

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-080

GM2 ([REDACTED])

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on March 10, 2020, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated December 2, 2022, 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 Gunner's Mate second class (GM2/E-5) who was discharged from the regular Coast Guard on August 31, 2015, asked the Board to correct his record by issuing him a non-regular retirement letter ("20-year letter") indicating that he had obtained at least twenty years of qualifying service for a Reserve retirement.¹

The applicant, through counsel, argued that he had over twenty years of qualifying service for a Reserve retirement. Specifically, he stated that he had served one year in the Marine Corps Reserve, seven years in the regular Marine Corps, two years in the Coast Guard Reserve, and eleven years in the regular Coast Guard. Accordingly, he argued that he must be granted a Reserve retirement once he reaches 60 years old.

The applicant stated that the Chief of the Coast Guard Legal Services Office denied him a 20-year letter because he was most recently a member of the regular Coast Guard. The applicant argued that this is erroneous and unjust because all active duty service counts as qualifying time for purposes of determining eligibility for a non-regular retirement. Specifically, he argued that that 10 U.S.C. § 12732(a)(2) states that all points earned in an active status of any armed force counts toward a non-regular retirement.

¹ In BCMR case 2016-171, the applicant asked the Board to correct his record by granting him a regular retirement. The Board denied his request because he had not completed the required 20 years of active duty.

SUMMARY OF THE RECORD

The applicant enlisted in the Marine Corps on June 27, 1994. He was released from active duty on March 20, 2002. A copy of the applicant's DD-214 for his service in the Marine Corps shows that he had completed 7 years, 8 months, and 24 days of active duty. His DD-214 also shows that he had no prior active service and 10 months and 29 days of prior inactive service.

On April 23, 2003, the applicant entered the Coast Guard Reserve. About two years later, on July 11, 2005, the applicant was discharged from the Reserve. According to his Statement of Credible Service, the applicant had served 6 months and 29 days of active duty while serving in the Reserve.

On July 12, 2005, the applicant enlisted in the regular Coast Guard.

On August 31, 2015, the applicant was discharged for unsuitability in accordance with Article 1.B.15. of the Military Separations Manual. His DD-214 shows "under honorable conditions" as the character of discharge; "separation for miscellaneous/general reasons" as the narrative reason for separation; RE-4 (ineligible for reenlistment) as the reenlistment code; and JND (separation for miscellaneous/general reasons) as the separation code. Block 12.c. of his DD-214 shows that he had completed 10 years and 20 days of net active duty for this period. Block 12.d. shows that he had completed 8 years, 3 months, and 23 days of total prior active service. Finally, Block 12.e. shows that he had completed 2 years, 7 months, and 20 days of total prior inactive service.

The applicant's record shows a Reserve Points statement for his service. The statement shows that from April 23, 2003, to April 22, 2004, the applicant earned a total of 63 points for inactive duty training. The statement also shows that from April 23, 2004, to April 22, 2005, the applicant earned 90 points for inactive duty training. Finally, the statement explicitly indicates that he served 20 years of qualifying service.

On January 22, 2020, the applicant received a letter from the Chief of the Legal Services Office of the Coast Guard in response to his request for a 20-year letter. The applicant was notified that he was not eligible for a non-regular military retirement or issuance of a 20-year letter. The Chief argued that 20-year letters are not issued to regular Coast Guard members or former members of the regular Coast Guard. In this case, the Chief stated that the applicant left the Reserve on July 11, 2005, and enlisted in the regular Coast Guard the following day. The applicant remained a member of the regular Coast Guard until he was involuntarily discharged on August 31, 2015. The Chief notified the applicant that this was considered a final decision.

VIEWS OF THE COAST GUARD

On September 24, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case.

The JAG stated that the applicant enlisted as a member of the Coast Guard Reserve from 2003-2005. At that point, the applicant enlisted in the regular component of the Coast Guard. He

remained a member of the regular Coast Guard until he was separated on August 31, 2015. Since that time, the applicant has not reenlisted in the Reserve. The JAG noted that even if the applicant had applied for reenlistment in the Reserve, he likely would not have received a positive recommendation for reenlistment based on his separation for alcohol abuse.

The JAG argued that the applicant's application is untimely. Regarding the merits, the JAG argued that the applicant failed to prove that the Coast Guard committed an error or injustice in denying him a non-regular retirement or a 20-year letter. The JAG stated that regular and Reserve components of the Armed Forces are separate entities with distinct paths to retirement. The JAG argued that while Reserve members can receive a regular or non-regular retirement, a regular member is only entitled to a regular retirement. Accordingly, for a member to receive a non-regular retirement in the Coast Guard, the member must be enlisted into the Reserve component. The JAG acknowledged that the other military branches have constructed different schemes, but argued that the Coast Guard continues to maintain this distinction.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 5, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. In his response, the applicant contested the JAG's recommendation to deny relief.

The applicant stated that it is undisputed that he completed over 20 years of qualifying service. He argued that the only remaining issue for the Board is whether the Coast Guard was erroneous and unjust in its interpretation of the federal statute. The applicant stated that in the advisory opinion, the JAG admitted to interpreting the federal statute differently than its sister services. The applicant argued that the other branches of the Armed Forces allow non-regular retirements in cases similar to his. He argued that this variance in the interpretation and applicability of the federal statute by the Coast Guard is the definition of an injustice. The applicant argued that equity requires the Board grant his request for a non-regular retirement based on his years of qualifying service, the clear language of the federal statute, and the Coast Guard's admission that it maintains a divergent interpretation of the law. The applicant concluded by also asking the Board to reconsider his request in BCMR case 2016-171 to grant him a regular retirement.

APPLICABLE LAW AND POLICY

Title 10 U.S.C. § 12731 discusses the age and service requirement for retired pay for non-regular service as follows:

- 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.

...

d) The Secretary concerned shall notify each person who has completed the years of service required for eligibility for retired pay under this chapter. The notice shall be sent, in writing, to the person concerned within one year after the person completes that service. The notice shall include notice of the elections available to such person under the Survivor Benefit Plan established under subchapter II of chapter 73 of this title and the Supplemental Survivor Benefit Plan established under subchapter III of that chapter, and the effects of such elections.

Title 10 U.S.C. § 12732 discusses computation of years of service for non-regular retirement as follows:

(a) Except as provided in subsection (b), for the purpose of determining whether a person is entitled to retired pay under section 12731 of this title, the person's years of service are computed by adding the following:

...

(2) Each one-year period, after July 1, 1949, in which the person has been credited with at least 50 points on the following basis:

(A) One point for each day of—

(i) active service; or

(ii) full-time service under sections 316, 502, 503, 504, and 505 of title 32 while performing annual training duty or while attending a prescribed course of instruction at a school designated as a service school by law or by the Secretary concerned; if that service conformed to required standards and qualifications.

(B) One point for each attendance at a drill or period of equivalent instruction that was prescribed for that year by the Secretary concerned and conformed to the requirements prescribed by law, including attendance under section 502 of title 32.

(C) Points at the rate of 15 a year for membership—

(i) in a reserve component of an armed force,

(ii) in the Army or the Air Force without component, or

(iii) in any other category covered by subsection (a)(1) except a regular component.

Article 8.F. of the Coast Guard Reserve Policy Manual, COMDTINST M1001.28C, discusses retirement as follows:

In accordance with Reference (a), Title 10 U.S.C. §12731 and Reference (b), Title 14 U.S.C. §705, a reservist is entitled, upon application, to non-regular retired pay if the member:

1. Has attained the applicable eligibility age of 60 years, or for purposes of early retirement, as described in Chapter 1, Section C of this Manual regarding RCCs may not be less than 50 years of age;
2. Is not entitled to receive military retired pay under any other provision of law;
3. Has performed at least 20 years of satisfactory qualifying federal service as computed, in accordance with Reference (a), Title 10 U.S.C. §12732; and
4. For members who completed the years of qualifying service on or after 25 April 2005, there is no minimum RC service requirement in accordance with Reference (m), Service

Credit for Non-Regular Retirement, DoDI 1215.07. A member with a combination of 20 qualifying years of active duty and Reserve service may be eligible to receive non-regular retirement whether they are currently serving in the AC or RC. Commanding Officer (CG PPC-RAS) shall notify each person who has completed the years of service required for eligibility for retirement. Notice shall be sent, in writing, to the person concerned within one year after the person becomes eligible in accordance with Reference (a), Title 10 U.S.C. §12731.

Article 8.H.4. of the Reserve Policy Manual states the following about qualifying years of service and combining partial qualifying years of service:

A member who has a break in service that occurs during an anniversary year shall be credited with a partial year for non-regular retirement. When a partial year occurs, the member must meet the minimum retirement point requirements for the member's service to be credited as a partial year toward a qualifying year. Partial years of qualifying service may be combined and credited toward total qualifying service. For the purpose of determining entitlement to retired pay, in accordance with reference (a), 10 U.S.C. §12732, years of satisfactory federal service are computed by totaling all anniversary years in which at least 50 points have been credited on the following basis:

- a. One point for each day of active duty in an Active or Reserve component of an Armed Force, or each day of commissioned service in the National Oceanic and Atmospheric Administration (NOAA) or Public Health Service (PHS). In the case of enlisted members of the Armed Forces who have served as a cadet or midshipman but who did not later receive or do not hold a commission as an officer, service as a cadet or midshipman at a Service Academy shall be included and counted as active duty;
- b. One point for each authorized IDT drill, RMP, ATP or FHD period performed;
- c. 15 points a year for membership in a RC of an Armed Force; and
- d. Points earned by satisfactory completion of authorized Coast Guard correspondence courses.

On May 17, 2021, the Office of the Under Secretary of Defense for Personnel and Readiness issued DoD Instruction 1215.07 regarding service credit for non-regular retirement. The instruction was explicitly made applicable to all Military Departments including the Coast Guard. Article 3.1. discusses the criteria for establishing the service requirement for a satisfactory year of service for a non-regular retirement:

- a. Qualifying Years of Satisfactory Service. Pursuant to Chapter 1223 of Title 10, U.S.C., a qualifying year of creditable service toward a non-regular retirement is a full-year, as described in Paragraphs 3.1.b. and 3.1.c., during which a member of an Active Component (AC) or Reserve Component (RC) is credited with at least 50 retirement points. Accumulating 20 such years, except as otherwise provided by law, is one requirement necessary to qualify for non-regular retired pay.

Article 3.2. of the instruction discusses the Reserve service requirement to qualify for non-regular retirement as follows:

- a. Non-Regular Retirement Qualification. A Service member must complete 20 creditable years of qualifying service to qualify for non-regular retired pay at, or after, the age specified in Section 12731(f) of Title 10, U.S.C.
 1. Any Service member who completed the years of qualifying service before October 5, 1994, must have served the last 8 years of qualifying service in a Reserve Component.

2. Any Service member who completed the years of qualifying service on or after October 5, 1994, but before April 25, 2005, must have served the last 6 years of qualifying service in a Reserve Component.
3. Any Service member who completed the years of qualifying service on or after April 25, 2005, has no minimum Reserve Component service requirement.
4. Continuous service is not required to meet the 6 or 8 years of qualifying service specified in Paragraphs 3.2.a.(1) and 3.2.a.(2).
 - a. Exclude any period of service as an Active Component member intervening between periods of RC service counted toward the 8-year requirement of Paragraph 3.2.a.(1) or the 6-year requirement of Paragraph 3.2.a.(2) in determining whether the Service member has 20 years of eligible service for non-regular retired pay in accordance with Decisions of the Comptroller General, File B-111903.
 - b. Treat service in an Active Component during a partial year as 1 full year of such service for purposes of applying Paragraph 3.2.a(4)(a).

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.² The record shows that the applicant was discharged on August 31, 2015. Within a year of his discharge, the applicant did not receive a non-regular retirement letter as required by law. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in 2015, and his application is untimely.
3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.³ In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review"⁴ to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted 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."⁵ Although the applicant in this case did delay filing his application, the evidence of record reveals a significant, prejudicial error in his record, as explained below, and so the Board finds that it is in the interest of justice to excuse the untimeliness of the application.
4. The applicant argued that the Coast Guard committed an error and injustice by denying him a 20-year letter. First, the applicant argued that he is entitled to a 20-year letter because he completed at least 20 years of qualifying service. Computation of years of service for purposes of a non-regular retirement is established by 10 U.S.C. § 12732. According to the statute, for the purpose of determining whether a person is entitled to non-regular retired pay, a person's years of service are computed by adding each one-year period in which the person has been

² 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

³ 10 U.S.C. § 1552(b).

⁴ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁵ *Id.* at 164, 165; see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

credited with at least 50 points on the following basis: (A) One point for each day of (i) active service; or (ii) full-time service while performing annual training duty or while attending a prescribed course. The member must have 20 full years of qualifying service to be retired, but qualifying partial years may be added to make a full year.⁶

The applicant's record supports his claim that he earned 20 years of qualifying service toward a Reserve retirement:

- His DD-214 from the Marine Corps shows 7 full years of qualifying service and one qualifying partial year of 8 months and 24 days. The 8 months and 24 days are qualifying because he was on active duty at the time and so earned one point for each day of active duty. The 8 months and 24 days amount to 264 days calculated per regulations as 8 months times 30 days per month (240 days), plus 24 days.
- The applicant's Coast Guard records show 12 full years of qualifying service from April 23, 2003, through April 22, 2015, and one qualifying partial year for his 131 days of active duty from April 23, 2015, through his discharge from active duty on August 31, 2015.
- The applicant's two partial years of qualifying service combine to more than one full qualifying year of service because 264 days plus 131 days equal 395 days, which is more than a year.

With 7 full qualifying years in the Marine Corps, 12 full qualifying years in the Coast Guard, and one full qualifying year from his two partial qualifying years combined, the Board finds that the preponderance of the evidence shows that the applicant had performed 20 full years of qualifying service toward a Reserve retirement when he was discharged from active duty on August 31, 2015. Moreover, the applicant's Reserve Points Statement from the Coast Guard expressly states that he had completed 20 years of qualifying service toward retirement.

5. The applicant also argued that he is entitled to a 20-year letter in accordance with federal statute. The Board agrees. Title 10 U.S.C. § 12731 provides the legal basis for retired pay for non-regular service members. According to the statute, a person is entitled to a non-regular retirement if 1) the person is 60 years old; 2) the person has performed at least 20 years of service computed under section 10 U.S.C. § 12732; 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 of the armed forces, but not while a member of a regular component, 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) the person is not entitled, under any other provision of law, to retired pay from an armed force.

First, the applicant acknowledges that he is not yet 60 years old. However, according to 10 U.S.C. § 12731(d), a person who has completed the years of service required for eligibility for a non-regular retirement is required to be notified in writing of their eligibility. As such, while the applicant is not yet entitled to non-regular retired pay because of his age, he is still eligible for a

⁶ Reserve Policy Manual, Chap. 8.h.4.

20-year letter documenting his eligibility once he reaches the age of 60. Second, as discussed above, the applicant has completed 20 years of qualifying service. Next, paragraph 3 is inapplicable to the applicant. The statute states “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 of the armed forces, but not while a member of a regular component.” In this case, the applicant served some of his qualifying service before 2005. However, he did not *complete* his years of qualifying service until 2015. Finally, the applicant is not entitled to retired pay from the regular Coast Guard. As established in the Final Decision in BCMR case 2016-171, the applicant did not perform the required 20 years of total active duty service before he was discharged for alcohol abuse. Accordingly, his request for a regular retirement was properly denied.

6. The JAG argued that the applicant is not entitled to a 20-year letter because he last served in the regular Coast Guard. To support its assertion, the JAG argued that a member of the regular Coast Guard is only entitled a regular retirement. The Board finds this argument unpersuasive. First, the JAG failed to cite any relevant Coast Guard policy, manual, or case law to support its assertion. In fact, applicable Coast Guard policy contradicts the JAG’s assertion. According to Article 8.F. of the Coast Guard Reserve Policy Manual, any service member who completes the years of qualifying service on or after April 25, 2005, has no minimum Reserve component service requirement to be eligible for a non-regular retirement. As discussed above, the applicant completed his years of qualifying service after 2005 and so does not have a minimum Reserve component service requirement. Accordingly, the fact that the applicant last served in the regular Coast Guard is irrelevant for purposes of receiving a non-regular retirement.

Further, the JAG’s assertion that members of the regular Coast Guard are prohibited from receiving a non-regular retirement is contrary to the plain language of 10 U.S.C. § 12731, which authorizes Reserve retirements for a “person” who qualifies, not just a reservist who qualifies. The statute clearly permits regular members of the Armed Forces to be eligible for a non-regular retirement. While there are certain component requirements for members who completed their qualifying service before 2005, such requirements are not applicable to the applicant. The Coast Guard’s claim that the applicant could be denied a 20-year letter because he was not a member of the Reserve on his date of discharge from the Coast Guard clearly contradicts 10 U.S.C. § 12731, which Congress amended twice to reduce the previously required final period of Reserve service from eight years, to six years, to zero years. Thus, a “person” like the applicant who is not serving in the Reserve on the day they complete 20 years of qualifying service toward a Reserve retirement is entitled to a 20-year letter and to Reserve retired pay upon reaching age 60. Therefore, the applicant has proven by a preponderance of the evidence that under the plain language of 10 U.S.C. § 12731, he is legally entitled to and eligible for a 20-year letter and non-regular retirement upon reaching age 60.

7. The applicant received a general discharge from active duty “under honorable conditions” on August 31, 2015. According to the Coast Guard, however, the only reason the applicant is ineligible for a Reserve retirement is because he was not a member of the Reserve when he was separated from the Service, which has already been addressed.

8. In this response to the advisory opinion, the applicant asked the Board to reconsider his request for a regular retirement. However, the applicant has not submitted evidence or arguments that warrant reopening any of the issues that were decided in the Final Decision in BCMR case 2016-171, which denied his request for a regular retirement. Specifically, the applicant did not provide any evidence that he served on active duty for 20 years.

9. Accordingly, the applicant's request is granted in part. The Coast Guard should notify the applicant, in writing, that he has completed 20 years of qualifying service for a non-regular retirement in accordance with 10 U.S.C. § 12731(d).

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former GM2 [REDACTED] [REDACTED] USCG, for correction of his military record is granted in part. The Coast Guard shall notify him within 90 days of this decision, in writing, that he has completed 20 years of qualifying service for a non-regular retirement in accordance with 10 U.S.C. § 12731(d). All other requests are denied.

December 2, 2022

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