

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-159

**XXXXXXXXXXXXX
XXXXXXXXXXXXX**

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 applicant's completed application on May 28, 2009, and subsequently prepared the final decision for the Board as required by 33 CFR § 52.61(c).

This final decision, dated February 25, 2010, 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 initially enlisted in the Coast Guard Reserve for eight years on May 5, 1989, with an expiration of enlistment on May 4, 1997. He spent several months in the delayed entry program until discharged and entered active duty on July 11, 1989 for four years. He was released from active duty (RELAD) into the Reserve on April 10, 1994 to serve the remainder of his eight-year obligation, which according to his DD 214 terminated on May 4, 1997. Subsequently on May 21, 2003, the applicant reenlisted in the Reserve to attend officer indoctrination school, and on June 13, 2003, he was commissioned as an ensign in the Reserve.

On July 23, 2007, the Commanding Officer, Personnel Service Center (PSC), responded to a letter from the applicant requesting a review of his retirement points statement. PSC informed the applicant that a discrepancy was found in his pay and active duty base dates, which had been corrected. The new statement of creditable service (SCS) provided to the applicant showed his adjusted pay base date as July 23, 1995 (it had been July 11, 1989, the date he began active duty), and his adjusted active duty base date as December 9, 1998. The SCS also showed that the applicant was discharged from the Coast Guard Reserve on May 4, 1997, and did not reenlist in the Coast Guard until May 21, 2003, to attend officer indoctrination school.

In requesting that the Board correct his record to show no break in service from May 5, 1997 to May 21, 2003, the applicant stated that during that period he was operating as if he were in the Inactive Reserve and that he was in full compliance with all Inactive Reserve requirements

when he requested to enter the Selected Reserve (SELRES) in 2002. He stated that he was informed that he had been discharged from the Reserve because of incomplete paperwork. He stated that shortly after this notification, he reentered the Reserve to attend officer indoctrination school and is currently in the SELRES. The applicant further stated the following:

I believe my record is incorrect for several reasons. First, I completed the paperwork that was sent to my residence and requested to remain in the Inactive Reserve . . . Additionally, I maintained compliance with all Inactive Reserve requirements during the time I was in the Inactive Reserve to include the period USCG questions. I have included a letter I sent to the USCG on April 18, 2002 requesting my reentry to the drilling Reserve following my completion of school . . . Clearly, I believed I was still in the Inactive Reserve but was advised that my record was lost and I should apply to a Reserve entry program to expedite reentry. Figuring I could address this issue once I rejoined the USCG, I applied and was accepted into a Reserve direct commission program on May 21, 2003.

Once I was back in the drilling Reserve, I was being paid properly for a year (proper pay base) and was recalled on October 1, 2003. I spent approximately four and one-half years . . . on active duty. Throughout this time period my Reserve Point Statement changed yearly and with that, so did my pay. There were over payments, under payments, point statement audits and point statement corrections throughout that time period . . .

My request is to correct my service record to indicate no break in Reserve service or if necessary, the thirteen (13) month-break between my letter of April 18, 2002 and my acceptance back into the Reserve on May 21, 2003. This change has very little practical effect on my continued service as I still need to complete "good" Reserve years in order to vest into the Reserve retirement system. My reason for filing this claim is to rectify the error in my record. I have been advised that the USCG cannot find my Inactive Reserve paperwork and since I did not make a copy of the form(s) I completed, the agency will rely on its own records (or lack thereof).

The applicant submitted a statement from a relative who stated that she remembers the applicant executing a certain document in the winter of 1996 regarding his intention to remain in the Inactive Reserve. She stated that she remembers this because she was concerned about the possibility of a military recall.

The applicant submitted a copy of an April 18, 2002, letter which he alleged that he sent to the Integrated Support Command in Cleveland Ohio. He stated in that letter that he had been in the Individual Ready Reserve (IRR) since April 10, 1994, and would like to return to drilling status. He stated that he had completed school and was able to assume a more active role in the Reserve.

In May 2003, the applicant reenlisted in the Coast Guard Reserve and was subsequently commissioned as an officer. He submitted copies of his leave and earnings statements for June

2003 through June 2004 showing his pay entry base date as July 11, 1989, and his active duty base date as April 10, 1994 (although the applicant has continuously served in the Reserve since May 2003, he did not submit any LESes after June 2004).

VIEWS OF THE COAST GUARD

On April 24, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. The JAG adopted the facts and analysis provided by the commanding officer of the Personnel Service Command (PSC).

PSC stated that on April 10, 1994, the applicant completed 4 years and 9 months of enlisted active duty and was released from active duty and transferred to the IRR to complete the remainder of his initial military obligation, which terminated on May 4, 1997. On May 21, 2003, the applicant reenlisted in the Coast Guard Reserve to attend officer indoctrination school. On June 13, 2003, the applicant accepted a Reserve commission in the grade of ensign, and on May 1, 2004, he accepted a Reserve commission in the grade of LT.

PSC stated that the applicant's military record does not support any activity by the applicant during the period from May 5, 1997, to May 20, 2003, and that applicant was not a member of the Coast Guard during this period.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

The Board received the applicant's response to the views of the Coast Guard on November 23, 2009. He disagreed with them and restated the contentions made in his application. The applicant stated that the affidavit from his relative that she remembers the applicant completing papers of his intent to remain in the Inactive Reserve, his own statement in this regard, and a copy of his 2002 letter requesting to affiliate with the drilling Reserve rebut the Coast Guard's contention that there is no official record or correspondence that the applicant requested an extension of his enlistment. In this regard, the applicant argued that so long as he maintained a few basic requirements as a member of the IRR no paperwork would have been generated. He stated that no paperwork was ever sent to him except for the form that he completed requesting to remain in the Reserve. He stated that he completed the only correspondence that was sent to him while in the IRR, and therefore he complied with all requirements to remain in the inactive Reserve.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant enlisted in the Coast Guard delayed entry program on May 5, 1989. At that time he incurred an initial military obligation of eight years, four years of which was required active service. He served on active duty for four years and nine months and was released from active duty on April 10, 1994 to serve the remainder of his eight year obligation, which expired on May 4, 1997, in the Individual Ready Reserve (IRR).¹ On May 21, 2003, the applicant reenlisted in the Reserve to attend officer indoctrination school. On June 13, 2003, he was commissioned an ensign in the Reserve.

4. The issue is whether the applicant's record correctly reflects a break in service from May 5, 1997 to May 20, 2003. The applicant has not persuaded the Board that the break in his Coast Guard service is erroneous. Article 12.B.11a. of the Personnel Manual states that unless a member voluntarily or involuntarily remains beyond the normal enlistment expiration date, the member shall be discharged on the day before the applicable enlistment anniversary date, which in this case was May 4, 1997. Further Article 8.B.13 of the Reserve Policy Manual (1997) states that "the discharge of a reservist who is not on duty on the date of separation takes effect at 2400 on the effective date of separation, regardless of when the separation documents are received in the mail. During the period under review, indefinite enlistments were not available. Each contract had a definite beginning and end. To voluntarily continue service beyond the expiration of an enlistment without a break in service, a member has to reenlist or extend the current enlistment prior to or within 24 hours of discharge. See Articles 1G.7.c., 1.G.9c. & 1G.9.f. of the Personnel Manual in effect at that time. There is no evidence in the record that the applicant reenlisted or extended his Reserve enlistment on or before May 5, 1997 and the applicant has offered none. To effect a reenlistment there must have been a reenlistment contract and an oath taken for a new period of service. To effect an extension of his then 1989 enlistment, the applicant and his commanding officer must have agreed in writing to any such extension. No such documents are in the record. The applicant has the burden of proving by a preponderance of the evidence that he was in the Reserve from May 5, 1997 through May 20, 2003. See 33 C.F.R. § 52.24(b). He has failed to show that he executed a reenlistment or extension of enlistment to remain in the Reserve between May 5, 1997 and May 20, 2003.

5. Contrary to the applicant's view of the evidence, neither the relative's statement that in 1996 the applicant submitted a request to remain in the Inactive Reserve, nor the applicant's own statement in that regard, nor the fact that he allegedly met the requirements for good standing in the IRR persuades the Board that he was in the Reserve after May 4, 1997. The statements prove only, if anything, that the applicant sent a document to the Coast Guard requesting to remain in the Inactive Reserve. He has not put forth any evidence however that merely requesting to remain in the Service creates a binding contract between the Coast Guard and himself. Additionally, the Board would note that the applicant has presented no evidence that

¹ A member of the IRR was obligated maintain physical standards, keep their commanding officers advised of their current address, and respond to official correspondence. Article 1-C-4 of the Reserve Policy Manual. Most members of the IRR have completed their required active service obligation but must remain in the Ready Reserve to complete their military obligation. Article 1-C-4.b.(1) of the Reserve Policy Manual.

the Coast Guard ever received the document that he allegedly sent or replied to it. Nor has the applicant presented any evidence that he followed up on his request, which he should have done when he did not hear anything back from the Coast Guard within a reasonable time after submitting the request. In the absence of a reply from the Coast Guard to his request, it was not reasonable for the applicant to assume that he was still in the Service after the expiration of his enlistment unless such was expressly stated in the Coast Guard's correspondence or in Coast Guard regulations. No such information is before the Board and the Board is not aware of any unwritten policy that allows for continued voluntary service after the expiration of an enlistment without a written reenlistment or extension contract.

6. The applicant's other contention that his 2003 LESes are proof that he was in the Reserve without a break in service because they show his pay entry base date as July 11, 1989 is not convincing. At most they show that the pay entry base date on the LESes was an administrative error, which the Coast Guard subsequently corrected. In BCMR No. 346-89, the Coast Guard withdrew an offer of a Reserve commission to an applicant after she had executed the document accepting the commission because she had not met all of the eligibility requirements. Even though that applicant argued that she had a binding contract, the Secretary's delegate stated, "I do not find the Coast Guard's effort to correct an administrative error by withdrawing the commission, completing its record, and acting on that completed record as "shocking" to the sense of justice.^[2] No bad faith or other impropriety was apparent in the withdrawal of the offer." Likewise in this case, the Coast Guard acted only to correct an administrative error to make its records accurate. The pay base date matter when unresolved led to the applicant's overpayment and underpayment at various times since his return to the Reserve in 2003, but the Board does not find the situation with regard to pay to be such an injustice as to shock the sense of justice.

7. In deciding this case, the Board is cognizant of the principle that absent evidence to the contrary, the Coast Guard officials and other Government employees are presumed to have carried out their duties "correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). The evidence offered by the applicant does not rebut the fact that his record contains no reenlistment or extension of enlistment contract covering the period from May 5, 1997 to May 20, 2003. His evidence, at most, establishes that he sent a document to the Coast Guard, not that the document was actually received or acted upon by the Coast Guard. The advisory opinion stated that there was no correspondence from the applicant in his record. Therefore, without any evidence that the Coast Guard actually had, at a minimum, a request for an extension or reenlistment from the applicant, the Coast Guard is presumed to have correctly discharged him from the Reserve at the expiration of his enlistment on May 4, 1997.

² For BCMR purposes "[i]njustice", when not also 'error', is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). The Board has authority to determine whether an injustice exists on a "case-by-case basis." Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

8. Accordingly, the applicant has failed to prove by a preponderance of the evidence that the Coast Guard has committed an error or injustice in his record by showing that he had a break in service from May 5, 1997, through May 20, 2003.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of LT XXXXXXXXXXXX, USCGR, for correction of his military record is denied.

Bruce D. Burkley

(recused)*

Erin McMunigal

Dorothy J. Ulmer

* The Board member recused herself because she knows the applicant and could have a potential conflict of interest. Under 33 C.F.R. §§ 52.11(b) and 52.61(c), two members constitute a quorum and a majority vote of the members of the Board shall constitute the action of the Board.