DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-130

XXXXXXXXXX
xxxxxxxxx, LCDR

FINAL DECISION

Author: Ulmer, D.

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 application was docketed on June 13, 2006, upon remand from the Court of Federal Claims pursuant to 28 U.S.C. § 1491(a)(2). See *Baird v. United States*, No. 04-1454C (Fed. Cl. June 1, 2006).

This final decision, dated September 28, 2006, is signed by the three duly appointed members who were designated to serve as the Board in this case.

INTRODUCTION AND REMAND

On September 14, 2004, the applicant filed an action in the Court of Federal Claims seeking to enjoin the Coast Guard from attempting to recoup $1785 from him. The Coast Guard believed that the applicant had been erroneously paid for four days of active duty from September 23, 2001 through September 26, 2001. In addition, the applicant sought back pay for 22 days of accrued unused leave that he was not permitted to sell back to the Coast Guard. He also alleged the following in his complaint:

> [T]he Integrated Support Command provided the plaintiff with a record of his military service as outlined on the [DD Form 214]. Plaintiff noticed that [the DD FORM 214] contained an approximately one-year discrepancy in active duty service performed. Plaintiff attempted to correct this error, but was told that his military record had been tampered with and that he would need to have them corrected by competent authority. In September 2000, the plaintiff became aware of other errors of service, including computerized and falsified documents, which

> fictitiously changed his military service. These records were brought forward in front of the several promotion boards dating as far back as 1990.

In its Opinion and Order on Motion to Dismiss that concluded with a remand to this Board, the Court summarized the applicant's allegations and claims as follows:

> First, [Plaintiff] seeks to have his record of military service corrected with respect to the period during which he was recalled to active duty (June 24, 2001 to December 27, 2001).[1] Second, [Plaintiff] seeks back pay and allowances allegedly forfeited as a result of his service in the absence of written orders between September 23 and September 26, 2001. Third, Plaintiff seeks to enjoin the Coast Guard from continuing its collections efforts related to the alleged overpayments . . . Finally, [Plaintiff] alleges a violation of his Fifth Amendment Due Process rights, though the specifics of this claim are not clear. (*Baird* at 7.)

On June 1, 2006, the Court remanded the case to the BCMR to resolve the following issues within 90 days:[2] (1) Whether and to what extent the applicant's record of military service contained errors. (2) Whether and to what extent the applicant is entitled to back pay and allowances as a result of his service in the absence of written orders between September 22 and September 26, 2001.[3] (3) Whether and to what extent the United States Coast Guard made overpayments to the applicant in connection with the period between September 22 and September 26, 2001, and whether the Coast Guard's efforts to collect such sums may resume. *Id*. at 11.

BACKGROUND

BCMR No. 107-96

"[1] [The applicant] also alleges the existence of errors in his service record that fall outside the June-December time period. Specifically, he complains of 'fraudulent entries . . . made by unidentified persons that were hidden from plaintiff, excluded from previous administrative record, and not discovered until September 2000.' He further claims to have been illegally excluded from consideration for promotion in 1990. Finally, [the plaintiff] claims the Coast Guard altered his 'retirement points statement' in 2001 and 2002, and 'deleted retirement credits' from his record of service." *Baird* at 7, footnote 9.

[2] On June 14, 2001, the court issued a stay to allow the parties to search for and exchange certain documents related to the case. On July 26, 2006, the applicant received the documents that he requested from the Coast Guard, and a new 90-day period began for the Board to resolve the remanded issues.

[3] Although the remand order lists the dates between September 22, 2001, and September 26, as the days not covered by written orders, the actual period is from September 23, 2001 through September 26, 2001.

On April 19, 1996, the BCMR received an application from the applicant requesting that the Board make several corrections to his military record. The application was placed on the Board' s docket as BCMR No. 107-96. The evidence in the case revealed that the applicant was a Reserve officer who served temporary periods of active duty. On January 6, 1989, a new set of active duty orders was prepared for the applicant covering the period from January 23, 1989 to May 31, 1989. On January 10, 1989, the Commander, Eighth Coast Guard District, canceled the orders, and on January 17, 1989, the applicant was placed in the Individual Ready Reserve (IRR).

On June 1, 1990, the applicant was convicted in the United States District Court of one count of violating 18 U.S.C. § 203.[1] He was sentenced to one year of incarceration, the execution of which was suspended; one year of probation; 200 hours of community service; pay a special assessment of $50.00; and he was barred from holding a future position in the federal government.

On November 21, 1990, having failed to earn the required minimum 27 retirement points to remain in the IRR, the applicant was placed on the Inactive Status List (ISL). He was advised that while assigned to the ISL he could not earn retirement points, participate in any Reserve training activities, or be considered for promotion.

On July 15, 1994, the Court of Appeals set aside the applicant's conviction because of the erroneous exclusion of certain testimony. *United States v. Baird*, 29 F.3d 647 (D.C.C. 1994). On October 28, 1994, the indictment was dismissed.

After his conviction was reversed and the indictment dismissed, the applicant requested that he be returned to the active Reserve. On December 2, 1994, he was transferred into the IRR.

The relevant requests for relief by the applicant in BCMR No. 107-96 were as follows:

> a. Effect the payment of all pay and allowances lost as a result of the actions taken against [him] . . . from 23 Jan 1989 until [present].

* * *

[1] 18 U.S.C. § 203(a) imposed criminal penalties for "[w]hoever, otherwise than as provided by law, for the proper discharge of official duties, directly or indirectly--. . . demands, seeks, receives, accepts, or agrees to accept any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another--"

b. Determine that the cancellation of a set of temporary active duty orders [which] were scheduled to commence on 23 Jan 1989 for 129 days . . . was improper and without due process.

* * *

d. Find that my involuntary transfer from the Selected Reserve and transfer to the IRR [Individual Ready Reserve] (and subsequently the ISL [Inactive Status List]) . . . was not done in accordance with procedures outlined in 32 CFR, Part 100, Section 100.5, Paragraph 3, which calls for convening of a board of officers as required by 10 U.S.C. 1163.

e. Determine that the Coast Guard had in fact attempted to effect a discharge, as evidenced by [his] removal from the Register of Reserve Officers . . .

* * *

i. Conclude that [he] would have been eligible for consideration for promotion to Commander by the FY91 selection board, and due to removal from a status allowing consideration for promotion without due process, and . . . effect the promotion to the grade of Commander (O-5) with a date of rank of 1 July 1991.

* * *

k. Determine that . . . that the time spent awaiting the outcome of the matter should be credited as active duty and satisfactory years for retirement purposes.

Final Decision, BCMR No. 107-96, pp. 1-2.

In a final decision, issued on September 12, 1997, the Board denied relief and made the following pertinent findings and conclusions:

12. The applicant has not shown that the Commandant committed any error by placing him in the IRR (non-pay) rather than in the Selected Reserve (pay) upon the applicant's release from active duty. The Board is not aware of any law or regulation that entitles a Reservist to be placed in the Selected Reserve. In Sharp v. Weinberger, 593 F. Supp. 886 (D.C. 1984), the court dismissed the challenge of a Ready Reserve officer's transfer to the Standby Reserve, notwithstanding the fact that he had signed a Ready Reserve agreement. The court stated that "[a] change in status of reserve

officer is a matter committed solely to the discretion of the Secretary of the officer's branch of service or the President of the United States." In the instant case, the applicant had no agreement at all, only active duty orders that had been completed to term.

13. Since the applicant was not separated from the Reserve, he was not entitled to a Board of Officers at the time of his transfer to the ISL (inactive duty status list). The applicant was placed on the ISL because he did not earn the minimum number of retirement points (27) to remain in the IRR. A member on the ISL is not eligible for consideration for promotion and can not earn pay or retirement points. Encl: (1-1), COMDTINST M1001.27. Since the applicant was on the ISL at the time the CDR selection board met in 1990 and 1991, he was not eligible for consideration for promotion to that grade.

* * *

15. The applicant has failed to prove that the Coast Guard committed any error or injustice in the handling of his case. Thus, no basis exists to consider whether an adjustment to his date or rank is appropriate, if he is later selected for CDR. There is also no basis to consider awarding back pay and allowances.

* * *

17. All of the applicant's contentions have been considered. Those not discussed within the findings and conclusions are considered to be without merit.

Id. at 13-14

Court Appeal of Final Decision in BCMR No. 107-96

The applicant appealed the Board's final decision in Docket No. 107-96 to the Court of Federal Claims. On March 23, 1999, that Court granted summary judgment in favor of the Coast Guard and the United States. *Baird v. United States*, No. 98-CV-387 (Fed. Cl. March 23, 1999). The United States Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims decision. *Baird v. United States*, No. 99-5097 (Fed. Cir. August 28, 2000). The Court of Appeals decision stated the following:

[Plaintiff-Appellant (hereafter applicant)] claims that his service from October 1, 1987 to December 31, 1988 and potential service from January 23, 1989 to May 31, 1989 were periods of extended active duty, even

though he did not enter into a written active duty agreement with the government. An active duty agreement is not automatically created when a period of temporary active duty is extended beyond twelve months. See 10 U.S.C. § 679 (1988) (renumbered 10 U.S.C. § 12311 (1994)) (providing the terms for active duty agreements without addressing whether temporary active duty performed in excess of twelve months automatically converts to an active duty agreement). The [B]oard properly concluded from the record that [the applicant] did not have an active duty agreement and that his period of active duty in 1987 to 1988 contained no guarantees against early release or for further extension of active duty.

[The applicant] also claims that his active duty orders were improperly cancelled and his due process rights were violated. A reservist on active duty without an active duty agreement does not have an indefinite active duty assignment and may be released from active duty at any time. See . . . (10 U.S.C. § 12313(a) (1994); Groves v. United States, 47 F.3d 1140, 1145 (Fed. Cir. 1995). A reservist on active duty does not have a constitutionally protected property interest in his active duty position. See Alberico v. United States, 783 F.2d 1024, 1027 (Fed. Cir. 1986). The [B]oard properly concluded that [the applicant] was not contractually entitled to retain his active duty position, that he had no reasonable expectation of continued service and that his right to due process was not violated upon his release from active duty because he had no property rights in the position.

In addition, [the applicant] seeks back pay pursuant to 37 U.S.C. § 204, even though he was not on active duty during the disputed time period. However, a reservist is entitled to compensation only if he actually performs his duties. See Dehne v. United States, 970 F.2d 890, 894 (Fed Cir. 1992). Thus, the Board held that [the applicant] was not entitled to pay, allowances, credit or retired pay for that time period. He does not point to any statute or regulation that mandates pay for constructive service. We therefore agree that [the applicant] is not entitled to back pay.

[The applicant] further claims that the Commandant of the United States Coast Guard improperly removed him from the rolls of the Coast Guard Reserve. Although he raised the issue before the [B]oard, the records show that [the applicant] was at all relevant times a reserve officer on the rolls. He was on active duty from October 1, 1987 to December 31, 1988. On January 6, 1989, he was ordered to active duty from January 23, 1989 to May 31, 1989, but these orders were cancelled before being executed and he was placed in the Selected Reserve. He was moved on January 17,

> 1989, from the Selected Reserve to the Individual Ready Reserve (IRR), and he was notified on November 21, 1990 that he was being transferred to the inactive status list (ISL) for failure to earn the minimum required retirement points in the preceding year in accordance with the Reserve Administration and Training Manual . . . Section 14-1. Each of these alterations in [the applicant's] status was within the sound discretion and in accordance with the procedures of the United States Coast Guard. There is no clear and convincing evidence that he was actually removed from the rolls.
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> Finally, [the applicant] claims that he is entitled to collateral remedies. However, unless the plaintiff is entitled to a monetary remedy, the United States Court of Federal Claims lacks jurisdiction over collateral remedies. See Holley v. United States, 124 F.3d 1462, 1466 (Fed. Cir. 1997) Accordingly, the Court of Federal Claims correctly declined to reinstate [the applicant] to the rank of captain, to remove the July 20, 1989 officer evaluation report from his records, and to grant attorney's fees or costs.

Baird v. United States, No. 99-5097 (Fed. Cir. August 28, 2000) at 2-4.

The applicant petitioned the Court of Appeals for a rehearing, which was denied on December 14, 2000. *Baird v. United States*, No. 99-5097 (Fed. Cir. December 14, 2000). On December 20, 2002, the applicant petitioned the Court of Federal Claims to set aside its March 1999 summary judgment and for a new trial.[4] On December 20, 2002 the Court returned the applicant's motion unfilled stating that the case was closed and noting the mandate issued by the Court of Appeals for the Federal Circuit on December 21, 2000.

Applicant's Requests for Reconsideration of BCMR No. 107-96

The BCMR file shows that on two different occasions, the applicant requested that the Board reconsider its final decision denying his requests for relief in BCMR No. 107-96. His second request for reconsideration, received by the Board on December 27, 2000, was based upon the discovery of certain computer entries that, he alleged, show that the Commandant separated him or dropped him from the rolls in 1992. He alleged that the Coast Guard purposefully failed to disclose this information to the Board during the processing of his BCMR case. See DD149 (request for reconsideration) with attachments, dated December 21, 2000. [5]

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[4] The applicant's motion to set aside the summary judgment and for a new trail was based in part on allegations that the Coast Guard committed fraud by concealing computer entries showing that the applicant was allegedly discharged from the Coast Guard in 1992.

[5] The applicant attached to his request for reconsideration a copy of a September 21, 2000, Article 138 complaint against the Commandant alleging that his subordinates had misled the Board and civilian

On June 5, 2001, the Chairman of the Board determined that the applicant's reconsideration request did not meet the requirements for reconsideration under 33 CFR § 52.67 of the Board's rules. The Chairman informed the applicant that even if the keystrokes allegedly dropping him from the rolls were new evidence, it could not cause the Board to reach a different conclusion in his case. In this regard, the Chairman noted that the applicant had already raised the allegations of fraud in a petition for rehearing before the Court of Appeals that had been denied. With respect to the applicant's allegation that computer entries placing him on the ISL were made two days after the commander selection board had convened, the Chairman told the applicant the following:

> [The BCMR], in its final decision, found that you were properly placed on the ISL because you did not earn the number of points necessary to remain in the IRR . . . The fact that computer keystrokes were allegedly made placing you on the ISL based on the Commandant's earlier decision of November 21, 1990, that you would be transferred to the ISL, effective November 30, 1990, will not cause this Board to reach a decision other than that already made with respect to your non-consideration by the 1990 and 1991 commander selection boards. It was the Commandant's November 21, 1990 decision that you would be placed on the ISL effective November 30, 1990, that is determinative of your status, not when the entries were made into the computer system." [See BCMR June 5, 2001 letter denying reconsideration.]

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judges about the applicant's alleged 1992 separation from the Coast Guard. He alleged that information he received explaining the computer entries verifies that on May 28, 1992, the Commandant separated him from the Coast Guard and terminated his appointment as an officer. Subsequently, he alleged that the Commandant caused the 1992 entry to be deleted from the computer. The applicant suggests that the computer codes and entries prove that he was discharged from the Coast Guard without his knowledge and without due process.

On November 7, 2000, the Commandant responded to the applicant's Article 138 complaint. He explained to the applicant that a Headquarters' employee likely made the entries, but such entries standing alone were insufficient to effect the applicant's separation from the Coast Guard Reserve. The Commandant further stated, "To have been effectively separated from the Coast Guard Reserve, you must have been provided a DD 214 or other valid notification of the separation action. You have stated that you never received any notice of your separation from the Coast Guard, and our records do not indicate that any such notice was prepared. A separation is only effective if the service has the intent to separate the member and the member receives actual or constructive notice of the intended separation actions. See *United States v. Howard*, 20 M.J. 353, 354 (CMA 1985)." The Commandant told the applicant that the separation was not completed and that his record was corrected on November 10, 1994, by removing the computer entries.

As discussed earlier, the applicant was on the ISL from 1990 until December 1994, when he was returned to the Ready Reserve. Subsequently, after earning 20 years of satisfactory federal service, the applicant was placed on the retired list (RET-2), effective April 1, 2001. Pursuant to 10 U.S.C. § 12301(d), Commander, Coast Guard Personnel Command (CGPC) recalled the applicant to active duty, with his consent, from his retired status, effective April 1, 2001. This period of active duty was scheduled to and ended on September 22, 2001. After the September 11, 2001 terrorist attacks, a Coast Guard officer verbally requested that the applicant remain on active duty for an additional 90 days, with written orders to follow. On September 23, 2001, the applicant commenced this period of active duty and continuously performed military duties until December 27, 2001. However, when the written orders were received, the effective date was September 27, 2001, instead of September 23, 2001, leaving a four-day gap between the termination date (September 22, 2001) of the applicant's prior orders and the effective date of the new written orders (September 27, 2001). The Coast Guard paid the applicant for the entire month of September, including the four days that were not covered by the written orders. The applicant was released from active duty on December 27, 2001, the date his most recent orders terminated.

Prior to September 22, 2001, the applicant had already sold the maximum 60 days of unused leave permitted under 37 U.S.C. § 501(b)(3).[6] However, he alleged that but for the four-day break in service, he would have been permitted to bring forward the unused leave from the earlier period and to sell his entire balance of unused leave upon his release from active duty on December 27, 2001 under section 501(b)(5)(B) of title 37, United States Code.[7] This provision of law states that the 60-day limit shall not apply with respect to leave accrued by a member of the armed forces in the Retired Reserve while serving on active duty in support of a contingency operation. The applicant's October 2001 leave and earnings statement (LES) shows that he brought forward 17 days of previously accrued, unused leave from his earlier period of active duty. His December 2001 LES shows that at the end of the active duty period that terminated on December 27, 2001, the applicant had a balance of 20.5 days of unused leave. It also shows that he used 4 days of leave during the month of December 2001.

Although it is not clear from the record, it appears that in reconciling the applicant's final pay in December 2001, the Coast Guard determined that he had been overpaid and instituted action to collect a $1785 overpayment for the four days in

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[6] Section 501(b)(1) states that a member of the Coast Guard is entitled to be paid in cash or by a check on the Treasurer of the United States for such leave on the basis of the basic pay to which he was entitled on the date of discharge. Subsection 501(b)(3) states in pertinent part that the number of days of leave for which payment is made may not exceed sixty, less the number of days for which payment was previously made.

[7] Section 501(b)(5)(B) states, "The limitation . . . shall not apply with respect to leave accrued-- . . . by a member of the armed forces in the Retired Reserve while serving on active duty in support of a contingency operation."

September 2001 that were not covered by written orders. The applicant stated that he applied for a debt waiver; but there is no evidence in the record that the Coast Guard acted on the request for a waiver. Subsequently, the Coast Guard began efforts to collect the alleged debt.

As stated above, on September 14, 2004, the applicant filed an action in the Court of Federal Claims seeking to enjoin the Coast Guard from collecting the alleged overpayment, seeking back pay for the unused leave, and seeking the correction of other alleged errors in his record. These other errors are identified in *Baird v. United States* as "fraudulent entries . . . made by unidentified persons that were hidden from plaintiff, excluded from previous administrative record, and not discovered until September 2000[;]" his illegal exclusion from consideration for promotion in 1990; and claims that the Coast Guard altered his retirement points statement in 2001 and 2002, and deleted retirement points from his service record. See footnote 1, *supra*. On June 1, 2006, this case was remanded to the Board to resolve three issues discussed on page 2, *supra*.

Additional Submission by Applicant

On August 15, 2006, the applicant asked for permission to supplement the record. He provided additional documents to the Board (many of which were duplicates of earlier submissions) that he contended show the following:

- That he was improperly removed from an active reserve status in November 1990, and improperly excluded from consideration by the Reserve Commander Selection Board that convened on December 3, 1990.

- That the date of processing for the November 1990 reserve pay and point accounts was December 11, 1990. "The alleged screening that occurred on November 21, 1990 was incomplete, as it did not include November 01, 1990 information. I also note that the transmittal documentation from the Eighth Coast Guard District to the applicant was dated December 11, 1990."

- That the Commandant's November 21, 1990 letter that transferred the applicant to the inactive status list (ISL) did not comply with the regulation. In this regard, the applicant stated that he was not given 30 days to respond, i.e. provide evidence of completed drills; he did not have the ability to request a one time waiver of the participation standards; and he was not afforded any of the due process protections under Article [14-I] of the Reserve Training and

Administration Manual (RATMAN)[8]; and that the annual screening did not occur within three months of his anniversary date.

- That the Coast Guard did not provide him with prior notice of his transfer to the ISL. The applicant stated that he received notice of the transfer on December 11, 2001, but the transfer occurred on November 21, 2001, with the computer entry made on December 5, 2001.

The applicant argued that a statement from a YN1 explains why he was not screened for promotion in 1990. The YN1 stated that he was a personnel specialist attached to the Eighth Coast Guard District from January 1989 through December 1990. He further stated the following:

> Part of my assigned duties was to prepare and send certified letters to reserve officers who were being considered for promotion to the next grade. These letters advised each officer that they were being considered for promotion by a Reserve promotion board and that they had the opportunity to communicate pertinent information with the board that they believed was important in demonstrating their fitness for promotion.
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> I was aware that the Coast Guard was monitoring a civilian criminal case involving [the applicant]. I was also instructed not to send a certified letter to [the applicant] and I am not aware of any letter being sent to [the applicant] prior to the convening of the Reserve Commander Selection Panel.

The applicant alleged that documents of computer entries obtained from the Coast Guard show that he received a discharge under other than honorable conditions on May 28, 1992. He stated that these documents were previously concealed from the BCMR during the 1996 proceedings. He claimed that he was not able to obtain this information until 2001, and therefore his record with respect to this issue could not have been corrected during the 1996 BCMR proceedings.

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[8] Article 14-I-1. of the RATMAN calls for the annual screening of officers in an active status not on extended active duty for compliance with the minimum yearly point requirement (27). The screening is done at the end of an officer's anniversary year with notification to the officer approximately 3 months after the month in which the anniversary year ends. Article 14-I-2 provides procedures for transferring an officer to the ISL who failed to earn the required minimum points in an anniversary year. Officers notified of the transfer have 30 days from receipt of notification to request a waiver of the minimum participation requirement, supply documentation of additional points earned, request resignation, or request transfer to the Retired Reserve, if eligible. If no response is received, transfer to the ISL will be made 45 days from the date of the notification letter.

VIEWS OF THE COAST GUARD

On August 17, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board make three pertinent findings, as discussed below.

1. "**The BCMR should find that the Coast Guard made no overpayment to the Applicant in connection with service performed between the dates of September 22, 2001 and September 26, 2001. The Coast Guard should cease all efforts to recoup payments for service performed during this period**."

The JAG stated that the applicant had met his burden of showing that due to an administrative error written orders to active duty for the time period in question were never created and that he never received overpayment from the Coast Guard. The JAG stated that the applicant received payment for duty performed for September 23, 2001 through September 26, 2001 and therefore was not overpaid. The JAG further recommended that the Board find that the Coast Guard should permanently suspend all actions to collect any payments for service performed between September 22, 2001 and September 26, 2001.

2. "**The BCMR should find that the applicant is not entitled to any additional back pay or allowances resulting from the alleged break in service in September 2001**."

The JAG stated that this issue relates to the applicant's claim that "as a result of the 'erroneous' break in service that he forfeited 22 days of leave that he would have been entitled to payment for as unused accrued leave had there been no break in service." According to Chapter 10.A. of the Coast Guard Pay Manual and section 501 of title 37 of the United States Code, a member may receive payment for unused accrued leave up to a career maximum of 60 days, which the applicant had already met at the time of his release from active duty in December 2001. The JAG noted that 37 U.S.C. § 501(b)(5)(B) and Chapter 10.A.1.a.(2) of the Pay Manual authorize an exception to the 60-day limit for those retired reserve members serving on active duty in support of a contingency operation. The JAG recommended that the Board find that the applicant may receive payment for unused leave accrued from September 23, 2001 through December 27, 2001. The JAG supplied the following reasoning:

> On 29 March 01, the Coast Guard issued the Applicant temporary active duty (TEMAC) orders to report for duty beginning 1 April 01 and [the orders] were subsequently extended through 22 September 01. The orders covering this period were not issued for duty in support of a contingency operation. As the orders covering this period were not issued in support of a contingency operation, the Applicant is not entitled to payment for

unused leave that accrued up until 22 September 01. The Coast Guard issued orders beginning on 23 September 01 pursuant to a declaration of national emergency and in support of contingency operations in the aftermath of the September 11 terrorist attacks. Accordingly, the applicant may receive payment for unused leave only for service from 23 September 01 to 27 December 01.

During the period from 23 September to 27 Dec 01, the Applicant accrued (8) days of leave. The Applicant's records indicate that he used (4) days of leave from 11 Dec 01 to 14 Dec 01 . . . Coast Guard pay records indicated that the applicant was paid for those 4 days of unused leave. However, the Coast Guard pay center informed me that the Coast Guard applied payment for the 4 unused days of leave to the debt it believed the Applicant owed for payments for the dates between 22 September 01 and 26 Sep 01.

Accordingly, I recommend that the board find that the Applicant did not lose the right to payment for unused leave. Specifically, I recommend that the Board conclude that the Applicant could not be paid for the unused leave for the periods between 1 April 01 and 22 September 01 because the Applicant's duty during that period was not in support of a contingency operation and the Coast Guard had previously paid him for the maximum (60) days of unused leave. I recommend on this issue that the BCMR find that the Coast Guard correctly paid the Applicant for the four days of unused leave but that based on the conclusions above the Coast Guard should not have applied this payment to the debt the Coast Guard believed the applicant owed.

3. "**The applicant has not met his burden of showing that there are errors in his record**." The JAG stated that the court's order does not specify any alleged errors in the applicant's military record. However, the JAG stated that based on his reading of the applicant's court complaint and other filings, two errors were identified by the applicant. First, the applicant alleged an error in the DD FORM 214 that was provided to him upon his release from active duty in 2001. Second, the applicant alleged that there were "computerized and falsified documents which fictitiously changed his military service. These records were brought before board dating back as far as 1990."

With respect to the erroneous DD FORM 214, the Coast Guard agreed in a supplemental advisory opinion dated August 31, 2006, that errors existed on the document releasing the applicant from active duty on December 27, 2001, and recommended that it be corrected. The JAG stated that block 12.c. on the DD Form 214 should read 3 months and 2 days (92) days of net active service, and block 12.d. should be corrected to show the applicant's total prior active service as 13 years, 1 month, and 2

days. The Coast Guard classified these as administrative errors and stated that the applicant has not lost any benefits or entitlements as a result of the errors.

The JAG noted that in some of his court pleadings, the applicant alleged that the Coast Guard had "changed retirement point statements in February 2001 and July 2002 and deleted retirement credits which were included in [the applicant's] record of service that was reviewed and approved by the BCMR in 1996." On June 6, 2006, the Coast Guard Personnel Command (CGPC) produced a printed copy of the applicant's Reserve Retirement Points Statement showing 5,637 points. The JAG recommended that the Board find this point statement to be correct, as the applicant has produced nothing to demonstrate that it is incorrect.

With respect to the applicant's contention of computerized and falsified documents, the JAG presumed that these are the entries that it investigated in 2000 upon receiving a complaint from the applicant. On this issue, the JAG stated as follows:

> As discussed in the Coast Guard's 7 November 2000 letter to the applicant, it appears that on July 27, 1992, a member of the Coast Guard Headquarters staff entered the necessary computer codes to the Personnel Management Information System (PMIS) to document action separating the applicant from the Coast Guard Reserve. This was an administrative error because the applicant was never separated from the service.[footnote omitted]
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> On 10 November 1994, after the applicant's conviction in federal court was overturned and the indictment dismissed, the applicant notified the Coast Guard of the dismissal and that his name was missing from the 1994 Register of Reserve Officers. The Coast Guard corrected the computer entry in order for the applicant's record to reflect that he was never separated. On 2 December 1994, the Coast Guard returned the applicant to the IRR and he resumed eligibility for selection to Commander. From 10 November 1994 onward, the applicant's record as it appeared before all selections boards no longer reflected any break in service. In fact, the applicant's PDR as it appeared before the BCMR in 1997 reflected that there was no break in service. All selection boards that considered the applicant for promotion only reviewed his record, as it reflected no breaks in service. I recommend that the BCMR find that the applicant is not entitled to relief based on the computer entries made in 1992 and then corrected in 1994 because no promotion board ever considered the computer entries.

The JAG summarized the Coast Guard's recommendations, as follows:

A) the applicant received no overpayments in connection with his service between 22 September 2001 and 26 September 2001;

B) the applicant could not be paid for the unused leave for the periods between 3 April 2001 and 22 September 2001 because the applicant's duty during that period was not in support of a contingency operation and the Coast Guard had previously paid him the maximum (60) days of unused accrued leave;

C) the Coast Guard correctly made payment to the applicant for four days of unused accrued leave for service ending 27 December 2001 but that the Coast Guard erroneously applied payment for this unused leave to the debt it believed the applicant owed;

D) the Coast Guard should issue a corrected DD FORM 214 that reflects [the corrections recommended in the advisory opinion];

E) the Coast Guard record indicating that the applicant has 5,637 retirement points is correct;

F) the Coast Guard did not erroneously exclude the applicant from any Commander selection board from 1989 through 1994 because the applicant was on the ISL and ineligible for consideration; and

G) the applicant is not entitled to relief based on the computer entries made in 1992 and then corrected in 1994 because no promotion board ever considered the computer entries.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 17, 2006, the Board sent the applicant a copy of the Coast Guard's views, and on August 24, 2006, the Board sent the applicant a copy of the supplemental advisory opinion. On September 7, 2006, the BCMR received the applicant's reply to the views of the Coast Guard. He restated arguments and contentions made earlier in his previous BCMR application. In this regard, he contended that he is entitled to constructive active duty credit for the period January 23 1989 through December 1, 1994 because the Coast Guard committed a series of errors and injustices against him during this period as evidenced by a letter dated May 19, 1992 from the Commandant to the Commander, Eighth Coast Guard District. The letter stated that the applicant's sentence for his civil criminal conviction had not been stayed and that his appeal of that conviction did not cause an automatic stay of the sentence. The applicant stated that the letter is evidence that the Coast Guard erroneously believed that he was barred from consideration and participation in the Coast Guard Reserve. He argued that if the Coast

Guard had produced this letter along with evidence of the alleged deleted discharge contained in the computer records during his earlier BCMR application, the outcome might have been more positive.

The applicant appears to argue that he was illegally discharged from the Coast Guard with an other than honorable discharge, which if proven, entitles him to constructive active duty credit. Along this vein, he argued as he did in his earlier case that because he served on active duty for periods totaling more than 360 days in the late 1980s, his active duty should have been considered extended active duty under 10 USC 679, which would have afforded him some protection from discharge. He stated that Coast Guard regulation states that "Requests for more than 360 days duty will normally be considered extended active duty under 10 USC 679."

The applicant restated his argument that his placement on the ISL was not in compliance with Article 14-I of the RATMAN, and further stated that it should not have occurred until January 5, 1991, 45 days after he was notified of the transfer. Therefore, he argued that he was illegally excluded from consideration by the 1990 IDPL CDR selection board.

The applicant contended that on January 4, 2002, his retirement point statement was altered resulting in the deletion of 59 Coast Guard Reserve membership credits and the adjustment of his anniversary date to December 1, 1994. He alleged that the Coast Guard took these actions to reflect a "break in service." He stated that the Board should ensure proper credit be given for the period between January 23, 1989 and December 1, 1994 and eliminate this break in service.

The applicant stated that although the Coast Guard has acknowledged that he performed active duty from September 23, 2001 through September 27, 2001, it has failed to provide him with a remedy that cures the errors caused by the erroneous four-day break. In this regard, he stated that but for the gap in service he would have carried leave forward from one period to the next. He stated that the statute is silent as to the point and time that leave must have actually accrued while serving on active duty in support of a contingency operation to qualify for the exception under 37 U.S.C. § 501(b)(5)(B).

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, Court filings, 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 Court of Federal Claims remanded this case to the Board on June 1, 2006 and directed the Board to address the following issues: (1) Whether and to what extent the applicant's record of military service contained errors. (2) Whether and to what extent the applicant is entitled to back pay and allowances as a result of his service in the absence of written orders from September 23 through September 26, 2001. (3) Whether and to what extent the United States Coast Guard made overpayments to the applicant in connection with the period from September 23 through September 26, 2001, and whether the Coast Guard's efforts to collect such sums may resume. The Board addresses these issues in reverse order, as discussed below.

Issue: Whether and to what extent the United States Coast Guard made overpayments to the applicant in connection with the period from September 23 through September 26, 2001, and whether the Coast Guard's efforts to collect such sums may resume.

3. The JAG admitted, and the Board finds, that the Coast Guard committed an administrative error by not amending the applicant's September 28, 2001 written orders to show an effective commencement date of September 23, 2001. The Commander, Eighth Coast Guard District, requested that CGPC amend the September 28, 2001 written orders to show an effective date of September 23, 2001, but this was never done. The Commander also corroborates the fact that the applicant actually performed assigned military duties from September 23 through September 26, 2001, for which he received pay and allowances. The preponderance of the evidence supports the applicant's contention that he had valid verbal orders to active duty with an effective date of September 23, 2001, and that he performed duties under such verbal orders from September 23, 2001 through September 26, 2001. Therefore, the applicant was entitled to the pay he received for this 4-day period and is not in an overpayment status. The Coast Guard should permanently cease any efforts to collect money from the applicant with respect to this 4-day period. To correct the error and to avoid confusion in the applicant's record with respect to this 4-day period, the effective date of the active duty orders issued on September 28, 2001 should be corrected to have an effective date of September 23, 2001.

Issue: Whether and to what extent the applicant is entitled to back pay and allowances as a result of his service in the absence of written orders between September 22 and September 26, 2001.

4. The back pay requested by the applicant relates to his allegation that because of the 4-day break in service he lost 22 days of unused accrued leave upon his release from active duty on December 27, 2001. According to the applicant, had the 4-day break in service not occurred, he would have been permitted to carry forward approximately 17 days of accrued leave from his earlier period of active duty and he

would not have been subjected to the 60-day limit on the sale of accrued leave because his recall to duty on September 23, 2001, was in support of a national emergency. Section 501(b)(3) of title 37 U.S.C. states, "the number of leave days for which payment is made may not exceed sixty, less the number of days of leave for which payment was previously made under this section after February 9, 1976." Stated another way, a member of the armed forces may sell up to a maximum of 60 days of leave during a career, unless the member meets the requirements for an exception to the 60-day limit. Section 501(b)(5)(B) of title 37 of the United States Code provides such an exception. This provision states that the 60-day limitation shall not apply with respect to leave *accrued* by a retired reserve officer *while* serving on active duty in support of a contingency operation. Therefore, since the applicant had earlier in his career sold the maximum 60 days of accrued leave permitted under 37 U.S.C. § 501(b)(3), he could only sell additional leave in excess of the 60-day maximum if it were accrued during a period of recall from his retired status to active duty in support of a national contingency. The written orders issued on September 28, 2001, with an effective date of September 27, 2001, which the Board will order corrected to September 23, 2001, clearly state that the orders were issued in support of the declared national emergency with respect to September 11, 2001. Therefore, the Board finds that the applicant was entitled to sell that portion of unused leave that he accrued while serving on active duty from September 23 through December 27, 2001, under orders in support of a national emergency.

5. Contrary to the applicant's argument that he was not allowed to carry forward accrued leave from his earlier period of active duty that ended on September 22, 2001, his October 2001 LES shows a beginning leave balance of 17 days. Therefore, he must have carried forward the 17 days from September 2001. The applicant's December 2001 LES shows that he had a leave balance of 20.5 days and that he had previously used 4 days. The Coast Guard noted, however, that the applicant accrued only 8 days of leave from September 23, 2001 through December 27, 2001, while serving in support of the national emergency. Leave is credited on a monthly basis; therefore, leave that accrued to the applicant under the orders calling him to active duty in support of a national contingency is easily ascertainable.[9] Of the 8 days of leave that he accrued during the contingency period, the applicant used 4 days, and the JAG stated that the Coast Guard deemed the applicant to have sold the remaining 4 days and applied the proceeds toward the applicant's erroneous overpayment debt. The applicant has submitted nothing to contradict this statement.

6. The JAG recommended that the applicant be reimbursed for the 4 days of leave that was sold and applied toward the erroneous debt. The Board agrees with the

[9] Article 7.A.19.b. of the Personnel Manual states that leave is credited at the rate of 2 1/2 days for each full calendar month of active duty, with charts showing leave credited for fractional parts of a calendar month.

Coast Guard and finds that under 37 U.S.C. § 501(b)(5)(B), the applicant was entitled to sell the 4 days of unused leave that actually accrued during the period that he was serving under recall orders in support of the declared national emergency. He was not entitled, however, to sell any of the leave he accrued and brought forward from the earlier period of active duty because that leave was not accrued under orders recalling him to service in support of a national emergency. The pertinent statute states that the 60-day limit will not apply to leave *accrued* by a member of the armed forces in the Retired Reserve *while* serving on active duty in support of a contingency operation. It does not state that such a member is entitled to the exception for leave accrued while serving on active duty for other reasons. The Board finds the statute to be very specific, in permitting the 60-day limit to be exceeded only for leave accrued during the period that a retired member is serving in support of a national contingency.[10] Therefore, the applicant was entitled to sell the 4 days of unused leave that he accrued and did not use from September 23, 2001, through December 27, 2001,[11] and the Board will so direct it.

Issue: Whether and to what extent the applicant's record of military service contained errors.

7. After reviewing the court filings and supplemental information from the applicant, the Board finds that the applicant set forth numerous allegations, only two of which have not been previously considered and rejected by the BCMR: He alleged that his DD Form 214 was incorrect and that his retirement point statement was incorrect. The JAG agreed with the applicant that the DD Form 214 releasing him from active duty on December 27, 2001, was erroneous in that it did not accurately record his net active service for that period in block 12.c.; nor did it accurately record the applicant's total prior active service in block 12.d. The JAG stated that block 12.c. should read 3 months and 2 days of net active service instead of 3 months and 1 day of net active service; and that block 12.d. should read 13 years, 1 month, and 2 days of prior active

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[10] In Comp. Gen. B-228683 (1987) & B-181008 (1974), the Comptroller General strictly interpreted that provision of the law that limited the sale of accrued unused days to 60 days during a military career. In the two cases, each member had accrued leave that exceeded the 60-day maximum upon their release/discharge from active duty. The Comptroller General wrote in B-228683, "Because neither the statute nor regulation permits exceptions to the 60-day limitation, we have held that payment for accrued leave in excess of 60 days is prohibited irrespective of the member's reasons for failing to use the leave." The law is equally clear that the 60-day limit may be exceeded by a retired reserve officer for leave accrued during recall to active duty in support of a national emergency. It makes no provisions for tacking on leave from other periods of active duty.

[11] In the Armed Forces, leave is charged and accounted for on a "Last In, First Out," basis. Therefore, although the applicant carried over 17 days of unused leave on September 23, 2001, the 4 days of leave he took while serving in support of a contingency operation were properly charged against the 8 days of leave he earned from September 23 through December 27, 2001, rather than against the 17 days of leave he carried over. *See* Coast Guard Personnel Manual, Art. 7.A.19.a.1. DOD 7000.14-R, Vol. 7A, Chap. 35, Para. 350102.C. states that "when used, leave will be charged in reverse order with the most recently accrued leave charged first. This method is known as Last In, First Out (LIFO)."

duty instead of 12 years, 4 months, and 12 days of prior active duty. The applicant did not object to this recommendation in his reply to the advisory opinion. Therefore the Board finds that he agrees with it. In light thereof, the Board finds that the DD Form 214 is erroneous with respect to blocks 12.c. and d. and should be corrected as recommended by the JAG.

8. With respect to the applicant's other new allegation, that his retirement point statement is incorrect, the Board finds that he has not produced any evidence that the 5,637 retirement points (which include active duty and inactive duty points) recorded on his June 6, 2006 retirement point statement are incorrect. He contended that on January 4, 2002, the Coast Guard altered his retirement point statement resulting in the deletion of 59 Coast Guard Reserve membership credits and the adjustment of his anniversary date to December 2, 1994. In a December 2, 2002, letter, the Coast Guard Human Resources Service & Information Center (HRSIC) wrote the applicant and informed him that in accordance with the Reserve Policy Manual, his anniversary date had been adjusted to December 2, 1994, based upon the resumption of his ready reserve status from his ISL status. Article 8.C.3.a.(1) & (2) of the Reserve Policy Manual state the following:

"(1) The periods used for crediting of qualifying years for non-regular retirement shall be based on "anniversary" years that are calculated from an anniversary date. The date used to determine the anniversary year is established by the date the member entered into active service or into active status in a Reserve Component.

"(2) The start date (month and day) for each successive anniversary year will not be adjusted unless the member has a break in service. *A break in service occurs only when a member transfers to an inactive status list*, a temporary disability retired list, the Retired Reserve, or is discharged to civilian life for a period of greater than 24 hours." (Emphasis added.)

In light of the above regulation, the applicant's anniversary year was adjusted because he had a break in service caused by his transfer to the ISL in 1990. He remained on the ISL until December 1994. Therefore, no error occurred in the adjustment of the applicant's anniversary date resulting from his reentry to the Ready Reserve from the ISL. The applicant alleged that he lost 59 membership credits due to the adjustment of the anniversary date. He does not identify the years in which he allegedly lost the membership points. The Board surmises that he is contending that he lost membership points for the years that he was on the ISL. If so, the Coast Guard acted in accordance with regulations under both the RATMAN and the Reserve Policy Manual in deleting any membership points previously awarded to the applicant while on the ISL. Article 12-C-9.a of the RATMAN in effect until 1997 stated that 15 points are awarded each anniversary year for membership in the Ready Reserve or Standby Reserve (active

status)[12]; and Article 8.C.3.c. of the Reserve Policy Manual states that service in the inactive section of a Reserve component may not be counted in determining entitlement to retirement. From 1990 until late 1994, the applicant was in an inactive status on the ISL and was not entitled to earn any points either for service or membership. The Board finds that the Coast Guard acted appropriately in adjusting the applicant's anniversary year after he returned to an active status in the ready reserve from the ISL; that it properly deleted any membership points awarded to the applicant while on the ISL; and that it accurately recorded the break in service from the applicant's placement on the ISL until his return to the ready reserve. As stated above with respect to the applicant's total number of retirement points, the June 6, 2006, retirement point statement shows that the applicant has 5,637 such points, and he has produced nothing to show this figure to be inaccurate.

9. After the remand to the Board, the applicant requested to supplement the record. He submitted a statement and several documents from pay records, regulations from the RATMAN dealing with transfers to the ISL, and other documents in an attempt to reargue the issues that were considered and decided by the Board in BCMR No. 107-96. In this regard, the applicant alleged that he was placed on the ISL in 1990 in violation of the regulation; that he was illegally excluded from the 1990 IDPL selection board; and that he was illegally discharged or dropped from rolls without due process. He also alleged that he is entitled to constructive active duty credit for the period January 23, 1989, through December 1, 1994. In its final decision issued on September 12, 1997 in BCMR No. 107-96, the Board addressed each of these issues and denied relief. Moreover, the applicant appealed that final decision to the Court of Federal Claims, where it was found not to be arbitrary, capricious, or contrary to law. Subsequently, the Court of Appeals for the Federal Circuit sustained the decision of the Court of Federal Claims that the BCMR had not acted arbitrarily, capriciously, or contrary to law in denying the applicant's request in BCMR No. 107-96.

10. Therefore, for the applicant to obtain reconsideration on any of the restated allegations from the earlier BCMR case mentioned in Finding 9. above, he must meet the requirements for reconsideration at 33 C.F.R. § 52.67(1) & (2), which state that reconsideration is granted only if:

> (1) An applicant presents evidence or information that was not previously considered by the Board that could result in a determination other than that originally made. Evidence or information may only be considered if it could not have been presented to the Board prior to its original determination if the applicant had exercised reasonable diligence; or

[12] See also Enclosure (1-1) of the RATMAN.

> (2) An applicant presents evidence or information that the Board, or the Secretary as the case may be, committed legal or factual error in the original determination that could have resulted in a determination other than that originally made.

Of the numerous documents submitted by the applicant in court filings and to the Board after the remand, the Board finds three of them to be new documents that were not before the Board in BCMR No. 107-96 and that are relevant to whether to grant reconsideration on any issue previously decided by the BCMR. One document is a letter dated May 19, 1992, the contents of which state only that an appeal does not automatically stay the sentence of a court in a criminal conviction. (The applicant was convicted in 1990 of violating 18 U.S.C. 203; the conviction was later overturned on appeal in 1994.) The letter further informed the applicant that an order from the district court was required to cause a stay in the execution of the sentence. He claimed that the May 19, 1992 letter from the Commandant to the Commander, Eighth Coast Guard District, showed that the Coast Guard mistakenly believed that he was barred from participating in the Coast Guard Reserve due to his criminal conviction. However, the Board considered this information in reaching a decision in BCMR No. 107-96. At that time, the Board had a February 11, 1992 letter from the Commander, Eighth Coast Guard District informing the applicant that his sentence included an order barring him from holding a federal position and that the sentence would be executed unless he was granted a stay. Thus, the Coast Guard's position that part of the applicant's sentence barred him from holding a federal office was available to the Board when it considered BCMR No. 107-96; therefore such information is not new and could not result in a determination other than that made by the Board.

11. The other document(s) submitted by the applicant is a computer print out of certain codes that were entered into the Coast Guard's internal computer system allegedly showing that the applicant was discharged from the Coast Guard in July 1992.[13] This information about the computer entries may be new, but it is not information that could cause the Board to reach a different decision with respect to the finding in BCMR No. 107-96 that the applicant was at all relevant times a Reserve officer. While certain keystrokes indicating a separation may have been entered into the computer system, there is no evidence that the applicant was ever actually discharged from the Reserve. As the Court of Appeals for the Federal Circuit stated:

> [The applicant]. . . claims that the Commandant of the United States Coast Guard improperly removed him from the rolls of the Coast Guard Reserve. Although he raised the issue before the board, the records show that [the applicant] was at all relevant times a reserve officer on the rolls. He was on active duty from October 1, 1987 to December 31, 1988. On

[13] The Board notes that the Coast Guard corrected these erroneous computer codes in 1994.

> January 6, 1989, he was ordered to active duty from January 23, 1989 to May 31, 1989, but these orders were cancelled before being executed and he was placed in the Selected Reserve. He was moved on January 17, 1989, from the Selected Reserve to the Individual Ready Reserve (IRR), and he was notified on November 21, 1990 that he was being transferred to the inactive status list (ISL) for failure to earn the minimum required retirement points in the preceding year in accordance with the Reserve Administration and Training Manual . . . Section 14-1 . . . There is no clear and convincing evidence that he was actually removed from the rolls. (*Baird v. United States*, No. 99-5097 (Fed Cir, August 28, 2000) at 2.)

12. Moreover, the fact that the applicant was returned to the Ready Reserve from the ISL in 1994 without having to be re-commissioned or reappointed as an officer in the Coast Guard Reserve is persuasive evidence that he was not dropped from the rolls or separated from the Coast Guard. A discharge completely severs the relationship between an individual and the Coast Guard.[14] In addition, even if the applicant had been separated in July 1992, it would have had no effect on his non-consideration for promotion by the FY91 IDPL selection board. In this regard, he has presented no evidence that any selection board saw the computer entries. However, more importantly, such entries would not have been available to the FY91 IDPL selection board because they were not entered until July 1992, while the FY91 selection board convened in December 1990. Further, whether separated or not, the applicant would have been on the ISL from 1990 until 1994 and ineligible to compete for promotion. Accordingly, the computer print out document allegedly showing the applicant's discharge could not cause the Board to reach a different conclusion in this case, as the BCMR explained to the applicant in a December 27, 2000 letter.

13. The third relevant document not previously seen by the Board is the YN1's January 14, 2005 letter that could have been obtained and presented to the Board during its deliberation of BCMR No. 107-96. For this reason alone, reconsideration may be denied. However, the more important reason is that the letter could not cause the Board to reach a different outcome with respect to the 1990 IDPL selection board. The YN1 stated that he was instructed not to send a certified letter to the applicant advising him that the 1990 IDPL selection board would screen him. Since the Commandant had determined that the applicant would be placed on the ISL effective November 30, 1990, he was not eligible for consideration for promotion by the IDPL selection board that was scheduled to meet after his placement on the ISL. Members on the ISL cannot be promoted. See Encl: (1-1) of the RATMAN. The YN1's letter is consistent with the action taken by the Commandant in placing the applicant on the ISL and with Coast Guard policy. While this letter is a new document, it does not meet the Board's requirement for reconsideration because it could have been obtained and presented to

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[14] See Article 12.B.1.f.2. of the Personnel Manual.

the Board in BCMR No. 107-96 and it could not cause the Board to reach a different outcome in this case.

14. The Board notes that the applicant now argues that his transfer to the ISL did not take place in accordance with Article 14-I of the RATMAN. As stated earlier, reconsideration can only be granted based on new evidence or information that could not reasonably have been discovered through due diligence and that could result in a different decision, or based on evidence that the Board committed a legal or factual error in the original determination that could result in a different decision. Reconsideration is not granted to allow applicants to repeatedly reargue issues solely because of their disagreement with the outcome. Article 14-I of the RATMAN is not new evidence and reasonably could have been discovered through due diligence prior to final decision in BCMR No. 107-96. The RATMAN was available for review by the applicant and/or his attorney during the BCMR proceeding in BCMR No. 107-96. The failure to raise alleged violations of Article 14-I of the RATMAN by the Coast Guard for the Board's consideration during the processing of BCMR No. 107-96 rests with the applicant and his attorney. The Board did not commit any factual error with respect to the Article 14-I because it was not raised as an issue before the Board in BCMR No. 107-96 and is therefore waived. Accordingly, the Board finds that the applicant's arguments in this regard do not meet the requirements for reconsideration.

15. For the reasons discussed above, the Board finds that the applicant has failed to meet the requirements for reconsideration of BCMR No. 107-96 in all respects. As found in the Final Decision issued by the Board in BCMR No. 107-96 and as sustained by the Court of Appeals for the Federal Circuit, the applicant's military record contains no errors with respect to his placement in the IRR, his placement on the ISL, or his non-consideration by the selection board while on the ISL. Nor does evidence of the computer entries cause the Board to reconsider its original finding that the applicant was at all relevant times a Coast Guard Reserve officer.

16. All of the applicant's allegations and evidence have been reviewed and considered by the Board. Those not discussed within the Findings and Conclusions are considered not to be dispositive of this case.

17. Accordingly, the applicant should be granted partial relief, as recommended by the Coast Guard, which is directed below.

ORDER

The application of LCDR XXXXXXXXXX, xxxxxxxxxxxxx, USCGR, for correction of his military record is granted in part as follows:

His DD Form 214 documenting his release him from active duty on December 27, 2001, shall be corrected to show 3 months and 2 days of net active service in block 12.c. and 13 years, 1 month, and 2 days of prior active duty in block 12.d.

The Coast Guard shall reimburse him for (or allow him to sell back) the 4 days of unused leave accrued while serving under orders recalling him to active duty in support of a national emergency on September 28, 2001.

The Coast Guard shall correct or amend his September 28, 2001, recall orders to active duty to show an effective date of September 23, 2001. The Coast Guard shall correct his record to show that he is not in an overpayment status for the period from September 23, 2001 through September 26, 2001, and shall permanently cease all efforts to recoup payments made to him for this 4-day period.

All other requests are denied.

Julia Andrews

H. Lee Einsel, Jr.

Kathryn Sinniger