

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-054

XXXX, XXXXXXXXXXXX
XXXXXXXXXXXX, YN3 (former)

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the completed application on December 9, 2008, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 10, 2009, 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 alleged that in November 1995 she was erroneously denied Reserve Transition Benefits (RTB) when she was removed from a Selected Reserve (SELRES) pay billet and transferred to the Individual Ready Reserve (IRR) Active Status Pool (ASP). She stated that she was told that she was eligible for RTB and did the paperwork to receive them but never did. She asked to receive the RTB.

In addition, the applicant alleged that she was erroneously discharged from the Reserve in September 2003. She was still in the IRR at the time and should have been sent a contract in the mail so that she could reenlist in the Reserve, but she never received the reenlistment contract from the Coast Guard. Moreover, she was not informed of her discharge. The applicant stated that when she was transferred to the IRR in 1995, she was told that she "was to remain a reservist, participate in the program as able, and receive [a] reenlistment contract six months prior to my pay base date to inform the Coast Guard of my intentions." However, she was not sent a contract in 2003, and the Coast Guard apparently assumed that she wanted to be discharged and separated her without asking for her input. She alleged that the Coast Guard "had my address as far as I know" and that she would have reenlisted if given the option.

The applicant alleged that she discovered her failure to receive RTB in 1995 and her discharge in May 2007. She alleged that she has pursued her RTB for "thirteen years making phone calls whenever I could." In addition, she argued, it would be in the interest of justice for the

Board to excuse her delay in filing her application because she was erroneously denied RTB and she was not notified of the need to reenlist in 2003.

In support of her allegations, the applicant submitted a letter dated October 20, 2008, which a retired chief warrant officer (CWO) in the Reserve wrote on her behalf to the Chief of the Reserve Management Branch in the Personnel Command. The CWO stated that the applicant served in the SELRES from 1986 to 1995, when she was transferred to the IRR “due to downsizing.” The CWO stated that the applicant believes she is entitled to RTB because she was removed from active service in the SELRES due to downsizing. The CWO asked that the applicant’s record “be given a thorough review.” The applicant also submitted copies of official records, which are included in the summary of the record below.

SUMMARY OF THE RECORD

On September 8, 1986, the applicant enlisted in the Coast Guard Reserve for eight years. She drilled in a pay billet in the SELRES and received more than 50 points, thus earning satisfactory years of service for retirement purposes, in each of her anniversary years (AY)¹ from 1987 through 1995, except for AY 1990, in which she earned 40 points.

On December 20, 1993, the Commandant issued ALDIST 345/93 with the regulations for implementing RTB for members of the SELRES being involuntarily transferred to the IRR due to reserve force reductions. ALDIST 345/93 states the following in pertinent part:

2. Involuntary separation defined: The discharge of a member of the Coast Guard Reserve or transfer of such member from the Selected Reserve which is effective during the period beginning on October 1, 1991, and ending on September 30, 1999, shall be considered an involuntary separation for the purposes of the programs implemented by this guidance unless one or more of the following conditions applies:

A. The member was discharged or transferred from the Selective Reserve:

- (1) At the member’s request ...
- (2) As the result of the member’s unsatisfactory participation or unsatisfactory performance in the Selected Reserve or under adverse conditions as characterized by the Secretary of Transportation ...

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4. Requirement to inform members of the Reserve component of their rights and benefits: All members of the Coast Guard Selected Reserve involuntarily separated after October 1, 1991, are to be informed of the rights and benefits set forth in P.L. 102-484 as amended. The Coast Guard shall ensure that any materials which may serve to make this regulation more understandable to members of the Reserve component is made available without delay to all Reserve component members.

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7. Separation pay for members with 6 to 15 years of service:

A. During the period beginning on October 1, 1991, and ending on September 30, 1999, a member of the Coast Guard Selected Reserve who:

- (1) is involuntarily discharged or transferred from the Selected Reserve (as defined in section 2), and

¹ A reservist’s anniversary year (AY) begins on the anniversary of the date she entered the Reserve and ends on the day before the anniversary the following year. Thus, for example, the applicant’s AY 1988 began on September 8, 1987, and ended on September 7, 1988.

(2) has completed at least six years of service computed under section 1332 of title 10, United States Code, and has not completed 15 years of such service, as of the date of the member's involuntary separation, shall be eligible for separation pay computed in accordance with paragraph (c) of this section.

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8. Waiver of continued Selected Reserve service requirement for educational assistance under the Montgomery G.I. Bill ...

9. Commissary and exchange privileges ... [a member involuntarily discharged or transferred as defined in section 2] shall be authorized to continue to use commissary and exchange stores ... for a period of two years from the date of the member's involuntary separation from the Selected Reserve ...

On July 9, 1994, the applicant reenlisted in the Reserve for two years, to July 8, 1996.

On November 3, 1995, the Commanding Officer (CO) of the applicant's unit prepared the following Page 7 for her record. The Page 7 in the applicant's military record bears her signature at the bottom in acknowledgement.

95NOV03: This is an adverse administrative remarks entry for [the applicant]. [She] was placed on performance probation for a period of six months in February of this year because of low evaluations and failure to be recommended for advancement. [She] is a 1986 direct entry YN3 reserve petty officer. Since that time she has not advanced despite completing the YN basic and advanced courses at Petaluma in 1990 and 1992. She has completed several correspondence courses, but only passed the MRN E-4 EOCT in 1993 and has failed the MRN E-5 EOCT three times since June of 1994. On 20 OCT 95 [the applicant] was tested on several basic E-4 performance qualifications: computing active service time with prior service and no broken service; computing leave balance; draft a letter requesting discharge for "Care of a Newborn Child" scenario. [She] took from 100 until 1600 to complete these three basic questions. Prior to the test, [she] was taught how to do service time computations, and then she did two on her own while being supervised. She stated that she understood how to do these computations. Yet, on the test she did not complete the calculations correctly. With the second question on computing leave balance she was reminded twice to subtract the leave taken, and yet she still got the answer wrong. The third problem showed numerous errors in drafting a basic letter, including the format, spacing, and heading. Despite all the time available on the third problem her draft letter showed that she didn't even look in the correspondence manual.

Even though [the applicant] displays a willingness to learn, she requires retraining in the most basic tasks for each drill she performs at this unit. Based on the test given and the admin staff's normal working experience with [her], it is clear that [she] cannot perform the basic Yeoman skills for her pay grade, and general duties in the Admin department of this unit.

This entry is to officially notify [the applicant] that I am recommending she be transferred to IRR status.

On November 21, 1995, the District Commander sent the applicant a letter regarding her transfer to the IRR-ASP, which stated the following:

1. Effective 1 December 1995 you are assigned to the [IRR-ASP], Ninth Coast Guard District. Your Commanding Officer is Chief, Personnel Reporting Unit, Ninth Coast Guard District. Because you were removed from a pay billet, you are entitled to [RTB]. You will be receiving more information from Commandant in regards to your RTB.

2. While assigned, no active duty/inactive duty training is required. You must, however: (1) advise us of any address or status change; (2) receive permission to travel outside CONUS for

more than 30 days; (3) promptly answer all Reserve-related correspondence, and (4) retain all previously issued uniform items while in the ASP.

3. As a Coast Guard Reservist you are also liable for active duty in time of war ...
4. As a member of the ASP, you may participate in the Coast Guard correspondence course programs, perform Special Active Duty for Training (SADT) and also perform Temporary Active Duty (TEMAC). ...
5. It is advantageous to actively participate in the Reserve Program through correspondence courses and SADT when available, because you can continue to earn credit towards Reserve retirement pay and full military retirement benefits at age 60. To qualify for retirement you must earn a minimum of 50 Reserve Retirement Points each year for at least 20 years prior to age 60. By remaining a member of the Coast Guard Reserve you will automatically earn 15 retirement points per year. You can earn the additional 35 points needed for a satisfactory year by completing correspondence courses (at 2 to 68 points per course) and performing SADT (at one point per day of duty performed). Additional information regarding SADT and TEMAC opportunities can be obtained by writing or calling the Force Optimization Branch ...
6. You may also retain your Reserve affiliation by reenlisting for periods of 2 to 8 years. Approximately six months prior to the end of your current enlistment/obligation you will be contacted by this office to determine if you desire to reenlist in the Coast Guard Reserve. If you so desire, you simply complete the enlisted contract forwarded to you with instructions for its execution.
7. If you want to drill with a Reserve Unit in the future, and thus earn drill pay, submit a letter to this office indicating the unit you desire to join. ...
8. If you were released from active duty after 4 years, or if you were placed into the IRR from a drilling status prior to completing 20 satisfactory years service, your eligibility for SGLI terminated ...

On August 14, 2000, the Integrated Support Command in Cleveland sent the applicant a letter advising her that her Reserve enlistment² would expire on September 8, 2000, and asking whether she intended to reenlist or to be discharged. The letter stated that she would be discharged on September 8, 2000, if no response was received by that date. On September 8, 2000, the applicant reenlisted in the Reserve for three years, through September 7, 2003.

In AY 1996, the applicant earned 27 points, including 15 points for membership and 12 for the drills she performed from September 8, 1995, until her transfer to the IRR. From AY 1997 through AY 2003, she received just the 15 points for membership that every reservist receives annually because she earned no points by performing SADT or TEMAC or by taking correspondence courses. The Coast Guard also credits the applicant with 5 prorated membership points for the period September 8, 2003, to January 6, 2004, for reasons unapparent in the record.

VIEWS OF THE COAST GUARD

On April 30, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief. In so doing, he adopted

² The applicant's military record does not contain copies of the reenlistment/extension contract(s) that covered the period July 9, 1996, through September 8, 2000.

the findings and analysis provided in a memorandum on the case submitted by Commander, Personnel Service Center (PSC), who also recommended that the Board deny relief.

The PSC stated that the application was not timely filed and should be denied due to its untimeliness and lack of merit. Regarding the alleged lack of merit, the PSC stated that the Page 7 dated November 3, 1995, shows that the applicant was transferred to the IRR due to substandard performance. Therefore, the PSC argued, she did not meet the conditions for RTB under ALDIST 345/93. With respect to the applicant's allegations about her discharge in 2003, the PSC simply stated that her "record does not support this."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 27, 2009, the applicant responded to the views of the Coast Guard. She alleged that her military record contains no Page 7s subsequent to 1994. She stated that the last Page 7 she remembers receiving documented the fact that she was put on weight probation in 1994. However, she lost weight and met the weight standards within three months.

The applicant stated that the Page 7 regarding her alleged substandard performance is dated November 3, 1995, which was a Friday and a non-drill day for her. She alleged that she "had no knowledge of this entry" and never received it. She alleged that her drill day was Saturday, November 4, 1995, and on that day she was told only that she could not drill any more because the unit was disbanding at the end of the year. She pointed out that the PSC did not mention any signature at the bottom of the Page 7.

The applicant stated that she was transferred to the IRR because of downsizing and unit disbandment and that the letter she received dated November 21, 1995, "said it all and it should be considered." The letter told her that she would receive more information soon, but she did not. In addition, she never received anything telling her that she would be denied RTB.

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 over this matter pursuant to 10 U.S.C. § 1552.
2. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers, or reasonably should have discovered, the alleged error or injustice. The applicant knew or should have known that she was not receiving RTB by 1996 and, since she signed a three-year reenlistment contract dated September 8, 2000, and did not sign another in September 2003, she knew or should have known that she had been discharged in September 2003. Therefore, her application is untimely.
3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that to determine whether the interest of justice supports a waiver

of the statute of limitations, the Board “should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review.” The court further instructed that “the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review.” *Id.* at 164-65; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant did not explain her delay in filing her application with the Board but alleged that she has sought RTB for thirteen years by making telephone calls and that she only discovered that she had been discharged from the Reserve in May 2007. The Board does not find her explanations for her delay to be compelling.

5. A cursory review of the merits of this case indicates that the applicant’s claim for RTB cannot prevail. The Board begins every case by presuming that the disputed military records are correct,³ and the applicant bears the burden of proving by a preponderance of the evidence that the military records are erroneous or unjust. The Page 7 in the applicant’s record dated November 3, 1995, bears her signature. While she may have signed it on November 4, 1995, she was clearly informed that her CO was initiating her transfer to the IRR because of substandard performance. The letter dated November 21, 1995, however, supports the applicant’s contention that she was entitled to RTB because the unit was disbanding and she was transferred to the IRR due to the disbandment of the unit. Therefore, the record contains documentary evidence of two possible causes for the applicant’s transfer to the IRR:

(a) First, the applicant may have been transferred to the IRR because of substandard performance. It is possible that the letter dated November 21, 1995, was sent to all SELRES members assigned to her unit, since it was being disbanded, and that on that date her name had not yet been removed from the unit roster even though her CO had initiated her transfer to the IRR for substandard performance on November 3, 1995. Under ALDIST 345/93, if her CO’s recommendation that she be transferred to the IRR for substandard performance was approved, she was not entitled to RTB.

(b) Second, it is possible that the CO’s recommendation that she be moved to the IRR because of substandard performance was disapproved and that she was transferred only because of downsizing and unit disbandment, as she alleged. In this case, she would have been entitled to RTB under ALDIST 345/93.

6. The applicant has not submitted sufficient evidence to prove that she was transferred to the IRR because of the disbandment of her unit rather than because her CO’s recommendation was approved. Moreover, she has delayed so long in contesting the matter that whether her CO’s recommendation was approved or not can no longer be determined; there is no evidence of either approval or disapproval in her military record. However, the applicant apparently did not receive RTB, and the Coast Guard’s failure to pay her RTB is presumptively correct.⁴ Therefore, the applicant’s request for RTB cannot prevail on the merits.

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

⁴ *Id.*

7. The applicant's claim concerning her discharge in 2003⁵ likewise cannot prevail on the merits. The applicant claims that she received no warning that her enlistment was ending. However, she should have known the end date of her own enlistment and, if she failed to hear from the Coast Guard, she should have timely inquired. The letter dated November 21, 1995, stated, "Approximately six months prior to the end of your current enlistment/obligation you will be contacted by this office to determine if you desire to reenlist in the Coast Guard Reserve." (Emphasis added.) The Coast Guard apparently fulfilled this promise because the applicant was reenlisted when her enlistment ended in 1996. The letter did not promise that the Coast Guard would indefinitely remind her of her need to reenlist if she wanted to remain a member of the Reserve. Moreover, neither the applicant nor anyone else is entitled to remain indefinitely in the IRR.

8. Because the application was untimely and the applicant's claims cannot prevail on the merits, relief should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁵ The Board notes that the actual date of discharge is unclear because the Coast Guard has credited the applicant with five prorated membership points for the period September 8, 2003, to January 6, 2004.

ORDER

The application of former YN3 xxxxxxxxxxx xxx, xxxxxxxxxxx, USCGR, for correction of her military record is denied.

Bruce D. Burkley

Robert S. Johnson, Jr.

Randall J. Kaplan