

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

Application for Correction of  
Coast Guard Record of:

BCMR Docket  
No. 2002-136

**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. It was docketed on July 12, 2002, upon the BCMR's receipt of the applicant's complete application for correction of his military record.

This final decision dated July 24, 2003, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant asked the Board to correct his record to show the years from September 3, 1987 to September 2, 1988 and September 3, 1988 to September 2, 1989 as satisfactory years of federal service for the purpose of earning a Reserve retirement with pay at age 60. (To have a satisfactory year of federal service<sup>1</sup> for retirement purposes, a reservist must earn 50 points<sup>2</sup> per anniversary year. <sup>3</sup> Fifteen of the 50 points are gratuitous, and the reservist is required to earn only 35 additional points to have a satisfactory year toward retirement). As of the date he filed his application with the Board, the applicant had 18 years, 3 months, and 14 days of satisfactory federal service.

The applicant's anniversary year began on September 3. For the two anniversary years between September 3, 1987 and September 2, 1989, the applicant only earned the 15 gratuitous points for each year. The applicant alleged that he should be credited with satisfactory service (35 points) for the anniversary years ending September 2, 1988 and September 2, 1989 because the Coast Guard misfiled his reserve commission dated

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<sup>1</sup> Enclosure (1) to the Reserve Policy and Training Manual stated, "A year of satisfactory federal service is any anniversary year during which a reservist earned a minimum of 50 retirement points. The accumulation of 20 years is required for retirement with pay.

<sup>2</sup> Retirement point - "A numerical unit, used to credit an individual for active duty, membership and participation in reserve training for use in determining retirement benefits. . . ." See Reserve Training and Policy Manual.

<sup>3</sup> Enclosure (1) to the Reserve Policy and Training Manual stated that the anniversary year extends from the date of entry or reentry to the day preceding the anniversary of entry.

September 3, 1987 and failed to respond to his letters and phone calls requesting to be placed into a selected reserve billet (assignment).

The applicant served on active duty from May 19, 1982 through September 2, 1987. He was commissioned in the Reserve on September 3, 1987. He stated that prior to his discharge from the Coast Guard he had identified a reserve billet and on May 11, 1987 he sent a letter to the First Coast Guard District (CCGD one) requesting to be assigned to a Reserve unit and specifically that job. He stated that he did not receive a reply to his letter, a copy of which was submitted with his application.

On January 23, 1988, the applicant sent a letter to the Commandant, complaining that he had contacted CCGD one on three separate occasions asking for an assignment to a Reserve unit but he had received no reply. In that letter, he inquired about whom he needed to contact to expedite his request. A copy of this letter was also enclosed with his BCMR application.

On February 16, 1988, the Commandant responded to the applicant's January 23, 1988 letter. The Commandant told the applicant that his executed oath of Office had been inadvertently filed in his service record without action, for which he offered the applicant an apology. He welcomed the applicant to the Reserve and told the applicant that the Commandant would "provide a copy of your letter to CCGD one (rs) for their action concerning your request for assignment to a Selective Reserve unit. They will contact you directly regarding this matter." The CCGD one forwarded the Commandant's letter to the applicant with an endorsement, which congratulated the applicant on his appointment and wishing him success in the Reserve.

According to the applicant, CCGD one did not take any action to assign him to a Reserve unit. He stated that in January 1989 he received a letter from the Commandant, endorsed by CCGD one, stating that the applicant had failed to earn the minimum 27 points required to remain in the Active Reserve for the anniversary year ending September 2, 1988. After receiving this letter, the applicant stated the following:

I immediately called the District and finally received instructions to submit an assignment data card. I did so, and confirmed that it had been received. Again time went on and I was not assigned. In September 1989 I received a call from a CDR . . . , who said he saw my name on the ISL (inactive status list)<sup>4</sup> and asked me if I wanted to be part of his staff. I wrote another letter to both Commandant and the First District explaining

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<sup>4</sup> Enclosure (1) to the Reserve Policy and Training Manual Reserve Administration and Training Manual stated that members on the ISL may not earn retirement points, compete for promotion, or receive pay. The Commandant may transfer officers to the ISL who fail to earn the minimum retirement points for a given year.

my attempts to be assigned. I was then assigned a billet. Consequently, I lost two years of satisfactory service toward my retirement.

The applicant stated that he discovered the alleged error on September 18, 1989. He stated that the Board should waive the statute of limitations because at that time he lacked experience with the Reserve program and he was not aware of any recourse. He stated that he has always been upset by not being assigned to a unit for two years. He stated that he now has 18 years of satisfactory service and was recently not re-assigned to a pay billet. He argued that if he had been properly assigned to a Reserve unit upon entry into the Reserve program, he would have received the pay and the points and would now be eligible to retire with 20 years of satisfactory federal service.

### **Views of the Coast Guard**

On November 26, 2002, the Board received an advisory opinion from the Chief Counsel of the Coast Guard recommending that the Board deny the applicant's request for untimeliness or in the alternative for lack of proof.

With respect to untimeliness, the Chief Counsel stated that an application for correction of a military record must be filed within 3 years after the alleged error or injustice was discovered or should have been discovered, unless the delay is excused in the interest of justice. He stated that the applicant filed his application more than three years after the Commandant informed him in 1988 that his Oath of Office had been misfiled. The lack of knowledge about the BCMR is not, according to the Chief Counsel, a valid basis on which to waive the statute of limitations.

The Chief Counsel stated that notwithstanding the Coast Guard's delay in processing the applicant's reserve application and oath of office, the applicant is not entitled to a correction of his record to provide point credit for drills that he failed to perform. In this regard the Chief Counsel stated the following:

(1) 10 U.S.C. 12732(a) requires that a member earn at least 50 points during a one-year period to establish entitlement to retired pay. The applicant earned only 15 points during each of these two years rather than the 50 that are statutorily required. The statute does not provide an exception to this requirement for administrative error or misunderstanding. The member shall earn the required number of drill points during the anniversary year to receive retirement eligibility credit by earning "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 . . .

(2) The applicant cannot be credited for duties he did not perform in order to attain satisfactory federal service for retirement. Although the

applicant was not actively drilling, he was not precluded from obtaining the points needed in order to receive a satisfactory year, i.e. fifty points. Applicant could have earned credit (points) during these anniversary years through completion of correspondence courses or funeral duty . . .

(3) 10 U.S.C. 12732(a) does not provide the Coast Guard any fiscal law authority to credit the Applicant with reserve duty points entitling the applicant to retired pay and benefits when the applicant did not serve the time required to earn the drill point credits.

### **Applicant's Response to the Views of the Coast Guard**

On February 25, 2003, the applicant submitted a response to the views of the Coast Guard, disagreeing with them. He stated that contrary to the Chief Counsel's comment, there was more than a five-month delay in processing his transition into the Reserve. He stated that the delay in his assignment to the Reserve continued beyond the date of the letter from the Commandant dated February 1988. The applicant stated that he tried to rectify this situation by writing and calling CCGD one, to which he received no reply. He further stated the following:

There was no assignment letter from [CCGD one] to the IRR<sup>5</sup>. There was no correspondence from them about contacts, the reserve system, opportunity for drilling, or how the whole point system and reserve program worked. Where and who did I contact for the correspondence courses that were available for me to gain enough points for satisfactory service as the Coast Guard's advisory opinion states? The next correspondence that I received from anyone after "welcome to the Coast Guard Reserve" was a letter endorsed by the same First District Office on 13 January 1989, saying that I have failed to attain the required participation standards for my annual year ending in September of 1988. This is now a year period, not five months as the Coast Guard has stated.

After receipt of the next letter I called First District and was told to send them an assignment data card. The evidence that I did so was that I eventually was assigned. However, the time frame for someone to call me, . . . and ask if I wanted to get out of the ISL and into a billet, was not until September of 1989. This is a two-year period. The letter that got me out of the ISL and into a billet was dated 18 September 1989 and was a part of my package sent to the Board.

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<sup>5</sup> Article 1-A-1-b provides that members of the IRR (individual Ready Reserve) are unpaid reservists who have no obligation to participate in the Selected Reserve. They may earn points toward retirement through correspondence courses or funeral duty. They are obligated to keep the District Commander advised of their current address and to respond to official correspondence.

The applicant reiterated that he had no knowledge of the BCMR process and received no formal training on the reserve program until he was assigned to a unit.

## FINDINGS AND CONCLUSIONS

The Board makes the following findings of fact and conclusions of law on the basis of the applicant's 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, 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 applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22.

3. The Board may still consider the application on the merits, however, if it finds it is in the interest of justice to do so. The interest of justice is determined by taking into consideration the reasons for and the length of the delay and the likelihood of success on the merits of the claim. See, Dickson v. Secretary of Defense, 68 F. 3rd 1396 (D.D.C. 1995).

4. The applicant stated that he discovered the error or injustice in 1989, but due to lack of experience with the reserve program he was not aware of any recourse. This Board has held consistently that a lack of knowledge about the BCMR itself is an insufficient ground on which to waive the statute of limitations. In addition, even if the applicant was not initially aware of the Board or the regulations pertaining to the Reserve program, he had three years after discovery of the error to file an application with the Board. However, he took no action to correct the matter until after the recent loss of his Reserve pay billet, which was approximately 14 years after he became aware of the alleged error and/or injustice.

5. The Board further finds that it is not likely that the applicant would prevail on the merits of this claim, even if the Board were to waive the statute of limitations. The applicant earned no points for the two-year period from September 3, 1987 to September 2, 1989, except for the 15 gratuitous points awarded to each member in the Ready Reserve. His military record reflects this fact. Although he earned no additional retirement points, he has asked the Board to grant such points because the Coast Guard failed initially to assign him to a unit. The applicant has not shown, other than making infrequent inquiries about an assignment to a Reserve unit, that he diligently sought out the other avenues available for earning retirement points. The applicant knew that he had been commissioned into the Reserve on September 3, 1987 and must have known that he was required to do something for those years to count toward retirement from the Reserve. He has not shown that he acted diligently in seeking other available

avenues for earning the necessary 50 points for the years from September 3, 1987 to September 2, 1989.

6. Moreover, the applicant can still earn the 50 points per year for the next two years, through correspondence courses or by drilling with a unit in a non-pay capacity, to earn the 20 years of satisfactory federal service necessary to qualify for a Reserve retirement. While the Coast Guard may have acted slowly in assigning the applicant to a unit, that failure is not so egregious as to require the Board to award the applicant 50 points for each of his first two anniversary years in the Reserve, making them satisfactory for retirement purposes, when he in fact earned no points. Nor is the Board aware of any regulation that requires the Coast Guard to act within a certain amount of time in making Reserve assignments.

7. Based on the length of the delay, the lack of persuasive reasons for not acting sooner to correct his record, and the probable lack of success on the merits of his claim, the Board finds it is not in the interest of justice to waive the three-year statute of limitations in this case.

**ORDER**

The application of xxxxxxxx, USCGR, for the correction of his military record is denied.

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Julia Andrews

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Nancy Lynn Friedman

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George J. Jordan