

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2010-119**

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XXXXXXXXXXXXXXXXXXXX**

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**FINAL DECISION**

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receiving the completed application on March 5, 2009, 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 November 5, 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, who retired from the Coast Guard Reserve as a master chief fire control technician on March 13, 2007, asked the Board to correct his retirement date to April 1, 2007. He alleged that his request to be transferred from the Selected Reserve (SELRES) to the Individual Ready Reserve (IRR) was unjustly denied just 30 days before his 62nd birthday.

The applicant stated that he completed his SELRES service on his 60th birthday, March 13, 2007, and entered retired status RET-1 on that date with 40 years, 10 months, and 3 days of creditable service time and 4,491 retirement points. His base pay at the time was based on "over 26 years" of service. However, he alleged, under the National Defense Authorization Act for Fiscal Year 2007, as of January 1, 2007, members with more than 30 years of service were allowed to continue to accumulate creditable service for the purpose of military retired pay, and as of April 1, 2007, the pay table was extended from a top category of "over 26" years of service to 40 years of service.

The applicant stated that he was forced out of the Reserves because his 60th birthday occurred on March 13, 2007, just 18 days before the new pay chart went into effect. However, as of January 1, 2007, when all service up to 40 years became creditable, he was still in the SELRES. He had no knowledge of the law, and the Coast Guard did not issue ALCOAST 023/07 with information about the upcoming pay raises until January 12, 2007.

The applicant alleged that due to discrepancies in his number of retirement points, he was not issued a retirement letter until April 16, 2007, and he never knew his retirement pay would be based on all 40 of his years of creditable service until he received that letter.

On December 16, 2008, the applicant stated, he contacted the Personnel Service Center to determine whether his retirement date could be changed to April 1, 2007. When he asked if he could forgo his retirement pay and return to the IRR for a month so that his retirement pay would be based on the new pay rates that went into effect on April 1, 2007, he was advised to contact the Office of Reserve Affairs. He noted that the Reserve Policy Manual allows members “to defer retirement with permission until age 62” and that he could still meet the physical and dental requirements for active service. However, his request was denied and he was advised to contact the BCMR.

The applicant alleged that the senior enlisted pay raises were delayed until April 1, 2007, which unjustly disadvantaged people who retired between January 1, 2007, when the law went into effect and April 1, 2007, when the pay raises went into effect. He stated that he does not believe the law was intended to cause this injustice and that if he had known about the law, he would have requested an 18-day extension.

In support of his allegations, the applicant submitted a copy of a letter he received from the Personnel Service Center (PSC) dated April 16, 2007, which states the following in pertinent part:

The following information represents the action that has been taken on your Reserve retirement effective 3/13/07. You will be retired as follows:

Highest grade held (grade retired):	E-9
Creditable service time:	40-10-03
Total retirement points:	4491
Base pay for E-9 from 2007 ADPS:	\$5512.80
Total multiplier (4491/360 x 0.25 = %):	.3120
Retired pay (base pay 5512.80 x .3120):	\$1719.00

The applicant also submitted a copy of the letter he sent to the PSC dated December 16, 2008 (three months before his 62nd birthday), regarding these issues. He offered to return to the IRR for a month so that he could qualify for retired pay based on the new higher pay rates. He alleged that the PSC “should have contacted the members of the USCGR with more than 40 years of service so that they could have made a decision to extend, if only a few days were needed, while still in either the selected reserves or IRR.” In response, the PSC advised him that his retired pay scale was correct because of his 60th birthday falling on March 13, 2007, and that if he wanted to go into the IRR, he would need to contact the BCMR because the PSC could not change his retirement date.

In addition, the applicant submitted a similar letter that he sent to the Office of Reserve Affairs on January 12, 2009. In response, he was advised that the

only course of action available to you would be a BCMR. Upon initial review by this office, it is our opinion that you would NOT be eligible for increased compensation based on the language in

the NDAA, specifically the effective date of this provision. Once the eligibility period has been established, a member must be within the determined period of eligibility. One day less and you are ineligible. Extensions to remain in the active status until age 62 are rarely granted. There would have to be a demonstrable service need for a unique skill set that could not be provided elsewhere. Extensions to remain in an active status are never granted solely for the purpose of earning an entitlement.

It is within your right to pursue the BCMR; however you should note that in order for the BCMR to find in your favor, the onus will be on you to prove the Coast Guard violated its policy and procedures or treated you in an inequitable manner. ...

## **VIEWS OF THE COAST GUARD**

On July 7, 2010, the Judge Advocate General (JAG) submitted an advisory opinion and recommended that the Board deny relief. In so doing, he adopted the findings and analysis provided in a memorandum by the PSC, which noted the following:

- The applicant was born on March 13, 1947, and entered military service on May 10, 1966.
- On September 15, 1987, the applicant was notified that because he had completed 20 years of satisfactory service, he would be eligible to receive retired pay upon reaching age 60 on March 13, 2007, and that no retirement credits could be accrued after age 60 unless he was recalled to active duty.
- On June 6, 2000, the applicant elected to be transferred to RET-2 status, which is for members who are eligible to retire but are not yet eligible for retired pay because they are not yet 60 years old. He had been advised that under a SELRES force strength policy, he had the option of transferring to RET-2 status, transferring to the IRR and drilling without pay, transferring to the non-drilling active status pool, or being discharged. His request was approved and on August 1, 2000, he was transferred to RET-2 status. On August 1, 2000, the pay tables extended to only 26 years of service. The letter informing him of his transfer to the Retired Reserve states that upon “reaching age 60, you will have met all requirements for retirement pay. To insure you begin receiving retirement pay and benefits, write to HRSIC six months prior to your 60th birthday advising this office of your birth date and current mailing address. Please enclose a copy of this RET-2 transfer letter, retirement point statement HRSIC-4973A (enclosure 3), and an Reserve Component Survivor Benefit Plan (RCSBP) Option Election Certificate, NAVMC 11221).”
- On March 13, 2007, the applicant attained age 60, whereupon his status changed to RET-1 and he became entitled to retired pay.
- The extension of the pay table and new pay raises went into effect on April 1, 2007.
- Article 8.C.12.c. of the Reserve Policy Manual (RPM) prohibits the retention of retirement-eligible reservists past age 60 absent a compelling need of the Coast Guard and approval of the reservist’s request by the Commandant.

- Article 8.B.3. of the RPM allows members to defer retirement to age 62, with permission from the Commandant, only if they are not qualified for retirement.

Therefore, the PSC concluded that the applicant was not entitled to return to service after his 60th birthday because there was no compelling Service need for it. The PSC recommended that the Board deny relief.

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On August 11, 2010, the Board received the applicant's response to the views of the Coast Guard. He stated that the advisory opinion is silent about the fact that he returned to drilling at a SELRES unit from August 2004 until his 60th birthday because his billet at ESU Alameda had remained unfilled between August 2000 and August 2004. Therefore, he received permission from CG-131 to return to his SELRES billet until 2006, when he requested and received an extension of the permission to drill up through his 60th birthday. The applicant stated that the fact that he was authorized to return to drilling after he entered RET-2 status "shows that exemptions to the Reserve Policy Manual can [be] and are made on a case by case basis." Another example of such exemptions, he noted, was referenced in ALCOAST 170/99, issued on November 5, 1999, which states that "[o]ver the past few years, SELRES participation waivers have been granted to reservists to exceed the 60-year maximum age limit or the 30-year total qualifying service limits. These waivers have permitted senior reservists to be overbilled while the Coast Guard Reserve was below personnel strength.... C. As of 31 Jan 2000, over age 60 waivers will no longer be approved. D. As of 31 Jan 2000, no further 30-year waiver requests will be accepted. E. Feb 2000, all personnel age 60 and over will be transferred from SELRES status or separated as appropriate." He stated that the Coast Guard should have made an exemption for him "like they have in the past for other members" so that he could qualify for retirement pay based on the new pay rates.

The applicant stated that he believes he is the only Coast Guard reservist "who is qualified for this pay reform with the credible service time over 40 years." He further stated that he thinks that the Coast Guard's mandatory retirements under the High Year Tenure rules "will make it impossible for any active duty Senior Enlisted or Reserve Senior Enlisted to participate in the pay reform under Public Law 109-364 Section 601(c)." He noted that without the waiver of a prior rate adjustment scheduled for fiscal year 2007 in § 601(a) of the law, the new reform could not have gone into effect until 2008.

With regard to the letter about his retirement dated April 16, 2007, the applicant explained that on March 3, 2007, he had to request correction of a retirement point statement that had been issued on December 15, 2006, because it contained errors and did not reflect his most recent service. He submitted a copy of this letter.

## APPLICABLE LAW

Public Law 109-364, 120 Stat. 2083, was enacted on October 17, 2006. Section 601, entitled "Fiscal Year 2007 Increase in Military Basic Pay and Reform of Basic Pay Rates," states the following:

(a) WAIVER OF SECTION 1009 ADJUSTMENT.--The adjustment to become effective during fiscal year 2007 required by section 1009 of title 37, United States Code, in the rates of monthly basic pay authorized members of the uniformed services shall not be made.

(b) JANUARY 1, 2007, INCREASE IN BASIC PAY.--Effective on January 1, 2007, the rates of monthly basic pay for members of the uniformed services are increased by 2.2 percent.

(c) REFORM OF BASIC PAY RATES.--Effective on April 1, 2007, the rates of monthly basic pay for members of the uniformed services within each pay grade (and with years of service computed under section 205 of title 37, United States Code) are as follows:

[Tables omitted except for E-9 rate]

ENLISTED MEMBERS [FN1]

Pay Grade	2 or less	Over 2	Over 3	Over 4	Over 6
E-9 [FN2]	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
	Over 8	Over 10	Over 12	Over 14	Over 16
E-9 [FN2]	\$0.00	\$4,110.60	\$4,203.90	\$4,321.20	\$4,459.50
	Over 18	Over 20	Over 22	Over 24	Over 26
E-9 [FN2]	\$4,598.40	\$4,821.60	\$5,010.30	\$5,209.20	\$5,512.80
	Over 28	Over 30	Over 32	Over 34	Over 36
E-9 [FN2]	\$5,512.80	\$5,788.50	\$5,788.50	\$6,078.00	\$6,078.00
	Over 38	Over 40			
E-9 [FN2]	\$6,381.90	\$6,381.90			

[footnotes omitted]

ALCOAST 023/07, issued on January 12, 2007, announced the new pay rates effective as of April 1, 2007, and stated that "[e]ffective 1 JAN 2007, the 75 percent maximum for computation of military retired pay has been removed for members who retire on or after that date. Members with service beyond 30 years may continue to accumulate multiplier credit for the purposes of computing military retired pay at the rate of two and one-half percent per year."

Article 8.C.2.a. of the Reserve Policy Manual (RPM) states that “[w]hen reservists complete at least 20 years of satisfactory federal service and have reached age 60, they are eligible for transfer to RET-1 status upon request. When transferred to retired with pay status, reservists receive a Retired Identification Card and are eligible for the same benefits available to active duty retirees.”

Article 8.C.2.b.(1) of the RPM states that members who have satisfied all of the requirements for retirement but are not yet 60 years old may enter RET-2 status, which means that they are “entitled to unlimited commissary, exchange, and morale, welfare, and recreation benefits. Unless recalled to active duty, RET-2 reservists are not entitled to earn pay and allowances or retirement points, or receive military legal assistance or medical and dental care.”

Article 8.B.3. of the RPM states that at age 60, “[a] member not qualified for retirement ... shall be discharged without board proceedings, unless Commandant (CG-131) approves the member’s request to defer retirement until age 62.”

Article 8.C.12.c. of the RPM states that “[e]nlisted members who are eligible to receive retired pay will only be retained in the Ready Reserve beyond age 60 to fulfill compelling needs of the Coast Guard and upon approval of a member’s written request to COMDT (CG-131), via the chain of command.”

Article 8.C.4. states that in calculating Reserve retired pay, a reservist’s retired base pay is “as computed under 10 U.S.C. 1406 or 1407.” Section 1407 concerns members who entered the Service after September 7, 1980, but § 1406(b)(2) states that, for those who entered the Service before that date, a reservist’s “retired pay base is the monthly basic pay, determined at the rates applicable on the date when retired pay is granted ... of the highest grade held satisfactorily by the person at any time in the armed forces.”

Under Article 8.C.12.a. of the RPM, reservists in receipt of the “20-year letter,” which the applicant received in 1987, may request transfer to RET-2 status at any time. Under Article 8.C.12.c., “[r]eservists who remain in an active status in the Ready Reserve after becoming retirement eligible may request to transfer to RET-1 status upon reaching age 60. ... Enlisted members who are eligible to receive retired pay will only be retained in the Ready Reserve beyond age 60 to fulfill compelling needs of the Coast Guard and upon approval of a member’s written request to Commandant (CG-131), via the chain of command.”

Article 12.G.1. of the Personnel Manual describes the Coast Guard’s “High Year Tenure” (HYT) program as follows:

The High Year Tenure policy establishes limits on the amount of time an active duty enlisted member can remain at each pay grade. It is designed to increase personnel flow, compel members to advance in their rating, and allow more consistent training and advancement opportunities for the enlisted workforce. With more balanced, consistent opportunities, the Coast Guard can retain the most highly motivated members who in turn gain in experience and ensure the Coast Guard retains its leadership and professional continuity.

Article 12.G.3. states that members in pay grade E-9 attain their “professional growth point” upon “[t]hirty years’ active military service [and may] reenlist or extend up to but not beyond 30 years, one month’s active military service....” Article 12.G.5.1. states that “[m]em-

bers can re-enlist or extend only for periods that will expire before one month after their PGP date. Unless Commander, (CGPC-epm-1) grants a HYT waiver, the HYT policy supersedes other reenlistment policies or extension opportunities.” Article 12.G.7.1. states that “Commander, (CGPC-epm-1) will discharge a member who fails to advance before his or her PGP date. However, a retirement-eligible member may request retirement.”

## FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The applicant was timely filed.

2. The applicant alleged that his retirement date of March 13, 2007, his 60th birthday, is unjust because it precludes him from having his retirement pay based upon the increased pay rates that went into effect on April 1, 2007. He alleged that the Coast Guard could have authorized him to retire on April 1, 2007, instead of March 13, 2007, or could have allowed him to return to the IRR for a month before his 62nd birthday so that he would qualify for the higher pay rate. The Board begins its analysis in every case by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust. 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the “clear and convincing” evidence standard recommended by the Coast Guard and adopting the “preponderance of the evidence” standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)). Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.” *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

3. In Public Law 109-364, Congress authorized new pay rates to go into effect on April 1, 2007, and extended them from the previously highest category, “over 26,” to a new high for “over 40.” Although the applicant considers his situation to be one of a kind because he has more than 40 years of service, there were presumably hundreds of retired military members with more than 26 years of service who became eligible for retirement pay in the months between the enactment of the law and April 1, 2007, and who would have benefited greatly if Congress had made the new pay rates effective earlier or if the Coast Guard and other military services had granted all of their retiring members extensions to April 1, 2007. Anytime the law changes entitlements as of a specific date, there are people who are advantaged and disadvantaged by being subject to the law in effect on one side or the other of that date. In this case, Congress did not make the new law retroactive, and the Board is not aware that the Coast Guard (or any of the other military services) has granted extensions to retiring reservists or recalled them for active or inactive duty just so they could take advantage of the higher pay rates under the new law. Therefore, the applicant has not shown that he has been treated unjustly in comparison to the other retirement-eligible reservists who turned age 60 before April 1, 2007, but who would have bene-

fited greatly had they entered RET-1 status after April 1, 2007, because of the extension of the pay scale under Public Law 109-364.

4. Under Article 8.C.12.c. of the RPM, Reserve “[e]nlisted members who are eligible to receive retired pay will only be retained in the Ready Reserve beyond age 60 to fulfill compelling needs of the Coast Guard and upon approval of a member’s written request to Commandant (CG-131), via the chain of command.” The applicant noted that the Coast Guard sometimes waives the rules. He pointed out that the Coast Guard waived the age limit and its HYT policy for many reservists in the late 1990s and, when he retired to RET-2 status prior to age 60 and his billet remained unfilled, he was allowed to return to the SELRES to continue drilling in that billet until age 60. Thus, he received a waiver of the rule under Article 8.C.2.b.(1) of the RPM that a member in RET-2 status may not earn retirement points unless they are recalled to active duty. As ALCOAST 170/99 shows, however, the Coast Guard waived the HYT rules and age limit in the late 1990s because of compelling Service needs. In allowing the applicant to return to drilling in 2004 after he had elected to enter RET-2 status, the Coast Guard apparently recognized a need, but it did not authorize him to drill indefinitely and, when he requested an extension in 2006, authorized him to drill only up to his 60th birthday in March 2007. Therefore, the preponderance of the evidence shows that when the applicant requested the extension in 2006, the Coast Guard found no compelling Service need that would warrant his retention beyond age 60.

5. The applicant noted that his creditable service for retirement purposes was not properly tallied in 2006 and that he received a letter regarding his points, creditable service, and retirement pay on April 16, 2007. The Board notes that this letter is dated approximately one month after the applicant was last authorized to drill for retirement points. The date of the letter does not persuade the Board that the Coast Guard erred or acted unjustly in refusing to extend his retirement date to April 1, 2007, or to allow him to transfer to the IRR for a month prior to his 62nd birthday.

6. The applicant argued that the Coast Guard’s HYT program is unfair because it could preclude anyone from ever attaining the “over 40” pay rate. The Board finds that the fact that the HYT program, when enforced, makes it unlikely if not impossible for a member to serve long enough to attain the “over 40” rate does not prove that the HYT program is erroneous or unjust given its purposes as described in Article 12.G.1. of the Personnel Manual.

7. The applicant turned 60 on March 13, 2007, and is therefore entitled to retirement pay under the law in effect on that date. The Board finds that he has not proved by a preponderance of the evidence that the Coast Guard committed an error or injustice<sup>1</sup> by refusing either to extend his retirement date to April 1, 2007, or to allow him to return to active or inactive duty for a month prior to his 62nd birthday to qualify for the pay raises that went into effect on April 1, 2007, under Public Law 109-364. Therefore, his request should be denied.

#### **ORDER**

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<sup>1</sup> For the purposes of the BCMRs, “[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 application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, Retired, for correction of his military record is denied.

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Donna M. Bivona

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Evan R. Franke

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Darren S. Wall