

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-192

**XXXXXXXXXXXXXX
XXXXXXXXXXXXXX**

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application upon receipt of the applicant's completed application June 2, 2010, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated March 10, 2011, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his record to show that he had a combined 21 years of active duty and reserve service when he was discharged from the Coast Guard on February 24, 1988. Therefore, he was entitled to reserve retired pay (non-regular retired pay under 10 U.S.C. § 12731) at age 60, which he attained on [REDACTED]

Prior to enlisting in the Coast Guard on May 31, 1979, the applicant served 1 year, 11 months, and 1 day in the active duty Navy and 10 years, 8 months, and 8 days in the Navy Reserve. He had a total of 12 years, 7 months, and 9 days of total federal service when he enlisted in the Coast Guard.

The applicant enlisted in the regular Coast Guard for 4 years on May 31, 1979 and was discharged from this period of active duty on July 25, 1983. He reenlisted in the regular Coast Guard for 2 years on November 8, 1983 and extended this enlistment for 2 years on November 7, 1985. The applicant again extended his enlistment for 6 months on March 31, 1986. His end of enlistment was April 7, 1988. However, the applicant was honorably discharged from the Coast Guard for the convenience of the government due to weight control failure on February 24, 1988. He was given a JDM¹ separation code and an RE-3F² reenlistment code, both of which indicate

¹ At the time of the applicant's separation, the JDM separation code meant that a member was discharged because he or she exceeded the weight standards.

weight control failure as the reason for his discharge. The applicant alleged that his separation and reenlistment codes were assigned in error due to bureaucratic bungling and his hasty discharge.

According to the applicant's DD 214 (documenting his discharge from the Coast Guard in 1988), he had a total of 10 years, 5 months, and 20 days of active duty service and 10 years, 7 months, and 28 days of inactive duty service.

The applicant stated that it is in the interest of justice to consider his application if it is not timely because he did not learn of the injustice until he did not receive retirement pay in 2006, as he had been told. He stated that he "was told that validation would occur automatically near 2006 when I turned 60-62—it didn't." The applicant submitted documents showing that in the latter part of 2009, he sought assistance from a counselor at the Department of Veterans Affairs (DVA) in his effort to obtain retired pay.

VIEWS OF THE COAST GUARD

On September 1, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant relief in accordance with the memorandum from Commander, Personnel Service Center (PSC). PSC stated the following:

The application is not timely and should be denied due to untimeliness. The only mention the applicant makes regarding the untimeliness of the application is that, "I was told validation would occur automatically near 2006 when I turned 60-62 [sic]—it didn't."

According to [a recent statement of creditable service], the applicant rates 21 years, 0 months, and 13 days of creditable service. As 20 years of service is the minimum threshold needed to be retirement eligible, the applicant should have been placed in a RET-2 [Reserve retired without pay] status upon being discharged from active duty, in accordance with [Article 8.C.2. of the Reserve Policy Manual].

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According to [a computation of retirement point credits], the applicant's total retirement points credited equals 4654. This amount will be used to calculate the proper retirement pay the applicant is entitled to receive beginning at age 60.

The applicant's contention regarding the separation code of JDM and reentry code of RE-3F being in error is correct. According to [the Separation Program Designator] (SPD) Handbook, the proper notation that should appear on the applicant DD-214 should be as follows:

² The RE-3F reenlistment code means that a member is eligible for reenlistment except that he exceeds weight standards.

Block 25 Article 12.C.10 [of the Personnel Manual as the separation authority]

Block 25 LBD [as the separation code, which means sufficient time for retirement]

Block 27 RE-2 [as the reenlistment code, which means retirement]

Block 28 sufficient service for retirement [as the narrative reason for separation]

PSC concluded by stating that the applicant should be entitled to retired pay in accordance with the computations found in [the statement of creditable service and the statement computation of retirement points credit] now that he has reached age 60 and is in an RET-1 (Reserve retired with pay) status. PSC stated that in addition, the applicant should be issued a DD-215 correcting blocks 25-28 of his DD 214 as discussed above.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 1, 2010, the Board received a reply from the applicant to the views of the Coast Guard. He agreed with them.

APPLICABLE REGULATION

Article 8.C.1. of the Reserve Policy Manual states that under 10 U.S.C. § 12731, a reservist is entitled upon application, to non regular retired pay if the reservist

- a. is at least 60 years of age;
- b. is not entitled to receive military retired pay under any other provision of law;
- c. has performed at least 20 years of satisfactory qualifying federal service as computed under section 10 U.S.C. 12732; and
- d. in the case of a member who accumulated 20 years of qualifying service before May 1, 2005, has performed the last six years of qualifying service as a member of a Reserve component.

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 section 1552 of title 10 of the United States Code.

2. The application was not timely. To be timely, an application for correction of a military record must be submitted within three years after the alleged error or injustice was or should have been discovered. *See* 33 CFR 52.22. The applicant stated that he discovered the alleged error when he did not receive retired pay between the ages of 60 and 62, as he had been told in 2006. However, the Board finds that the alleged error was or should have been

discovered on [REDACTED] when the applicant reached his 60th birthday and did not receive retired pay. Therefore, his application should have been filed with the Board within 3 years of his 60th birthday on [REDACTED]. The Board did not receive the applicant's application until May 3, 2010.

3. The Board may still consider the application on the merits, if it finds it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that in assessing whether the interest of justice supports a waiver of the statute of limitations, the Board "should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review." 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." *Id.* at 164, 165. See also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995). The Board is persuaded to excuse the untimeliness because the delay is less than 2 months in duration and the applicant acted reasonably in seeking assistance from a DVA counselor in solving the problem when he did not receive retired pay between the ages of 60 and 62. Additionally, reserve retired pay does not begin until age 60 and the applicant having been discharged at age 41 would have had no reason to doubt his eligibility for retired pay, particularly since his record did not contain any notification to him that he would not be eligible for reserve retired pay at age 60. Furthermore, a cursory review of the merits indicates the application is likely to prevail. Therefore, due to the short delay in filing his application, the lack of notification of a potential problem with receiving reserve retired pay, and the likelihood of success on the merits of his claim, the Board will excuse the untimeliness and perform a full review of the merits.

4. The JAG recommended relief based upon a recently prepared Coast Guard statement of creditable service and a statement of retirement points credit that document the applicant's 20 years of qualifying service for retired pay at age 60. The Board, relying on the Coast Guard's computation and its advisory opinion, agrees with the JAG that the applicant has at least 21 years of satisfactory federal service.

5. However, reaching age 60 and having 20 years of satisfactory service are not the only requirements for entitlement to reserve retired pay. According to Article 8.C.1. of the Reserve Policy Manual, the applicant must also have spent the last six years of his service as a member of the Reserve component to be entitled to retired pay. According to the applicant's military record, his 4-year enlistment contract dated May 31, 1979, and his 2-year reenlistment contract dated November 8, 1983, (that was extended for two years) show that he enlisted in the regular component of the Coast Guard. Therefore, his last 6 years of service were not in a Reserve component.

6. The Board finds that it would be an injustice, however, for the applicant to be denied reserve retired pay after serving for over 20 years in the armed forces because he enlisted in the regular Coast Guard instead of the Coast Guard Reserve. Additionally, there is nothing in his Coast Guard military record that indicates that the rules about qualifying for reserve retired pay were explained to him at the time he enlisted in the Coast Guard, even though there were documents in his record showing that he had significant time in the Naval Reserve. Nor is there any evidence in his military record that he ever received a retirement points statement before his

last discharge from the Coast Guard in 1988. Therefore, he had no notice of any problem that might have existed with his eligibility for retired pay at age 60.³ As the Coast Guard has recommended relief, and the applicant has agreed with that recommendation, it would be a further injustice that shocks the sense of justice for the Board to deny relief to the applicant. Accordingly, the Board finds that the applicant's record should be corrected to show that his 1979 and 1983 Coast Guard enlistments were in the Reserve component of the Coast Guard. This correction does not affect the fact that the applicant served on active duty for the entire period of the two enlistments.

7. The Board is not persuaded that the applicant's DD 214 should be corrected in the manner recommended by the Coast Guard. The applicant's discharge, as noted on his DD 214, completely severed him from any military status. See Article 12.B.1.f. 2. of the Personnel Manual. Therefore, with the discharge in place, the applicant's record cannot be corrected to show that he is currently in a RET-1 (Reserve retired with pay) status because doing so would indicate that he still has a military status, when in fact he is a discharged member. However being a former member of the Coast Guard does not defeat the applicant's right to retirement pay. According to Article 8.C.16 of the Reserve Policy Manual, the fact that a Reserve member is discharged as opposed to being retired, is not prejudicial to the member regarding retirement pay because the right to receive such pay and personal medical benefits are not dependent upon membership in a Reserve component at the time of qualification.

8. Furthermore, the applicant's DD 214 should not be corrected because he was discharged due to weight control failure and not because he was entitled to immediate retirement as the DD 214 would suggest if the Board followed the Coast Guard's recommendation in this regard. The applicant was nowhere near the age necessary for retirement pay when he was discharged from the regular Coast Guard in 1988 at age 41. Additionally, as discussed above, as a discharged member, it would be inconsistent with regulation to show on the applicant's DD 214 that he is both a former member and a currently retired member.

9. Accordingly, the applicant should be granted the partial relief discussed above.

³ In BCMR No. 193-92, the Deputy General Counsel for the Department of Transportation granted relief to an applicant who claimed that the Coast Guard committed an error by discharging him because he could not complete 20 years of satisfactory service before reaching age 62. The Deputy General Counsel also found that the Coast Guard committed an injustice when it failed to inform the applicant that his unsatisfactory year for retirement purposes in 1979 would cause him to be unable to complete 20 years of satisfactory service for retirement prior to his 62nd birthday. The Deputy General Counsel also found that the Coast Guard committed an injustice by not informing the applicant at the time of his 1988 4-year reenlistment that he could not qualify for retirement with pay before reaching age 62 and that it committed an error by allowing him to reenlist when he would exceed age 62 before he earn 20 years of satisfactory service. To rectify the errors and injustices, the Deputy General Counsel ordered the applicant's record corrected to show that he performed 20 years of satisfactory service prior to his latest discharge in order to receive retirement with pay. The Deputy General Counsel stated that she did not order the applicant reinstated into the Reserve so that he could earn the one additional year for 20 years of satisfactory service because of the Coast Guard's requirement that members cannot serve beyond 62 years of age.

ORDER

The application of former XXXXXXXXXXXXX, USCG, for correction of his military record is granted, as follows:

His record shall be corrected to show that his May 31, 1979 enlistment and his November 8, 1983 reenlistment were in the Reserve component of the Coast Guard. His record shall also be corrected to show that upon his discharge on February 24, 1988, he had 21 years of satisfactory service and became entitled to non-regular retired pay upon reaching age 60.

The Coast Guard shall pay him any amount he is due as a result of the correction to his record, including any back pay and allowances.

No other relief is granted.

