

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 12 November 2024

DOCKET NUMBER: AR20230010346

APPLICANT REQUESTS: non-regular retirement backpay based on notification of eligibility for retired pay at age 60, retroactive to 25 November 2005, when he would have reached the age of 60 and would have been eligible to start receiving retirement pay and benefits.

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

- DD Form 149 (Application for Correction of Military Record)
- Power of Attorney

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. The applicant states he was not allowed to reenlist in the Massachusetts Army National Guard (MAARNG) because he was overweight. He was told at that time he was not authorized to receive retirement pay and TRICARE benefits. The Battalion he was in just let him go away without any out processing. When he asked about filing for his retirement pay, he was told that was not authorized any, even when he had a 20 year letter from the National Guard Bureau (NGB) stating he was eligible. When this bad advice/guidance was given, there were no Retired Service Officers (RSO) in the State, and only recently did he find out that there was an RSO at West Point that could have helped him. A close friend and his daughter did some research and contacted the MAARNG RSO who submitted his retirement request on 11 June 2023, but this covers 6 years of retirement pay. This request is for the other 11 plus years of back. He was recently diagnosed with cancer and only have a few months to live. He does not know how much time he has left before he dies. His daughter Jen**** [Full Name and Address] has Power Attorney to act for him in this matter if need be.

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

- a. He was born in November 1945. He turned 60 years of age in November 2005.
 - b. Having had prior eservice, he enlisted in the Massachusetts Army National Guard (MAARNG) on 8 July 1977. He held military occupational specialties 96B, Intelligence Analyst and 54B, Chemical Specialist.
 - c. On 9 September 1986, the National Guard Bureau (NGB) issued the applicant a Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter).
 - d. On 10 March 1988, the Adjutant General, MAARNG issued Orders 49-14 discharging the applicant from the ARNG and transferring him to the Retired Reserve. On 4 March 1988.
 - e. The applicant's DA Form 5016 (Chronological Statement of Retirement Points) shows he completed 19 years, 11 months, and 17 days of qualifying service towards non-regular retirement.
4. On 21 November 2023, the NGB provided an advisory opinion in the processing of this case. An advisory official restated the applicant's request to have to have back pay for retirement eligibility once he reached the age of 60 per his notification of eligibility for retired pay at age 60. The NGB recommendation is approval.
- a. The Soldier received a notification of eligibility for retired pay at the age of 60 on 9 September 1986. Soldier was later discharged from the MAARNG on 4 March 988 per the Soldier's report of separation and record of service form (NGB Form 22). In accordance with Title 10 of the United States Code (10 USC) 12731-12737, a Reserve Soldier or former Reserve Soldier must have completed a minimum of 20 qualifying years of service and have attained the eligibility age of 60 for retired pay.
 - b. Army Regulation (AR) 135-180, Section II, para 2-4(2)b, states that if a "Soldier has been notified of their eligibility for retired pay for non-regular service, the Soldier's eligibility for retired pay may not be denied or revoked on the basis of any error, miscalculation, misinformation, or administrative determination of years of serve performed, unless it resulted directly from the fraud or misrepresentation of the individual concerned".
 - c. The MAARNG did a review of the applicant's record and concluded that he is fully entitled to received retirement pay whether he was given poor guidance or forgot to apply at age 60. Soldier is entitled to receive retirement pay per AR 135-180, section II, para 2-4(2) b.
 - d. Title 31 of the United States Code (USC), section 3702 (a)(1)(A) outlines the authority to settle claims involving uniformed service members pay, allowances, travel,

transportation, payments for unused accrued leave, retired pay, and survivor benefits. Also, section 3702 (e) states that the Secretary of Defense may waive the 6 year time limitation set forth under this USC, and that in a case of claim by or with respect to a member of the uniformed services who is not under the jurisdiction of the Secretary of a military department, such a waiver may be made only upon the request of the Secretary concerned (as defined I section 101 of title 37). Additionally, Section 101, title 37 defines the term "Secretary concerned" under this USC as the Secretary of the Army, with respect to matters concerning the Army.

e. Based on the evidence presented, and a thorough review of the documents presented by the MAARNG, this office concludes that the applicant is eligible for retirement pay IAW 10 USC 12731-12737, and AR 135-180.

f. The applicant has stated in his claim that the MAARNG retirement services office has already started the process of back pay but for only 6 years of backpay as per Title 31 of the United States Code (b) (1), which provide a time limitation of only 6 years of backpay. This office with the recommendation of the MAARNG agrees that the Soldier should receive all his retirement pay from eligibility date, and that the ABCMR exempt him from the 6-year rule per 31 USC section 3702 (e), Section 101 of Title 37 as defined above. The opinion was coordinated with the assistance of the Massachusetts Army National Guard.

5. The applicant was provided with a copy of this advisory opinion to give him an opportunity to submit a rebuttal. There was no response received.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.

a. The evidence of record shows the applicant received a notification of eligibility for retired pay at the age of 60 on 9 September 1986. He was later discharged from the MAARNG on 4 March 988 per the Soldier's report of separation and record of service form (NGB Form 22). In accordance 10 USC, 12731-12737, a Reserve Soldier or former Reserve Soldier must have completed a minimum of 20 qualifying years of service and have attained the eligibility age of 60 for retired pay. By regulation, if a Soldier has been notified of their eligibility for retired pay for non-regular service, the Soldier's eligibility for retired pay may not be denied or revoked on the basis of any error, miscalculation, misinformation, or administrative determination of years of serve performed, unless it resulted directly from the fraud or misrepresentation of the individual concerned.

b. The Board agreed with the State ARNG and NGB that by virtue of having been issued a 20-Year letter, the applicant is entitled to receive retirement pay whether he was given poor guidance or forgot to apply at age 60. Soldier is entitled to receive retirement pay per 10 USC 12731-12737 and AR 135-180, paragraph 2-4.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army and Army National Guard records of the individual concerned be corrected by:

- a. Showing the applicant timely submitted a DD Form 108, Application for Retired Pay at age 60.
- b. Showing the appropriate office timely received, processed, and approved his application for retired pay at age 60.

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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, United States Code 12731-12737, a Reserve Soldier or former Reserve Soldier, must have completed a minimum of 20 qualifying years of service and have attained the eligibility age of 60 for retired pay.
3. Army Regulation 135-180, Army National Guard and Army Reserve, Retirement for Non-Regular Service, prescribes policies and procedures governing non-regular retirement. Section II, paragraph 2-4(2)b, states that if a "Soldier has been notified of their eligibility for retired pay for non-regular service, the Soldier's eligibility for retired pay may not be denied or revoked on the basis of any error, miscalculation, misinformation, or administrative determination of years of serve performed, unless it resulted directly from the fraud or misrepresentation of the individual concerned".
4. Title 31 of the United States Code (USC), section 3702 (a)(1)(A) outlines the authority to settle claims involving uniformed service members pay, allowances, travel, transportation, payments for unused accrued leave, retired pay, and survivor benefits.
5. Title 31 of the United States Code (USC), section 3702 (e) states that the Secretary of Defense may waive the 6 year time limitation set forth under this USC, and that in a case of claim by or with respect to a member of the uniformed services who is not under the jurisdiction of the Secretary of a military department, such a waiver may be made only upon the request of the Secretary concerned (as defined I section 101 of title 37).

//NOTHING FOLLOWS//