

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-152

**XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX**

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receipt of the applicant's completed application on April 15, 2011, and subsequently prepared the final decision as required by 33 C.F.R. § 52.61(c), with assistance from D. Hale.

This final decision, dated January 26, 2012, 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, a chief marine science technician (MSTC), in the Coast Guard Selected Reserve asked the Board to correct his record so that the "[b]ad year [2007] for retirement be removed." A reservist is required to earn 50 points per anniversary year for that year to count toward the 20 years of satisfactory service necessary for retired pay at age 60. The applicant earned only 49 points for his anniversary year ending in April 13, 2007. He currently has 19 years of satisfactory service.

The applicant stated that he was injured in an automobile accident on December 26, 2006 and was unable to resume his reserve drills until March 12, 2007. The applicant argued that he tried to complete a good year after his doctor cleared him to return to work by drilling on March 17, 18, 25, and again on April 7 and 14, and by performing annual duty for training (ADT) from April 16, 2007, to April 27, 2007.

The applicant stated that he did not discover the alleged error until September 2010 when he received a statement of creditable service.¹ He stated that the September 2010 statement of creditable service was the first he had received in three years.

¹ What the applicant received was probably a Retirement Points Statement because a Statement of Creditable Service does not normally record drill points.

SUMMARY OF THE RECORD

In support of his application, the applicant submitted the police report and records of his medical treatment. The police report shows that the applicant was struck from behind as he was turning into a residential driveway. The police report stated that no injuries were reported at that time. On the same day, the applicant underwent x-rays of his head and cervical spine but no significant problems were noted.

On January 3, 2007, an internist gave the applicant a disability certificate stating that he was under the doctor's care and that he was totally incapacitated beginning on December 26, 2006. The doctor did not give a date on which the applicant could return to work.

On January 8, 2007, an orthopedist diagnosed the applicant with cervical and lumbar strains and spasms and prescribed treatment with therapy. The physician wrote on the attending physician's report that the applicant was disabled "from December 26, 2006, through indefinite." However on a note for the applicant's employer, the physician stated that the applicant was not to return to work until he was evaluated again on January 29, 2007.

On February 21, 2007, the orthopedist saw the applicant for follow-up. The orthopedist diagnosed the applicant with a cervical, lumbar, and left shoulder strain. The medical note indicated that the applicant was still receiving treatment and did not state a date on which he could return to work.

On March 7, 2007, the applicant was seen by the orthopedist for a follow-up evaluation. The diagnosis was cervical strain, lumbar strain, and left shoulder strain. The orthopedist stated that the applicant could return to work in a full capacity on March 12, 2007.

A Retirement Points Statement printed from the Coast Guard's database on January 13, 2012, shows that the applicant began serving in the Army Reserve in 1975, and enlisted in the Coast Guard Reserve in 2000. With the exception of his anniversary years ending on April 13, 2001, and April 13, 2007, he has earned satisfactory years of service toward retirement in each anniversary year since his enlistment in the Coast Guard Reserve. The Retirement Points Statement shows that of the 49 points the applicant earned for the anniversary year ending April 13, 2007, 34 were from drills and 15 were gratuitous membership points. (A reserve unit normally schedules 48 drills each year. The Retirement Points Statement also shows that the applicant has also earned approximately 10 years of satisfactory service in Army Reserve and National Guard.

VIEWS OF THE COAST GUARD

On August 19, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request based on the analysis of the case provided in a memorandum from the Commander, Coast Guard Personnel Service Center (PSC).

PSC argued that the application should be denied because the applicant's Coast Guard record is presumptively correct and he failed to substantiate any error or injustice with regards to his record. PSC stated that the applicant earned only 49 points for his anniversary year from

April 14, 2006 to April 13, 2007. PSC stated that the record could not be changed or altered without documentation that proves the applicant received more than 49 points for that anniversary year.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 26, 2011, the BCMR sent the applicant a copy of the Coast Guard’s views and invited him to respond within 30 days. The applicant responded on August 31, 2011, and disagreed with the Coast Guard’s advisory opinion. He stated:

I completely disagree with the Coast Guard’s advisory opinion in my case. The CG advisory opinion states that I want a bad year removed; that is not the case. I am requesting a (1) day waiver of my anniversary year which would give me a good year for the year ending 13 April 2007. In the CG exhibits it shows (from Direct Access) that I served in the US Army Reserve 14 April 2007 to 13 April 2008. This is incorrect. I served in the CG Reserve that year, receiving 94 points for that year. Many times in my 25 years of service I have been required to perform “for the benefit of the service.” The motor vehicle accident was not “intentional misconduct, willful neglect, or failure to comply with standards and qualifications for retention established by the Secretary: or the disability was not incurred during a period of unauthorized absence.” 10 U.S.C. § 12731b. [2]

I made every effort possible to meet my requirements for a good year, the record reflects my efforts. I am not looking for a gift. I feel I have earned the year. In order for me to meet the ADT requirements for a good year I must perform ADT between the beginning of the Fiscal year (1Oct) and 13 April of the following year. On 17 April 2007 I performed 12 days of annual ADT. From 26 December 2006 until the middle of March 2007 I was on doctor’s orders not to work either my civilian job as a Federal Court Security Officer or as a Petty Officer in the CG. When I was released from these orders I went back to work at both positions. Short of working continuously for almost 6 weeks I could not possibly make up the drills I missed.

I am not looking for a magical point. I am requesting a 24-hour waiver of my anniversary year in order to give me a good year. The CG routinely waives requirements when it’s a benefit to the service.

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² 10 U.S.C. § 12731b. provides that the Secretary may treat a member with a physical disability that was not incurred in the line of duty as having met the 20-year service requirements if the member has completed at least 15 and less than 20 years of service. It does not apply if the disability was the result of the member’s intentional misconduct, willful neglect, or willful failure to comply with standard and qualifications for retention established by the Secretary; or if the disability was incurred during a period of unauthorized absence.

Thank you for your attention regarding this matter and although I have no intention of retiring until I am forced to leave kicking and screaming, I would like the record straight.

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 submission 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 because the applicant stated that he did not discover the alleged error until September 2010 when he received a Coast Guard statement of creditable service. He stated that he had not received a statement of creditable service for three years until he received the one in September 2010. The Board has no evidence to the contrary and no basis not to believe the applicant in this regard. Therefore, his BCMR application received on April 13, 2011 is timely.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant requested that the Board correct his record to grant him a one-day waiver of his anniversary year that ended on April 13, 2007, so that that year is satisfactory for retirement purposes. The Board interprets this request as one for the correction of his record to show that he earned one additional point for the anniversary year ending April 13, 2007, which would give him a total of 50 points for that year. A Retirement Points Statement from Direct Access shows that of the 49 points the applicant earned for the anniversary year ending April 13, 2007, 34 were from drills and 15 were gratuitous membership points.

4. The Coast Guard correctly noted that the regulation requires that a reservist earn 50 points per anniversary year for that year to be creditable toward a 20-year retirement. The applicant does not allege that the Coast Guard committed an error. Therefore, the basis for his request is injustice because he was unable to participate in drills from December 26, 2006 through March 12, 2007 due to injuries sustained in an automobile accident. The applicant stated that after his medical release to return to work, he completed drills on March 17, 18, and 25, and on April 7 and 14, but he presented no corroborating evidence that he actually drilled on these specific dates nor does the military record before the Board contain such corroboration. The applicant also stated that he performed annual active duty for training (ADT) from April 16, 2007, to April 27, 2007. There is no evidence in the record corroborating these specific dates. However, even if there was corroboration for the ADT, it would not count toward the anniversary year ending April 13, 2007 because it was not completed by April 13, 2007. As stated above, as of April 13, 2007, the applicant had accumulated only 49 points.

5. Despite the unfortunate circumstances mentioned above, the Board is not persuaded by the current evidence of record that the applicant has suffered an injustice. 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). Absences from scheduled drills are either excused or unexcused. If absences are excused they are rescheduled. In this regard, the applicant has offered no evidence that he informed his command about his motor vehicle accident or that he provided his unit with his doctor's statements that he was not able to work during a specific period. Nor does he state whether the command excused his absences from scheduled drills in January and February 2007. The Board has no evidence that the command agreed that the applicant could not drill, even in a limited duty status. In this regard, Article 5.B.5. of the Reserve Policy Manual states that if a disability is expected to last less than 4 months, the reservist shall be retained in the SELRES and the command shall either schedule the reservist for IDT training in a limited duty status or shall reschedule drills for when the member is fit for full duty.

6. It would be inappropriate for the Board to correct the applicant's record based upon injustice without knowing whether he fulfilled his responsibilities to his command. There is no evidence before the Board whether the command was aware of his temporary injury and inability to drill, whether the command excused his January and February absences, or whether the command offered any other options for earning points during his temporary injury. The military record provided to the Board from Coast Guard Headquarters is incomplete and therefore not of any assistance to the Board in determining the applicant's or command's actions with regard to processing the applicant's temporary injury. The Board presumes that the information relating to the applicant's interaction with his unit about his injury is in his local unit record. Therefore, the Board will grant further consideration on this application if the applicant submits a true copy of his unit PDR to the Board (including any administrative remarks page (page 7) entries about the injury, what, if any, options were offered to the applicant to earn points, and what drills were excused and rescheduled) within 180 days from the date of the final decision in this case.

7. The applicant cited 10 U.S.C.A § 12731b. in support of his application. However, this law does not apply to the applicant's situation because he is not permanently disabled and he is not seeking retirement.

8. Accordingly, the applicant's request should be denied, with further consideration granted in accordance with Finding 6.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXXXXXXXXXXXXX, for correction of his military record is denied. However, the Board shall grant further consideration of this application if the applicant submits a true copy of his unit military record to the Board (including any page 7s about the injury, what drills were excused and rescheduled, and what other options, if any, were offered for earning points) within 180 days from the date of this final decision.

Katia Cervoni

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