on September 20, 2012, but was not completed in accordance with 33 C.F.R. § 52.21 until his records were received on October 15, 2012.

and asked if the Coast Guard attorney would be present. The attorney stated that he would be attending as "Coast Guard representation."

VIEWS OF THE COAST GUARD

On April 18, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the requested relief.

The JAG admitted that in 2009 the applicant was asked by a Coast Guard attorney to testify pursuant to a civil lawsuit between private parties because he was a member of a boarding crew that had responded to a distress call following [redacted] The JAG also admitted that, if required to drill at a location other than their regular drill location, reservists may be entitled to a travel allowance pursuant to paragraph U7150.C3 of the Joint Federal Travel Regulations (JFTR). The JAG argued, however, that the applicant was a member of the Individual Ready Reserve (IRR) and not under any orders to drill. The JAG stated that even if the applicant had contacted his command in advance and sought permission to count the deposition as a drill, it would not have counted because a drill must last at least 4 hours, which the deposition did not. The JAG stated that if the applicant had asked the command for the drill and the drill had lasted at least 4 hours, then "he should have been placed on TDY [temporary duty] orders and received entitlements per the JFTR." The JAG argued that because the deposition did not last at least 4 hours, it cannot count as a drill.

The JAG also adopted the findings and analysis of the case in a memorandum by the Personnel Service Center (PSC). PSC stated that the applicant's request should be denied because he failed to contact his command to request to perform the drill and because the deposition lasted only 1 hour and 35 minutes, rather than a full 4 hours. In addition, PSC noted that under Article 1.C.2.b. of the Personnel Manual, members of the IRR are not paid for drills.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 17, 2013, the applicant responded to the views of the Coast Guard. The applicant stated that he conceded that for the purpose of earning retirement points and drill pay, a drill needs to last at least four hours. However, he argued, because the deposition was for Coast Guard related business, his travel expenses should be reimbursed. However, the Coast Guard attorney who contacted him never advised him to contact PSC for permission to drill and, when he asked whether the Coast Guard would issue orders for him to testify, the attorney stated "probably not."

APPLICABLE LAWS

Reserve Policy Manual

Chapter 1.C.2.b. of the Reserve Policy Manual in effect in 2009 stated that the IRR is

> [a] manpower pool principally consisting of individuals who have had training and have previously served in the Active forces or in the Selected Reserve. The IRR consists of individuals who must fulfill their military service obligation (MSO) under 10 U.S.C. 651, and those who have

> fulfilled their MSO and who voluntarily remain in the IRR. IRR members are not required to meet the same IDT and ADT training requirements as Selected reservists.
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> (1) IRR members may voluntarily participate in Reserve training programs (i.e., IDT or ADT) for retirement points only, without pay, and shall be assigned to the same Coast Guard or selected Joint Service units as their SELRES counterparts. They may also apply to perform Active Duty Special Work (ADSW) or Readiness Management Periods (RMPs) for pay. …
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> (2) Non-drilling IRR members are assigned to Commander, Personnel Command (rpm), who serves as members' commanding officer and point of contact for all administrative purposes. [redacted]

Chapter 1.D.6. of the Reserve Policy Manual (RPM) shows that members of the IRR may drill, but may not be paid for drills. However, they may be paid for a Readiness Management Period (RMP) or for performing active duty if they receive orders for active duty for training (ADT) or active duty for special work (ADSW). RMPs are periods of inactive duty of at least 3 hours for "accomplish[ing] training preparation or unit administration and maintenance functions, such as medical and dental readiness examinations and participation in enlisted Service-wide examinations … [T]he overall emphasis of the period is to improve individual or unit readiness (e.g., semi-annual weigh-in, verification of emergency data and SGLI, pre-mobilization training, hurricane preparedness, etc.)." RPM, Chap. 2.A.5. There are three kinds of ADT: IADT, which is a recruit's initial training period; ADT-AT, which "is to provide individual and/or unit readiness training" and "shall be for not less than 12 days and not more than 15 days"; and ADT-OTD, which is training in the member's specialty or rating with "a clear end result such as certification, re-certification, qualification, completion of performance qualifications, or graduation from a formal course of instruction." RPM, Chap. 3.A.3.b. ADSW is defined in Chapter 3.A.4.a. of the RPM as follows:

> Active Duty Special Work (ADSW), for the Active Component (ADSW-AC) or for the Reserve Component (ADSW-RC), which is active duty for reservists, authorized from applicable military or reserve appropriations (AC funded or RC funded) to support AC or RC programs, respectively. The purpose of ADSW is to provide the necessary skilled manpower assets to temporarily support existing or emerging requirements.

Chapter 3.B.1. states that requests for ADT-AT, ADT-OTD, ADSW, and IADT orders must be submitted by the unit or the member utilizing the Reserve Orders module in Direct Access. … Supervisors in the chain of command or commanding officers shall forward active duty requests to their servicing ISC (pf) in order for written orders to be issued well in advance of duty dates. Verbal orders may be issued in time-critical or emergency situations, but orders in writing must follow as soon as possible." Chapter 3.B.1.b. states that active duty "orders shall not be retroactively amended to change entitlements for duty already performed unless all facts and circumstances clearly demonstrate that some provision previously determined and definitely intended was omitted through error." Chapter 3.B.3. states,

> Unless otherwise stated, active duty orders are assumed to be for pay. Non-pay active duty is always voluntary duty. Active duty without pay accrues retirement points the same as active duty with pay. Per diem is not normally authorized for reservists who are performing active duty without pay; however, units may separately authorize per diem for reservists performing active duty without pay while they are in a travel status.

Chapter 3.B.5. states that a reservist on active duty who travels "outside the local commuting area to the assigned duty station" may be entitled to travel and per diem allowances.

Chapters 2.A.3. of the RPM states that reservists earn 1 point for each single drill attended and a single drill must "be four or more hours in duration" and "be performed in one calendar day." Travel time to and from the drill is not normally included in the 4 hours. Chapter 8.C.3.a.2. states that reservists receive 1 point for each day of active duty performed.

Joint Federal Travel Regulations

Reimbursement for "witness travel" is cove[redacted]TR in effect in 2009. Part E does not mention reservists. Paragraph U7062 in Part E states that an *active duty* member who serves as a witness in a criminal or civil case in which the Service "has a particularly strong compelling and genuine interest, may receive TDY travel and transportation allowances from the appropriate Service's funds, if competent authority determines that travel is required … . An active duty member, subpoenaed as a witness for … a private individual, or a corporation, does not receive any travel and transportation allowances. The witness should make arrangements for travel and subsistence expense payments with the individual or agency desiring testimony."

Paragraph U4100 of Part B of Chapter 4 of the JFTR states that per diem is paid "to offset the cost of lodging, meals, and incidental expenses" while the member is traveling away from his permanent duty station. U4102-F states that "[a] member is not authorized per diem for TDY that is performed entirely within 12 hours. Occasional meals may be reimbursed under par. U4510 when the member is required to procure a meal/meals at personal expense outside the PDS limits. See Ch 3 for transportation allowances."

Paragraph U7150-D.2. of Part G of Chapter 7 of the JFTR states that that a reservist who is not in the Standby Reserve and who is "authorized to perform inactive duty training without pay is authorized the travel and transportation allowances in par. U7150-C." Paragraph U7150-C.5. states that a "member directed to travel from other than the home/assigned unit to an alternate site within the local commuting area of the assigned unit/home is not authorized travel and transportation allowances" but may be paid "TDY mileage for the distance, limited to the distance from the assigned unit to the alternate site less the distance from home to the assigned unit."

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. Although the application was not completed by receipt of the applicant's military records until October 15, 2012, the Board finds that it should be considered timely because the applicant submitted his application to the Board within three years of the date he would have discovered

that he had not been paid or received a drill point for his deposition on September 9, 2012.[2] The Board notes that the applicant did not submit evidence showing that he has applied for and been refused reimbursement for his transportation to the deposition. However, since the Coast Guard did not allege that the applicant has failed to exhaust an available administrative remedy,[3] the Board finds the case is ready for decision.

2. The applicant alleged that the Coast Guard erroneously refused to award him drill and travel pay and points for participating in the deposition. When considering allegations of error and injustice, the Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[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]

3. The Board notes that according to the evidence of record, the deposition occurred in [redacted] which was located between the applicant's place of work in [redacted] and his home in [redacted] The evidence shows that he left work in [redacted] at about 3:00 p.m., drove north to the law offices for the deposition, which lasted from 3:35 to 5:10 p.m., before (presumably) heading northwest to his home in [redacted] The evidence also shows that the deposition was taken pursuant to litigation between private parties about a matter that the applicant had knowledge of because of his service on a Coast Guard boarding team while on active duty in 2006. The emails show that a Coast Guard attorney forwarded court deposition notices (not subpoenas) from one of the private parties' attorneys to the applicant and attended the deposition as "Coast Guard representation." There is no evidence that the attorney told the applicant he was required to testify.

4. The record indicates that the applicant's command had not authorized any inactive duty (drill or RMP) for him on the day in question, and no active duty orders had been issued. Although the Coast Guard suggested that the Board's inquiry should end there, the Board finds that the preponderance of the evidence shows that the applicant was reasonably relying on a Coast Guard attorney to advise him about what he should do, and he apparently asked the attorney whether he could get orders to require his attendance at the deposition as official duty. The attorney advised him "probably not." The attorney was presumptively correct,[6] but if the preponderance of the evidence shows that the attorney misled the applicant about his entitlements, the applicant should receive whatever payments he was due under applicable law.

5. The applicant has conceded that drill pay and points are earned only for drills lasting at least 4 hours,[7] which the deposition did not. The Board further notes that as a reservist

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[2] 10 U.S.C. § 1552(b).
[3] 33 C.F.R. § 52.13(b).
[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).
[6] *Id.*; 33 C.F.R. § 52.24(b).
[7] RPM, Chapters 2.A.3. and 2.A.4.

in the IRR, the applicant could have drilled for points but not for pay even if his command had granted a request to drill.[8] Reservists in the IRR may be paid for RMPs,[9] but the applicant's participation in the deposition for private litigants does not appear to meet the requirements for an RMP since the deposition did not last 3 hours and would not have affected the applicant's or the unit's readiness for mobilization.[10] Nor does the applicant's participation in the deposition meet the definition of any other type of inactive duty under Chapter 2 of the RPM because it did not qualify as a single drill and did not involve funeral honors.[11]

6. The applicant's participation in the deposition for 1 hour and 35 minutes does not appear to meet the definition of any type of inactive duty under Chapter 2 of the RPM. Under the JFTR, if the applicant had been authorized inactive duty by his command, he would not have been entitled to payment of per diem because his travel lasted less than 12 hours,[12] and he would not have been authorized a travel allowance.[13] Members are not entitled to transportation reimbursement for their commutes from home to their assigned duty stations.[14] Paragraph U7150-C.5. of the JFTR states that a reservist on inactive duty who is directed to travel on "official business" from some place other than his home to a duty station is entitled to reimbursement for the excess mileage, calculated by subtracting the distance from the member's home to the duty station from the distance from the other place to the duty station. In this case, however, the distance from the other place—the applicant's work site in [redacted]—to the deposition location in Xxxxx was less than the distance from the member's home in [redacted] to [redacted] or to the closest Coast Guard unit, and so even assuming the deposition constituted "official business," no excess mileage appears to have been incurred.

7. In light of findings 5 and 6 above, the Board concludes that the applicant has not proven by a preponderance of the evidence that he would or should have been authorized inactive duty to attend the deposition or that, if he had been, he would have been entitled to any points or any type of pay, allowance, or reimbursement for traveling to and attending the deposition.

8. Under paragraph U7062 of the JFTR, a member on active duty may be reimbursed for "witness travel" when the litigation involves private litigants only if the Service "has a particularly strong, compelling and genuine interest" in the case and if "competent authority determines that travel is required." Although the Coast Guard apparently had some interest in the case because its attorney attended, there is no evidence that it had a "particularly strong, compelling and genuine interest." In addition, to the Board's knowledge, no law required the Coast Guard to issue active duty orders for the applicant before facilitating his participation in the deposition on behalf of the private litigants.

9. Under Chapter 3 of the RPM, the types of active duty authorized for reservists do not appear to encompass one-day orders to be deposed for private litigation: IADT is for initial

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[8] RPM, Chapters 1.C.2.b. and 1.D.6.
[9] RPM, Chapter 1.D.6.
[10] RPM, Chapter 2.A.5.
[11] RPM, Chap. 2.A.2.
[12] JFTR, Chap. 4, Pt. B, U4102-F (2009).
[13] JFTR, Chap. 7, Pt. G, U71500C.2 (2009).
[14] JFTR, Chap. 3, Pt. F, U3505-A (2009).

recruit training; ADT-AT must last for at least 12 days; ADT-OTD is for training in the member's rating that leads to a certification of some kind; and ADSW is "to provide the necessary skilled manpower assets to temporarily support existing or emerging requirements" of either the Reserve or Active Component.[15] Even assuming *arguendo* that the purpose of ADSW orders under Chapter 3.A.4.a. of the RPM could be interpreted to include a deposition for private litigation in which the Coast Guard has some interest, the Board is not persuaded that the applicant would have been entitled to per diem, a travel allowance, or reimbursement for transportation to the deposition if he had been issued active duty orders to report for one day to the location of the deposition. His drive to the deposition was clearly within a reasonable commuting distance and not "outside the local commuting area" since the location of the deposition in [redacted] lay roughly between his civilian work location in [redacted] and his home in [redacted].[16]

10. In light of findings 8 and 9 above, the Board concludes that the applicant has not proven by a preponderance of the evidence that he would or should have been issued active duty orders to attend the deposition. If he had been, he would have been entitled to basic pay and one point, but he would not have been entitled to any travel allowance, per diem, or reimbursement for traveling to and attending the deposition. Although the Coast Guard facilitated the applicant's participation, the Board can find no policy that required the Coast Guard to issue orders for him to perform any kind of inactive or active duty. The Board is authorized to correct injustices as well as errors.[17] But based on the evidence of record and the circumstances of this case—especially the location of the deposition site between the applicant's home and work site—the applicant's voluntary participation in a deposition for private litigants without being paid by the Coast Guard does not shock the Board's sense of justice even though he was asked to testify because of his active duty service.[18]

11. Accordingly, the applicant's request should be denied because he has failed to prove by a preponderance of the evidence that the Coast Guard's refusal to authorize active or inactive duty and the consequent benefits and entitlements for the afternoon of the deposition constitutes an error or injustice.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

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[15] RPM, Chapter 3.A.

[16] RPM, Chapter 3.B.5.; JFTR, U7150-A, U3505, U3510, U4100 (2009).

[17] 10 U.S.C. § 1552(a).

[18] 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).

ORDER

The application of [redacted] USCGR, for correction of his military record is denied.

[redacted]