

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-191



FINAL DECISION

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. After receiving the applicant's completed application on August 28, 2015, the Chair docketed the case 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 21, 2016, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUESTS AND ALLEGATIONS

The applicant asked the Board to correct his record to show that he is eligible for a Reserve retirement. When he transferred from the active to the inactive Reserve in 1995, he had accumulated 19 years, 9 months, and 19 days of service toward retirement. He alleged that when he was first reenlisted 90 days before the end of his enlistment, he was told that it was legal and that if he continued to reenlist 90 days early every four years, he could retire a year early. The applicant also alleged that at one point, he was told that he had two unsatisfactory years toward retirement and so he served two extra years, and when he was transferred to inactive status in 1995, he was told that he had plenty of points to retire and that he would get a retirement letter in a year or two.

SUMMARY OF THE RECORD

On October 27, 1969, the applicant enlisted in the regular Coast Guard for four years. He was discharged on August 15, 1973, after 3 years, 9 months, and 19 days on active duty and immediately reenlisted on August 16, 1973, for six years. He was honorably discharge on completion of this reenlistment on August 15, 1979, and so had completed a total of 9 years, 9 months, and 19 days of active duty. He enlisted in the Reserve the next day, August 16, 1979.

As a member of the Selected Reserve beginning on August 16, 1979, the applicant drilled and performed annual training. He earned more than 50 points to be credited with satisfactory

years of service for ten years—from 1980 through 1990 except for the year 1984, in which he earned just 23 points.

On March 12, 1989, the applicant reenlisted in the Reserve for 8 years. However, on November 26, 1990, the Personnel Command issued orders transferring the applicant to the Individual Ready Reserve (IRR). In the IRR, the applicant could drill for points but not pay. However, his retirement points statements show that although he remained a member of the Ready Reserve for several years, he did not continue to drill for points, and 1990 was the applicant's last satisfactory year for retirement purposes.

A Statement of Creditable Service (SOCS) prepared in 1992 shows that he had 9 years, 9 months, and 19 days of active duty service and 10 satisfactory years of Reserve service for a total of 19 years, 9 months, and 19 days of creditable service toward retirement. The SOCS shows specifically that the applicant earned 65 points in his Reserve anniversary year ending August 15, 1980; 62 points in 1981, 60 points in 1982, 55 points in 1983, only 23 points in 1984, 69 points in 1985, 60 points in 1986, 60 points in 1987, 82 points in 1988, 76 points in 1989, and 79 points in 1990.

The applicant remained a member of the IRR, but he did not drill again. On April 9, 2010, he was transferred to the Inactive Status List (ISL), where reservists may not earn points towards retirement. The applicant was discharged from the Reserve on [REDACTED]

VIEWS OF THE COAST GUARD

On January 28, 2016, the Judge Advocate General submitted an advisory opinion recommending that the Board grant relief in this case in accordance with the findings and analysis provided in a memorandum, dated December 15, 2015, submitted by the Personnel Service Center (PSC).

PSC stated that the applicant needs 20 years of qualifying service toward a Reserve, non-regular retirement and only has 19 years, 9 months, and 19 days. Therefore, PSC stated, to qualify for retirement he must be credited with another 2 months and 11 days of activity duty service or 50 points within an anniversary year to attain 20 years of service for non-regular retirement.

PSC stated that no evidence has been found to support the applicant's claim that he was told that he had sufficient service time for retirement. However, because the applicant's 19 years, 9 months, and 19 days of service was an insufficient amount of time to earn non-regular retirement, the applicant should have been counseled with this information. PSC cited 10 U.S.C. § 1176, which states that if as of the date on which a member is to be discharged or transferred from an active status, the member has at least 19, but less than 20, years of service, the member has to be provided the opportunity to be credited with 20 years of service by the second anniversary of the intended date of discharge or transfer from an active status.

PSC stated that a reservist who is not qualified for retirement and not statutorily precluded from discharge may be discharged without board proceedings. The applicant reached the mandatory discharge age of 60 on [REDACTED]. Therefore, he was discharged from the

Reserve on [REDACTED] The reason for separation was listed as “expiration of enlistment.” PSC found that this separation was invalid since the applicant reached age 60 on [REDACTED] and should have either requested a waiver to remain in an active status until age 62 or been discharged. PSC stated that there is no evidence in the record that the applicant was warned that he did not have enough qualifying years for retirement and found that the applicant was not sufficiently counseled on policy and statute. Therefore, PSC recommended that the Board grant relief.

PSC recommended granting relief to the applicant by crediting 27 additional points in anniversary year ending August 15, 1984, to complete the qualifying year of service toward non-regular retirement. PSC recommended placing the applicant in retirement status of RET-1 (retired with pay) with the effective date of the final decision rendered by the Board.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 2, 2016, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond in writing within 30 days. No response was received.

APPLICABLE LAW AND POLICY

Title 10 U.S.C. § 12731 states the following regarding entitled [REDACTED] ve, non-regular retired pay:

(a) Except as provided in subsection (c), a person is entitled, upon application, to retired pay computed under section 12739 of this title, if the person--

- (1) has attained the eligibility age applicable under subsection (f) to that person;
- (2) has performed at least 20 years of service computed under section 12732 of this title;
- (3) in the case of a person who completed the service requirements of paragraph (2) before April 25, 2005, performed the last six years of qualifying service while a member of any category named in section 12732(a)(1) of this title, but not while a member of a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve, except that in the case of a person who completed the service requirements of paragraph (2) before October 5, 1994, the number of years of such qualifying service under this paragraph shall be eight; and
- (4) is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.

(b) Application for retired pay under this section must be made to the Secretary of the military department, or the Secretary of Homeland Security, as the case may be, having jurisdiction at the time of application over the armed force in which the applicant is serving or last served.

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(f)(1) Subject to paragraph (2), the eligibility age for purposes of subsection (a)(1) is 60 years of age.

Under 10 U.S.C. § 12732, a reservist’s years of service are computed by counting each year “in which the person has been credited with at least 50 points,” and a member receives one point for each day of active duty, one point for each 4-hour drill, and 15 gratuitous membership points per year.

Under 10 U.S.C. § 12733, a reservist’s years of service are computed based in part on the reservist’s days of active service, days of active duty, and points.

Reserve Administration Training Manual, COMDTINST M1001.27A states, in relevant part:

12-C-9 Retirement Points:

Fifty points must be earned in an anniversary year for that year to be satisfactory for computation of service for retirement.

1-D-9 30 Year Limitation:

On the thirteenth anniversary of their pay base date, Enlisted and chief warrant officer reservists will be transferred to TRA/PAY CAT H [the IRR].

- (1) Members so transferred may continue to participate in training and earn retirement points through IDT, ADT, and correspondence courses, in a non-pay status.

Title 10 U.S.C. § 1176, Enlisted members: retention after completion of 18 or more but less than 20, years of service states, in relevant part:

(b) Reserve Members in Active Status:

A reserve enlisted member serving in an active status who is selected to be involuntarily separated (other than for physical disability or for cause), or whose term of enlistment expires and who is denied reenlistment (other than for physical disability or for cause), and who on the date on which the member is to be discharged or transferred from an active status is entitled to be credited with at least 18 but less than 20 years of service computed under section 12732 of this title, may not be discharged, denied reenlistment, or transferred from an active status without the member's consent before the earlier of the following:

- (1) If as of the date on which the member is to be discharged or transferred from an active status the member has at least 18, but less than 19, years of service computed under section 12732 of this title—

(A) the date on which the member is entitled to be credited with 20 years of service computed under section 12732 of this title; or

(B) the third anniversary of the date on which the member would otherwise be discharged or transferred from an active status.

- (2) If as of the date on which the member is to be discharged or transferred from an active status the member has at least 19, but less than 20, years of service computed under section 12732 of this title—

(A) the date on which the member is entitled to be credited with 20 years of service computed under section 12732 of this title; or

(B) the second anniversary of the date on which the member would otherwise be discharged or transferred from an active status.

The Reserve Policy Manual, COMDTINST M1001.28A, Article 8.B.3 states, in relevant part:

A member not qualified for retirement (and not statutorily precluded from discharge) shall be discharged without board proceedings unless Commandant approves the member's request to defer retirement until age 62 (or sooner if the member becomes retirement qualified in the interim).

The Enlisted Accessions, Evaluations, and Advancements, COMDTINST M1000.2 states, in relevant part:

If a person has no obligation remaining under 10 USC § 651 it may be more expedient to effect a reenlistment prior to the expiration of the member's enlistment. Authority is granted to discharge and reenlist a reservist not earlier than three months before the expiration of his or her enlistment and not later than the day following the date of expiration of enlistment.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.
2. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. The applicant alleged that he discovered the alleged error in his record "sometime in 1995," which would make his application untimely.
3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if 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 to determine 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." The court further instructed that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review."¹
4. The applicant did not apply to the Board for correction of his military record until August 2015. However, it appears that misinformation and a lack of counseling may have caused his delay, and if misinformed, the applicant would not have known that he was not entitled to a Reserve retirement until he did not begin receiving retirement pay following his 60th birthday, which was [REDACTED]. Therefore, and given the potential merit of the applicant's request, the Board finds that it is in the interest of justice to excuse the application's untimeliness, waive the statute of limitations, and review the application on the merits.
5. The applicant alleged that his failure to qualify for a Reserve retirement is an error and injustice because he was misinformed and believed that he had qualified when in fact, he had 19 years, 9 months, and 19 days of creditable service toward retirement. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in

¹ *Allen v. Card*, 799 F. Supp. 158, 164,165 (D.D.C. 1992), see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

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.² 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."³

6. The Board is persuaded that the applicant was misinformed and believed that he had qualified for retirement when he stopped earning points in 1991. Before 1991, he had drilled very regularly, except in 1984, and he usually earned well more than the minimum of 50 points required to have a satisfactory year for retirement purposes. According to 10 U.S.C. § 1176, if as of the date on which a member is to be discharged or transferred from an active status, the member has at least 19, but less than 20, years of service, the member must consent to being transferred from an active status and so must have the opportunity to be credited with 20 years of service. Providing such an opportunity and receiving a member's consent would require at least notification of the issue and advice, and there is no evidence that the applicant was ever told that he had 19 but not 20 qualifying years of service and that he could request a waiver to remain in the IRR long enough to earn another qualifying year. Nor is there any evidence that he consented to being transferred to the ISL in April 2010, when he could have otherwise earned another satisfactory year of service for retirement purposes prior to his 60th birthday. With proper counseling, the applicant could have completed a 20th satisfactory year of service instead of being transferred to the ISL in 2010. Given the lack of evidence that the applicant was ever notified and offered the choice of consenting or requesting a waiver, and given the fact that the SOCS shows that he has been credited with 19 years, 9 months, and 19 days of service toward a non-regular retirement, the Board finds that his lack of legal entitlement to a Reserve, non-regular retirement constitutes an injustice in his record that should be corrected. His record should be corrected to show that he completed 20 years of satisfactory service toward a Reserve retirement and is in a retired pay status (RET-1).

7. PSC commented that the Board grant relief by adding 27 drill points to the applicant's record for 1984 to make that a satisfactory year toward retirement but then make him eligible for retired pay only as of the date of the Board's decision, with no entitlement to back pay. PSC cited no authority for this recommendation, and the JAG adopted it without comment. The Board finds that the relief recommended by the Coast Guard is overly generous in one respect and insufficient in another. It is overly generous because retired pay is calculated based in part on the total number of retirement points a member has earned during his or her career. Adding 27 unearned retirement points to the applicant's record in 1984, without subtracting 27 points from other years, would produce an unjustifiable increase in his retired pay. Therefore, to grant appropriate relief, the 27 points added to the applicant's 1984 anniversary year should be subtracted from his 1988 anniversary year, when he earned 82 points (and so can lose 27 points from that year with falling below 50 and losing a satisfactory year of service).

8. On the other hand, with respect to the date the applicant's retired pay should begin, the U.S. Court of Federal Claims half-a-loaf doctrine for the BCMRs demands that the

² 33 C.F.R. § 52.24(b).

³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

applicant receive the retired pay that he would have been entitled to if he had actually accumulated 20 years of satisfactory service toward retirement: “The ‘half-a-loaf’ doctrine normally applies where a corrections board grants plaintiff’s claim, but stops short of awarding the full appropriate relief requested by plaintiff. Failure of the board to grant full relief where it is mandated by the records change results in ‘a new cause of action’ or “‘continuing’ claim’ which revives the statute of limitations.”⁴ The court has also noted that “[o]nce the Board decides to give a remedy, it should not be free to slice the relief illegally or arbitrarily, sending the claimant forth with half-a-legal-loaf or even less.”⁵ Using the date of the Board’s decision as the date to start the applicant’s retired pay appears arbitrary since the date of decision has not been within the applicant’s control and since pursuant to the correction being made to his record, he would have been eligible for RET-1 status since his 60th birthday.

9. Under 10 U.S.C. § 12731(b), reservists must apply for retired pay, and the Coast Guard normally notifies them by mail in advance of their 60th birthdays of the steps they must take to receive retired pay. In this case, the applicant would have received no such notice because he was, at the time, ineligible for retirement, but he was only ineligible because the Coast Guard had failed to advise him to gain his consent before transferring him to the ISL in 2010, as required by 10 U.S.C. § 1176. Therefore, the applicant’s failure to request RET-1 status prior to his 60th birthday is attributable to the Coast Guard’s error, and to avoid giving the applicant only “half a loaf,” as the courts prohibit, his record should be corrected to show that he was transferred to RET-1 status (Retired with pay) on his 60th birthday.

10. Accordingly, relief should be granted by subtracting 27 points from the applicant’s 1988 anniversary year and adding the same 27 points to his 1984 anniversary year so that it becomes a satisfactory/qualifying year and he will have 20 years of satisfactory service for retirement purposes. His record should be further corrected to show that he was transferred to retired status RET-2, instead of being transferred to the ISL on April 9, 2010, and that he requested and was transferred to RET-1 status (Retired with pay) as of his 60th birthday, which was [REDACTED]. He should receive any amount due as a result of these corrections.

(ORDER AND SIGNATURES ON NEXT PAGE)

[REDACTED]

⁴ *Bonen v. United States*, 229 Ct. Cl. 144, 149 (1981) (citing *Denton v. United States*, 204 Ct. Cl. 188, 195, *cert. denied*, 421 U.S. 963 (1975)).

⁵ *DeBow v. United States*, 193 Ct. Cl. 499, 504 (1970), *cert. denied*, 404 U.S. 846 (1971).

ORDER

The application of former [REDACTED] USCGR, for correction of his military record is granted as follows:

- The Coast Guard shall correct his military record by subtracting 27 points from his points total for his anniversary year ending in 1988 and adding them to his total for his anniversary year ending in 1984, so that he shall be credited with a total of 50 points for his 1984 anniversary year and 55 points (instead of 82) for his 1988 anniversary year and shall have 20 years of satisfactory/qualifying service toward a Reserve, non-regular retirement.
- The Coast Guard shall correct his record to show that he was transferred to RET-2 status (Retired without pay), instead of the Inactive Status List, on April 9, 2010, and that he was transferred to RET-1 status (Retired with pay) on this 60th birthday.
- The Coast Guard shall pay him any amount due as a result of these corrections.

July 21, 2016

