DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-081

[redacted]
PS2 (former)

FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2707. The Chair docketed the case after receiving the completed application on February 12, 2019, and prepared the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated January 31, 2020, 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 direct the Coast Guard to issue him a 15-year physical disability retirement letter pursuant to 10 U.S.C. § 12731b,[1] so that his record would show that he was placed in RET-2 status, and then correct his status to RET-1 (eligible for Reserve retired pay) as of his 60th birthday in 2014.

[1] On October 5, 1999, the President signed Public Law 106-65, 113 Stat. 666. Section 653(b)(1) of this law is codified at 10 U.S.C. § 12731b, "Special rule for members with physical disabilities not incurred in line of duty," (emphasis added) and states the following:

> (a) In the case of a member of the Selected Reserve of a reserve component who no longer meets the qualifications for membership in the Selected Reserve solely because the member is unfit because of physical disability, the Secretary concerned may, for purposes of section 12731 of this title, determine to treat the member as having met the service requirements of subsection (a)(2) of that section and provide the member with the notification required by subsection (d) of that section if the member has completed at least 15, and less than 20, years of service computed under section 12732 of this title.
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> (b) Notification under subsection (a) may not be made if--
> (1) the disability was the result of the member's intentional misconduct, willful neglect, or willful failure to comply with standards and qualifications for retention established by the Secretary concerned; or
> (2) the disability was incurred during a period of unauthorized absence.

The applicant stated that he had performed 15 years of satisfactory service in the Coast Guard Reserve for retirement purposes when he received a life-threatening head injury while performing his civilian job as a police officer in 1993. Thereafter, he was unable to drill. He further stated that when he became incapacitated, his command promised him that he "would be eligible for retirement because of [his] physical disability that complies with all the provisions of 10 U.S.C. § 12731b." But instead of being retired, he was kept in the Selected Reserve and then "discarded from the reserves" when his enlistment ended. He stated that after he stopped drilling he was forgotten, that he was unable to advocate for himself, and that his administrative discharge resulted from administrative errors. He claimed that he discovered this error in his record on July 1, 2017.

To support his request, the applicant submitted his Reserve Retirement Points Statement dated July 27, 1991, which shows that he had accumulated 15 satisfactory years of service for retirement purposes by earning at least 50 points each anniversary year. He also submitted many medical documents showing that he was assaulted and suffered "facial fractures" in July 1993. VA medical records from 2013 show that he was being treated for chronic headaches, an aneurysm, and other medical conditions.

SUMMARY OF THE MILITARY RECORD

The applicant enlisted on active duty for 4 years on July 28, 1972, and was released into the Reserve on July 27, 1976, to complete his 6-year military service obligation in the Reserve. On July 27, 1978, he signed a 6-year Reserve extension contract, through July 27, 1984. On July 10, 1980, however, he reenlisted in the Reserve for 6 years, through July 9, 1986, to receive a reenlistment bonus. Then on July 10, 1986, he reenlisted in the Reserve for another 6 years, through July 9, 1992. There are no further enlistment or extension contracts in the applicant's record, but on July 27, 1998, the Coast Guard issued a memorandum stating that he had been honorably discharged effective that date.

A Computation of Retirement Point Credits prepared on October 29, 1993, shows that the applicant served 4 years on active duty from July 28, 1972, to July 27, 1976, when he was released into the Reserve. As a reservist, he did not drill regularly his first anniversary year, but thereafter he earned 11 more satisfactory years of service by earning at least 50 drill points per year. But starting in 1988, the applicant drilled only sporadically, and his Retirement Points Statements show that he performed his last drill in November 1991.

VIEWS OF THE COAST GUARD

On July 30, 2019, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief.

The JAG first noted that the applicant performed his last drill sometime during his anniversary year from July 28, 1991, to July 27, 1992. Although there is no signed reenlistment contract, a 6-year reenlistment must have been entered into the database in July 1992 because the applicant was not discharged from the Reserve until July 1998.

The JAG stated that the applicant's claim is barred both by the statute of limitations and by the doctrine of laches. The JAG stated that the applicant knew he had been discharged, instead of retired, no later than 1998, and he has not shown why it would be in the interest of justice to excuse his more than 20-year delay in applying to the Board. The JAG stated the applicant has not shown "good cause" for his failure to file his application more timely, and his application is time-barred. The JAG also argued that a cursory review of the merits shows "no likelihood of success on the merits as there is no evidence to support Applicant's contentions" and the law he relied on was not enacted until after his discharge. Therefore, the JAG stated, the Board should not waive its 3-year statute of limitations.

The JAG also stated that the doctrine of laches should bar the applicant's claim because his long delay has prejudiced the government. The JAG stated that there are no relevant Coast Guard medical records in his personnel file or copies of any correspondence that might have occurred between the applicant and the Coast Guard from the date of his injury in 1993 until his discharge in 1998. Any correspondence that might have supported or contradicted the applicant's claims is no longer available.

The JAG stated that the applicant's claim that he was told by his command when he became incapacitated that he would be retired under 10 U.S.C. § 12731b fails because that law did not exist until October 5, 1999. Nor is there any evidence that the applicant ever informed the Coast Guard about his disability or that the Coast Guard ever promised him a disability retirement, as he claimed. The JAG stated that even if the applicant had shown that he was promised a retirement due to his disability, the Coast Guard would disclaim that erroneous advice because the law was not yet enacted.

The JAG also adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC). PSC noted that the application is untimely. PSC stated that the applicant's 1993 head injury was not incurred "in the line of duty" for military purposes because he was not performing active or inactive duty at the time. PSC stated that the law allowing the Coast Guard to retire a reservist due to a physical disability not incurred in the line of duty as long as the reservist had at least 15 years of service was not enacted until October 5, 1999, after the applicant was discharged. PSC stated that the law did not authorize any retroactive retirements, and so the applicant's request should be denied.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 6, 2019, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a written response within 30 days. No response was received.

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.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.[2] Although the applicant claimed that he discovered the alleged error in his record in 2017, the record shows that he was informed that he had been discharged, rather than retired, no later than July 1998. Therefore, 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*, 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] Pursuant to these requirements, the Board finds the following:

a. The applicant claimed without explanation that he discovered the alleged error in 2017. He has provided no compelling justification for not submitting his application within three years of his discharge in 1998.

b. The Coast Guard's advisory opinion did not address significant legal developments in the history of 10 U.S.C. §§ 12731a and 12731b, which are important to consider. Therefore, the Board will excuse the application's untimeliness, waive the statute of limitations, and consider the applicant's request on the merits.

4. The applicant alleged that this lack of a 15-year retirement letter and retired status and pay are erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[6] 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."[7]

5. On October 23, 1992, Public Law 102-484, 106 Stat. 2716, was enacted, and section 4417(a), authorized the Secretaries of the military departments—defined in 10 U.S.C. § 101 as the Secretaries of the Army, Navy, and Air Force—to retire members of a Reserve component with more than 15 years of satisfactory service. The statute, originally codified at 10 U.S.C. § 1331a, allowed the Secretaries to limit the authority to particular categories of personnel to meet the needs of the Service as a force-shaping tool. On November 30, 1993, this law was amended to include the Coast Guard by Public Law 103-160, § 564, 107 Stat. 1670. And on October 5, 1994, the statute was amended and renumbered as § 12731a by Public Law 103-337, §§ 517, 1662(j)(1), 108 Stat. 2754, 2998, respectively. Section 517 added a new paragraph (c)(3):

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[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).
[6] 33 C.F.R. § 52.24(b).
[7] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

Sec. 517. Early reserve retirement eligibility for disabled members of Selected Reserve.

"(3) Notwithstanding the provisions of section 4415(2) of the Defense Conversion Reinvestment, and Transition Assistance Act of 1992 (division D of Public Law 102–484; 106 Stat. 2714), the Secretary concerned may, consistent with the other provisions of this section, provide the notification required by section 1331(d) of this title to a member who no longer meets the qualifications for membership in the Selected Reserve solely because the member is unfit because of physical disability. Such notification may not be made if the disability is the result of the member's intentional misconduct, willful neglect, or willful failure to comply with standards and qualifications for retention established by the Secretary concerned or was incurred during a period of unauthorized absence.".

By 1998, when the applicant was discharged from the Reserve, 10 U.S.C. § 12731a read as follows in its entirety:

(a) Retirement with at least 15 years of service.—For the purposes of section 12731 of this title, the Secretary concerned may—

(1) during the period described in subsection (b), determine to treat a member of the Selected Reserve of a reserve component of the armed force under the jurisdiction of that Secretary as having met the service requirements of subsection (a)(2) of that section and provide the member with the notification required by subsection (d) of that section if the member—

(A) as of October 1, 1991, has completed at least 15, and less than 20, years of service computed under section 12732 of this title; or

(B) after that date and before October 1, 1999, completes 15 years of service computed under that section; and

(2) upon the request of the member submitted to the Secretary, transfer the member to the Retired Reserve.

(b) Period of authority.—The period referred to in subsection (a)(1) is the period beginning on October 23, 1992, and ending on October 1, 1999.

(c) Applicability subject to needs of the service.—(1) The Secretary concerned may limit the applicability of subsection (a) to any category of personnel defined by the Secretary in order to meet a need of the armed force under the jurisdiction of the Secretary to reduce the number of members in certain grades, the number of members who have completed a certain number of years of service, or the number of members who possess certain military skills or are serving in designated competitive categories.

(2) A limitation under paragraph (1) shall be consistent with the purpose set forth in section 4414(a) of the National Defense Authorization Act for Fiscal Year 1993 (Public Law 102-484; 106 Stat. 2713).

(3) Notwithstanding the provisions of section 4415(2) of the Defense Conversion, Reinvestment, and Transition Assistance Act of 1992 (division D of Public Law 102-484; 106 Stat. 2714), the Secretary concerned may, consistent with the other provisions of this section, provide the notification required by section 12731(d) of this title to a member who no longer meets the qualifications for membership in the Selected Reserve solely because the member is unfit because of physical disability. Such notification may not be made if the disability is the result of the member's intentional misconduct, willful neglect, or willful failure to comply with standards and qualifications for retention established by the Secretary concerned or was incurred during a period of unauthorized absence.

(d) Exclusion.—This section does not apply to persons referred to in section 12731(c) of this title.

(e) Regulations.—The authority provided in this section shall be subject to regulations prescribed by the Secretary of Defense and by the Secretary of Transportation with respect to the Coast Guard.

6. It is unclear whether 10 U.S.C. § 12731a(c)(3), which was subsequently extended through 2001, would have applied to the applicant, however, because

- In 1999, 10 U.S.C. § 12731b was enacted to specifically address cases in which the member's disability was—like the applicant's—*not* incurred in the line of duty. The earlier provision, § 12731a(c)(3), was not repealed when § 12731b went into effect, which suggests that § 12731a(c)(3) might have been interpreted as not having the same effect as § 12731b even though the two statutes contain largely the same language.

- The applicant stopped drilling regularly and stopped participating satisfactorily in 1988—long before his injury in 1993. And under Chapter 4.A.2. of the Reserve Policy Manual then in effect, a member of the Selected Reserve who failed to participate satisfactorily by earning 50 points per year was either transferred to the Individual Ready Reserve (IRR) or discharged for "shirking." Selected Reserve billets are highly desired because members are paid for their drills, whereas members in the IRR can drill for points, but not pay. Therefore, members of the Selected Reserve who are not participating satisfactorily may be quickly reassigned to the IRR so that more available reservists can have those billets and get paid for their drills.

- Title 10 U.S.C. §§ 12731a and 12731b apply only to members of the Selected Reserve. Because the applicant stopped drilling regularly in 1988 and performed his last drill for the Coast Guard in November 1991, he was presumably transferred to the IRR at some point before the statutes were enacted in 1994 and 1999, respectively. If he was in the IRR when the statutes were enacted, he could not have qualified for a 15-year retirement under either statute.

- The applicant apparently did not sign a reenlistment contract in 1992, though a yeoman must have entered one for him in the database, and there is no clear evidence that he ever communicated with the Coast Guard after November 1991. The preparation of the Computation of Retirement Point Credits on October 29, 1993, theoretically could have been triggered by notification that the applicant had been severely injured, but by October 29, 1993, two years had passed since the applicant had performed any drills at all.

7. Under Chapter 4.A.2. of the Reserve Policy Manual, the applicant was presumably reassigned from the Selected Reserve to the IRR because of his unsatisfactory participation long before the authorities in 10 U.S.C. §§ 12731(a)(c)(3) and 12731b were enacted, and only members of the Selected Reserve were potentially eligible for early RET-2 status under those statutes. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that he is entitled to a 15-year retirement letter under either statute. His discharge is presumptively correct, and there is not enough evidence for the Board to conclude that the Coast Guard should have issued him a 15-year letter.

8. The applicant's request should be denied, but the Board will grant further consideration if he is able to submit evidence of his interactions or communications with the Coast Guard between 1991 and 1998.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former PS2 [redacted], USCG, for correction of his military record is denied.

January 31, 2020

[redacted]