

IN THE CASE OF: [REDACTED]

BOARD DATE: 7 December 2023

DOCKET NUMBER: AR20220009329

APPLICANT REQUESTS: correction to his records to reflect additional active service of 6 years and 2 months as an Active Guard Reserve (AGR) officer, additional pay he should have received while in that active service, and adjustment to his retired pay due to the additional service.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Regular Army DD Form 214 (Certificate of Release or Discharge from Active Duty) (October 1990 to January 2005)
- Memorandum, 30 January 2012, Subject: Selective Continuation (SELCON) on the Reserve Active Status List (RASL)
- Applicant's Declination of Selective Continuation on Reserve Active Status List and Election for Voluntary Retirement, 23 February 2012
- Memorandum, 30 July 2012, Subject: Notice of Selective Continuation (SELCON) on the Reserve Active Status List (RASL)
- Order O-03-290037, 8 March 212 (Retirement Order)
- Active Guard Reserve (AGR) DD Form 214 (2005 to 2012)
- Memorandum, 2 November 2017, Subject: Notification of Change to Active Guard Reserve (AGR) Policy pertaining to Selective Continuation (SELCON) in an AGR Status

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. He was notified that he was erroneously removed from Active Guard Reserve (AGR) status due to a practice that was not in compliance with Army policy at that time or now. That document is uploaded in supporting documents. Had the policy been properly followed and enforced, he would have been allowed to serve an additional 6 years and 2 months (74 months total) on active duty. He is requesting that his records be

corrected to give credit for an additional 74 months of active service that he was unjustly denied. He requests payment of the difference between retired pay and the pay he would have been entitled to including BAS (Basic Allowance for Subsistence) and BAH (Basic Allowance for Housing) for Monterrey, CA during the 74 months. He requests to have retired pay adjusted to reflect 74 months of additional service. And he requests to have all official records and DD Form 214 corrected to reflect an addition 74 months of Active Federal Service for a total of 28 years of Active Federal Service.

a. He was notified by memorandum from the U.S. Army Human Resources Command that he was part of a group of officers erroneously released from active duty to reserve active status. This group has been notified of their right to appeal this unjust action and to have amends made for the opportunities they were denied. Had the proper procedures been followed he would have remained on Active Duty for the maximum period permissible which he believes to be 28 years of AFS (active federal service) based on this memo, research of the personnel regulations and conversations with personnel command representatives responsible for this notification.

b. During the 6 months between notification and his retirement date, his command made numerous calls to PERSCOM (Personnel Command, now called U.S. Army Human Resources Command) seeking to determine if this action was in keeping with military regulations and policies since they were convinced this action was erroneous and wished to retain my services. All efforts were rebuffed including calls from the Commanding General of the 91st Division.

3. Review of the applicant's service records shows:

a. He executed an oath of office and was appointed as a Reserve commissioned officer on 19 May 1990.

b. After 4 months and 14 days of inactive service, he entered active duty on 3 October 1990. He served in a variety of assignments, and he was promoted to major (MAJ) in the Regular Army on 27 October 2004.

c. He was honorably discharged from active duty on 31 January 2005 due to General/Miscellaneous Reasons. His DD Form 214 shows he completed 14 years, 3 months, and 29 days of active service.

d. Following his separation from active duty, he executed an oath of office and was appointed as a Reserve commissioned officer on 1 February 2005. He entered active duty in the AGR program on the same date. He was assigned to Fort McCoy, WI, in an AGR status.

e. In May 2009, he was assigned to the 85th Training Command at Fort Knox, KY, and in May 2010, he was assigned to 91st Training Division, Fort Hunter Liggett, CA.

f. On 30 January 2012, a memorandum, Subject: Notice of Selective Continuation (SELCON) on the Reserve Active Status List (RASL), informed him that a Department of the Army Reserve Components Promotion Selection Board did not recommend him for promotion to the next higher rank for a second time. This event requires that he be separated from the Active Guard Reserve Program; however, a Selective Continuation (SELCON) Board recommended him for selective continuation. He can elect to remain on the RASL per AR 135-155 (Promotion of Commissioned Officers and Warrant Officers Other Than General Officers), paragraph 4-34, until he completes 24 years of commissioned service.

g. On 23 February 2012, the applicant acknowledged receipt of the SELCON memorandum. He acknowledged that he was presented the memorandum stating that he had been recommended to be selectively continued and can remain on the RASL in the Ready Reserve until he completed 24 years of commissioned service. He made the following choices:

(1) He voluntarily declined selective continuation on the RASL and understood that he would be subject to separation from active status.

(2) He has over 20 years of active service and would be eligible for voluntary retirement.

h. On 8 March 2012, the U.S. Army Human Resources Command (HRC) published Orders P-03-290037 retiring him from active duty in the rank of MAJ effective 31 July 2012.

i. The applicant retired due to length of service on 31 July 2012, and he was placed on the retired list in the grade of MAJ on 1 August 2012. His DD Form 214 for this period shows he completed 7 years and 6 months of active service, and he had 14 years, 3 months, and 28 days of prior active service, for a total of:

- 21 years, 09 months, and 28 days of active service
- 00 years, 04 months and 14 days inactive service
- 22 years, 02 months, and 12 days total commissioned service

4. On 2 November 2017, HRC informed the applicant that the Deputy Chief of Staff (DCS), G-1, Headquarters, Department of the Army (HQDA), has recently discovered that the past practice of releasing officers from the AGR Program after selection and acceptance of selective continuation (SELCON) was not in compliance with current policy. Some officers were impacted. Based upon the previous policy, the DCS, G-1,

advised the U.S. Army Human Resources Command (HRC) to consider notifying all former AGR CPTs and MAJs who were released from the AGR program to a reserve active status to serve their SELCON of the right to appeal to the Army Board of Correction of Military Records (ABCMR).

5. The Office of the Deputy Chief of Staff, G-1 provided an advisory opinion in the processing of this case. The G-1 advisory official stated:

a. [Applicant] is requesting a correction to his official Army records to reflect additional active service as an Active Guard Reserve officer, the additional pay he should have received while in that active service, and adjustment to his retired pay due to the additional service.

b. A review of the applicant's Army Military Human Resource Record (AMHRR) and official records revealed he was twice non-selected for promotion to lieutenant colonel by the Fiscal Year 2011 LTC Army Promotion List Active Guard Reserve (AGR) Promotion Selection Board. However, he was selected for continuation by Fiscal Year 2011 MAJ Army Promotion List AGR Selective Continuation (SELCON) Board pursuant to Section 14701, title 10, United States Code (10 USC 14701). During this timeframe the U.S. Army Reserve (USAR) and Army Human Resources Command (HRC) policy for managing AGR officers selected for continuation (as a condition of the officer to accept the SELCON) was to release them from active service with transfer to a troop program unit, or other active Ready Reserve status (IMA or IRR), to serve the period of continuation in a non-AGR status there.

c. Section 14701, Title 10, United States Code, provides that a reserve officer who holds the grade of major in the Army and who is required to be separated due to having been twice non-selected for promotion may not be continued on the RASL beyond the last day of the month in which the officer completes 24 years of commissioned service. The applicant was selected for continuation to complete 24 years of commissioned service. The applicant was commissioned on 19 May 1990 and had no subsequent breaks in service. Therefore, his SELCON period would have ended on 31 May 2014. As a result of the Army Reserve policy, he was scheduled for release from active service. But since he had accrued 20+ years of active service (ENCL 1), he elected to retire effective 31 July 2012, in lieu of transferring to a Ready Reserve status.

d. In early 2017 the DCS, G-1 requested a legal review by the Office of The Judge Advocate General (OTJAG) of the Army Reserve policy of separating AGR officers to Ready Reserve status after selection for SELCON. OTJAG rendered a formal legal opinion (DAJA-AL 2016/0449) on 3 March 2017. OTJAG's review of all statutory and regulatory related guidance concluded "that eligible USAR AGR officers may be SELCON pursuant to 10 U.S.C. § 14701, and DOD and Army policy, but that such continuation may not deviate beyond authorized statutory and regulatory periods of

continuation. Further, it is our opinion that, inasmuch as AR 135-18 provides no regulatory basis for the REFRAD of a USAR AGR officer who has failed twice for selection for promotion to the next higher grade who is SELCON, and, absent the application of a disqualifying criterion for continued duty in the program, such officers are to remain on active duty in the AGR Program as a matter of policy unless they voluntarily request to be removed from the program or otherwise become subject to a disqualification criterion.”

e. As a result of OTJAG’s 3 March 2017 legal opinion the DCS, G-1 Director of Military Personnel Management (DMPM) issued a memorandum (ENCL 2) on 21 March 2017 to HRC stating OTJAG opined “the current practice of releasing from active duty AGR CPTs and MAJs who have been selected for and accepted SELCON is in contravention with AGR Program policy and is legally objectionable. Accordingly, any AGR CPT or MAJ who is selected for and accepts SELCON will remain on active duty in the AGR Program for the duration of the SELCON period, unless other regulatory provisions require earlier removal or involuntary separation. Any pending separation action of an AGR CPT or MAJ who has accepted SELCON and is being separated solely for that reason must be terminated immediately.” The DMPM memo further advised “former AGR officers who were selected for and accepted SELCON, but who were released from active duty to serve the SELCON period in the Ready Reserve in other than AGR status, may request relief through application to the ABCMR; and that HRC should consider identifying and notifying all former AGR CPTs and MAJs who were released from active duty to serve their SELCON period in the Ready Reserve in other than AGR status in order to advise them of their right to appeal to the ABCMR.” Based upon receipt of the DMPM memo, HRC issued a memo to the applicant on 2 November 2017 notifying him of the error and the course of action for seeking relief.

f. It is the opinion of the DCS, G-1 that the applicant would have remained on active service in the USAR AGR Program, rather than retiring, had the USAR and HRC not erred in its execution of SELCON of AGR officers. However, the applicant’s SELCON period would have resulted in only serving an additional one year and 10 months (the completion of 24 years of commissioned service), not the additional six years and 2 months as he indicates in his appeal. This additional service would have resulted in his removal from the USAR AGR Program effective 31 May 2014.

g. Therefore, based upon the discussion in paragraphs 2 through 6 above, the Army G-1 recommends approval of the applicant’s appeal, but only in correcting his service records to credit him with an additional one year and 10 months of active service, receipt of the corresponding back pay and allowances, and recalculation of his retired pay due to the additional one year and 10 months of credited active service.

7. On 15 August 2023, the applicant responded to the advisory opinion and stated:

a. He questions the computation of the adjusted retirement date of 31 May 2014. It appears to be at odds with the sections below which would indicate the date should in fact be 31 October 2014. He believes the Advisory Opinion used the terms commissioned service and active commissioned service interchangeably when they are not interchangeable.

b. DoDI 1320.08 uses the term commissioned service in referring to the maximum of 24 years of service followed by the reference to §637(a)(3) of Title 10, U.S.C. The referenced portion of §637 is pasted below and highlighted to show they intended for such a computation to be Active Commissioned Service. The term commissioned service and Total Federal Commissioned Service are used for determining dates of rank, seniority between officers and date of appointment is used in AR 135-155.

c. He was required to wait from commissioning in May 1990 until October 1990 for the beginning of Officer Basic Course. The use of this inactive service time is being inappropriately used in this calculation. "Commissioned service" is not used for pay or retirement calculation in any of the documents referenced by the Office of The Deputy Chief of Staff, G-1, Washington, DC. In fact, he was not serving, and the inactive time was not counting towards years of service in any manner. The discrepancy between these two terms would change the computation of his retirement date from 1 May 2014 to 31 October 2014. He believes he would have been allowed to serve two years and three months longer before being removed from the USAR AGR Program. Considering this clarification of terms, he is requesting that his recalculated date be 31 October 2014 and that he be credited with an additional two years and 3 months of active service.

8. On 16 August 2023, the applicant again wrote to the Board and stated should the Board return a favorable disposition in this case, he would request that any monetary award include the standard OPM or applicable rate of interest. He would also request that any award be provided via paper check to the address on his application.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found partial relief is warranted.

2. The Board concurred with the conclusion of the advisory official that the applicant should have remained in the AGR program based on his SELCON status until he had completed his 24th year of commissioned service. Based on a preponderance of the evidence, the Board determined the applicant's record should be corrected to show he was retired on 31 May 2014 and placed on the Retired List the following day. He should be paid any additional pay and allowances he is due as a result of this correction.

3. The applicant's request to be paid interest on any retroactive pay and allowances he receives is not within this Board's purview.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
■	■	■	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by showing he retired on 31 May 2014 with placement on the Retired List the following day. He should be paid any additional pay and allowances he is due as a result of this correction.

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to a retirement date later than 31 May 2014.

2/12/2024

X

CHAIRPERSON

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or

injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Title 10, U.S. Code, section 14701 Selection of officers for continuation on the reserve active-status list. (a) Consideration for Continuation.—

(1) (A) A reserve officer of the Army, Navy, Air Force, or Marine Corps described in subparagraph (B) who is required to be removed from the reserve active-status list under section 14504 of this title, or a reserve officer of the Army, Navy, Air Force, or Marine Corps who is required to be removed from the reserve active-status list under section 14505, 14506, or 14507 of this title, may be considered for continuation on the reserve active-status list under regulations prescribed by the Secretary of Defense. (B) A reserve officer covered by this subparagraph is a reserve officer of the Army, Air Force, or Marine Corps who holds the grade of first lieutenant, or a reserve officer of the Navy who holds the grade of lieutenant (junior grade), and who— (i) is a health professions officer; or (ii) is actively pursuing an undergraduate program of education leading to a baccalaureate degree. (C) The consideration of a reserve officer for continuation on the reserve active-status list pursuant to this paragraph is subject to the needs of the service and to section 14509 of this title.

(2) A reserve officer who holds the grade of captain in the Army, Air Force, or Marine Corps or the grade of lieutenant in the Navy and who is subject to separation under section 14513 of this title may not be continued on the reserve active-status list under this subsection for a period which extends beyond the last day of the month in which the officer completes 20 years of commissioned service.

(3) A reserve officer who holds the grade of major or lieutenant commander and who is subject to separation under section 14513 of this title may not be continued on the reserve active-status list under this subsection for a period which extends beyond the last day of the month in which the officer completes 24 years of commissioned service.

(4) A reserve officer who holds the grade of lieutenant colonel or commander and who is subject to separation under section 14514 of this title may not be continued on the reserve active-status list under this subsection for a period which extends beyond the last day of the month in which the officer completes 33 years of commissioned service.

(5) A reserve officer who holds the grade of colonel in the Army, Air Force, or Marine Corps or the grade of captain in the Navy and who is subject to separation under section 14514 of this title may not be continued on the reserve active-status list under this subsection for a period which extends beyond the last day of the month in which the officer completes 35 years of commissioned service.

(6) An officer who is selected for continuation on the reserve active-status list under regulations prescribed under paragraph (1) but who declines to continue on that list shall be separated in accordance with section 14513 or 14514 of this title, as the case may be.

(7) Each officer who is continued on the reserve active-status list under this section, who is not subsequently promoted or continued on the active-status list, and whose name is not on a list of officers recommended for promotion to the next higher grade shall (unless sooner separated under another provision of law) be separated in accordance with section 14513 or 14514 of this title, as appropriate, upon the expiration of the period for which the officer was continued on the reserve active-status list.

//NOTHING FOLLOWS//