

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 2 April 2024

DOCKET NUMBER: AR20230010788

APPLICANT REQUESTS: correction of his records to show he is authorized back pay of his retirement pay, retroactive to 15 February 2012, instead of only 6 years of back pay, pursuant to the Barring Act.

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

- DD Form 149 (Application for Correction of Military Record)
- Memorandum Notification of Eligibility for Retired Pay at Age 60
- DD Form 1883 (Survivor Benefit Plan (SBP) Election Certificate)
- NGB Form 22 (Report of Separation and Record of Service)
- Orders 025-050 Army National Guard (ARNG) Discharge Orders
- State of Michigan Judgment of Divorce
- DD Form 2293 (Application for Former Spouse Payments from Retired Pay)
- State of Michigan Qualifying Court Order for a Military Retirement Plan
- Letters to U.S. Army Reserve (USAR) Personnel Center
- U.S. District Court Eastern District of Michigan Southern Division Order Granting Unconditional Writ Ordering a New Trial and applicant's Immediate Release
- NGB Form 23A (ARNG Retirement Points History Statement)
- Affidavit of J- S-
- State of Michigan Judicial District 9th Judicial Court Dismissal without Prejudice

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 eligible to start receiving retired pay on 15 February 2012. The applicant was wrongfully convicted of a double homicide in 2002. On 24 February 2023, the applicant was released from prison due to a vacated conviction under a Brady Act violation. While in prison, he was unable to apply for retired pay. He is asking for full relief. After wrongfully spending 22 years in prison, he is finally able to receive the benefits he has earned. He asks the Board to please consider back paying

him to the date of retirement. It was of no fault of his own that he was unable to apply. He was also fully exonerated of all charges on 1 June 2023.

3. The applicant's complete service record is not available for the Board's consideration; however, the applicant provided enough documentation for the Board to make a decision in his case.

4. The applicant provides the following documents:

a. NGB Form 22 shows the applicant was born on XX F\_\_\_ 1952. He enlisted in the ARNG on 24 July 1985. He would turn 60 in F\_\_\_ 2012.

b. Memorandum subject Notification of Eligibility for Retired Pay at Age 60, dated 22 August 2001, notified the applicant he had completed the required years of service and would be eligible for retired pay, upon application, at age 60.

c. DD Form 1883, dated 14 October 2001, shows the applicant selected Survivor Benefits Plan (SBP) for spouse only based on the full amount of his retired pay with immediate coverage.

d. Orders 025-050, published by State of Michigan Department of Military and Veterans' Affairs, dated 25 January 2002 shows the applicant was being honorably discharged from the ARNG and transferred to USAR Control Group (Retired Reserve) effective 10 December 2001.

e. NGB Form 22 reflects the applicant was honorably transferred to USAR Control Group (Retired Reserve) on 10 December 2001, based upon his total service for retired pay of 20 years and 5 months.

f. State of Michigan Judgment of Divorce, dated 10 March 2003, shows the applicant and his spouse were divorced.

g. DD Form 2293, dated 31 March 2003, shows the applicant's ex-wife requested 50 percent of the applicant's disposable retired pay per month.

h. State of Michigan Qualifying Court Order for a Military Retirement Plan, dated 10 April 2003, states according to law, the applicant's ex-wife was entitled to a share of the applicant's military retirement benefits.

i. A letter from the applicant's ex-wife to USAR Personnel Center, dated 15 May 2003, wherein the ex-wife forwarded the Qualifying Court Order for a Military Retirement Plan and the completed DD Form 2293. On 20 May 2003, the ex-wife's attorney also sent USAR Personnel Center the documentation.

j. United States District Court Eastern District of Michigan Southern Division Order Granting Unconditional Writ Ordering a New Trial and Applicant's Immediate Release, dated 24 February 2023, shows the applicant's convictions and sentences were to be vacated immediately and a new trial was granted. The court ordered the applicant be immediately released from Michigan Department of Corrections custody.

k. NGB 23A, dated 11 April 2023, shows the applicant had 20 years and 5 months creditable service for retired pay.

l. An affidavit from the applicant's ex-wife, 17 May 2023, states the ex-wife waived any claim to any past and future benefits owed to the applicant that were awarded to her in her divorce case. She would execute and have delivered to the applicant all documents or other instruments necessary to accomplish the transfer of properties.

m. State of Michigan, Judicial District, 9th Judicial Court Dismissal without Prejudice document, 1 June 2023, shows the charges against the applicant were dismissed.

5. The applicant's service record contains Orders C08-391477 published by U.S. Army Human Resources Command (AHRC), dated 10 August 2023, which placed the applicant on the retired list effective 15 February 2012.

6. On 25 October 2023, the Chief, Personnel Services Division, AHRC, provided an advisory opinion, which states: The applicant states he was incarcerated due to a wrongful conviction from sometime in 2002 until 24 February 2023. During this time, he was not able to apply for his retired pay and benefits. The applicant attained age 60 on 15 February 2012, if not for his wrongful conviction, he would have been afforded the opportunity to apply for his retired pay and benefits within the allowed 6-year statute of limitations. The documents submitted by the applicant support the fact that he was wrongfully incarcerated and further go on to state that he was exonerated of all charged on 1 June 2023. Therefore, it is the opinion of AHRC that the applicant receive back pay retroactive to the date he attained age 60, which is 15 February 2012.

7. On 27 October 2023, the advisory opinion was provided to the applicant to allow him the opportunity to respond. He did not respond.

#### 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. The applicant served in the ARNG from July 1985 to December 2001 and was transferred to the Retired Reserve with 20 or more qualifying service for non-regular retirement. He reached age 60 in 2012. However, he states he was unable to apply for retired pay at

age 60 because he was incarcerated due to a wrongful conviction from sometime in 2002 until 24 February 2023. The Board reviewed and agreed with the advisory official's finding that if not for his wrongful conviction, he would have been afforded the opportunity to apply for his retired pay and benefits within the allowed 6-year statute of limitations. He provides documents that support the fact that he was wrongfully incarcerated and further go on to state that he was exonerated of all charged on 1 June 2023. Therefore, the Board determined he is entitled to receive back pay retroactive to the date he attained age 60 in February 2012.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

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

- showing the applicant timely applied for retired pay benefits prior to reaching age 60 in February 2012
- showing the appropriate office timely received, approved, and processed his application for retired pay benefits
- paying him any additional retired pay retroactive to the date he turned 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 USC, section 12731 (Age and service requirements), (a) a person is entitled, upon application, to retired pay computed under section 12739 of this title, if the person:

a. Has attained the eligibility age applicable under subsection (f) to that person.

b. Has performed at least 20 years of service computed under section 12732 of this title; in the case of a person who completed the service requirements of paragraph (2) before 25 April 2005, performed the last six years of qualifying service while a member of any category named in section 12732(a)(1) of this title, but not while a member of a regular component, except that in the case of a person who completed the service requirements of paragraph (2) before 5 October 1994, the number of years of such qualifying service under this paragraph shall be eight

c. Is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve

3. Army Regulation (AR) 135-180 (Qualifying Service for Retired Pay Non-Regular Service) paragraph 2-3 states under Title 10, USC, section 1331(d), each Reserve Components Soldier who completes the service required under paragraph 2-1 to be eligible for retired pay at age 60 under this regulation will be notified in writing within 1 year after he or she has completed that service. This notification will be issued by the Commanding General Army Reserve Personnel Center at the time 20 satisfactory years of service is completed. The notification will be issued to those individuals credited with 20 years of qualifying service prior to discharge or transfer to the Retired Reserve.

4. Title 31, U.S. Code, section 3702, also known as the Barring Statute, prohibits the payment of a claim against the Government unless the claim has been received by the Comptroller General within 6 years after the claim accrues. Among the important public policy considerations behind statutes of limitations, including the 6-year limitation for filing claims contained in this section of Title 31, U.S. Code, is relieving the Government of the need to retain, access, and review old records for the purpose of settling stale claims, which are often difficult to prove or disprove.

//NOTHING FOLLOWS//