

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 June 2024

DOCKET NUMBER: AR20230011682

APPLICANT REQUESTS: correction of the Former Service Member's (FSM) record to show he submitted for and was approved for a Non-Regular Retirement at age 60 (6 July 2007). A personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- Applicant personal statement number one
- Alabama Department of Veterans Affairs (DVA) letter
- Letter Testamentary
- Death certificate
- Memorandum, Subject: Notification of Eligibility for Retired Pay at Age 60
- National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service)
- Statement of Service
- NGB Form 23B (Army National Guard (ARNG) Retirement Points History Statement)
- Orders Number 210-29
- Special Orders Number 142
- Congressional assistance request
- DA Form 2-1 (Personnel Qualification Record) page 3
- FSM's brothers' personal statement number 2

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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 in pertinent part on DD Form 149 and personal statement number one:

a. Upon turning 60 the FSM visited his former Alabama Army National Guard (ALARNG) unit to initiate his retirement application. However, despite having an NGB Form 22 showing 20 years, 1 month, and 9 days of service, and a 20-Year Letter "Notification of Eligibility for Retired Pay at Age 60" from the NGB in his personnel record, he was informed that he was ineligible to receive a retirement pension because his point calculations added to less than 20 years of service. It was communicated to him the revised retirement point calculation was accurate and final; therefore, he did not pursue a retirement application any further. The FSM lived 14 years post his retirement age without receiving any of the retirement pay he rightfully earned. The FSM passed away in June 2022. However, after initiating an inquiry through the Governor of Alabama, a recent analysis of his military record by a Retirement Services Officer (RSO) at the Alabama State Military Department verified he, in fact, had the required 20-year service time for retirement. According to the RSO, the initial analysis apparently did not go back far enough to capture, his full service record with time in the U.S. Army Reserve, which was not included on the NGB Form 23B. Further analysis showed he was granted a retention waiver to extend his service time to ensure eligibility for a retirement pension.

b. The FSM served in the ALARNG from 1966 to 1986. He had a life-long connection to the ALARNG as the FSM had a full-time career with the Guard and retired as a Lieutenant Colonel and Battalion Executive Officer. His brother served in the Guard for eight years until he was honorably discharged with the rank of Specialist Five. Serving in the ALARNG was an expectation in the FSM's family as military service was a part of their identity and family value system.

3. A review of the FSM's official record as provided by the applicant shows the following:

- a. NGB Form 23B shows the FSM entered the ARNG on 25 August 1966.
- b. On 24 July 1973, the FSM was released from the ARNG.
- c. On 25 July 1973, the FSM became a member of the U.S. Army Reserve (USAR) and was assigned to a Troop Program Unit.
- d. On 6 November 1974, the FSM was released from the USAR.
- e. On 7 November 1974, the FSM became a member of the ARNG and served continuously until 3 October 1986.

f. On 3 October 1986, the NGB issued the FSM a Memorandum, Subject: Notification of Eligibility for Retired Pay at Age 60, which informed him he had completed the required years of service to be eligible for retired pay upon application at age 60.

g. On 30 October 1986, Orders Number 210-29 issued by the Alabama Office of the Adjutant General, the FSM was honorably released from the ARNG and assigned to the USAR Control Group (Retired Reserve), effective 3 October 1986.

h. The FSM turned 60 years of age on 6 Jxxx 2007.

4. The applicant in addition to the above provides:

a. Alabama DVA letter wherein a DVA representative provides the letter in support of the applicant's petition for the FSM's retirement pension and reiterates the applicant's opening statement to the Board.

b. Letter Testamentary which shows the applicant was designated as the personal representative of the FSM and was authorized to administer his estate.

c. Death certificate showing the FSM passed away on 29 June 2022 and the informant was his brother Ro- B-.

d. NGB Form 22, ending on 3 October 1986, showing the FSM at the time was in the rank/grade of captain (CPT)/O-3, transferred to the USAR Control Group (Retired Reserve), completed 10, years, 9 months, and 3 days of net service, with 9 years, 4 months, and 6 days of prior Reserve Component service, and 20 years, 1 month, and 9 days of total service for pay.

e. Statement of service which shows the FSM:

- ALARNG enlisted from 23 August 1966 to 20 June 1969; 2 years, 9 months, and 26 days
- ALARNG officer from 21 June 1969 to 24 July 1973; 4 years, 1 month, and 4 days
- USAR officer from 25 July 1973 to 6 November 1974; 1 year, 3 months, and 12 days
- SCARNG officer from 7 November 1974 to 31 December 1975; 1 year, 1 month, and 25 days
- ALARNG officer from 1 January 1976 to 24 August 1986; 10 years, 7 months, and 23 days
- Totaling 20 years and 1 day of total service

f. NGB Form 23B dated 18 April 2023, showing the FSM completed at the time 19 years of creditable service for retired pay.

g. Congressional assistance request wherein the applicant requested assistance from the office of the Honorable K- I- pertaining to the FSM.

h. DA Form 2-1, page 3, showing the FSM's assignment history.

i. FSM's brothers' personal statement which states the following:

(1) The FSM passed away on 29 June 2022. He served in the ALARNG for 20 years and obtained the rank of CPT. His beginning years of service was around 1967 or 1968. When the FSM retired after 20 years of service and began to fill out his retirement papers for his pension, he was told by his Company Commander, he only had 19 years of credited service and was not eligible for a retirement pension. A few months before his death, he gave permission for the applicant to inquire about his time of service. During this time, he began to have medical issues and died before any information was obtained. The applicant received notice after his death that there was a letter on file showing he had credit for 20 years of service in the ALARNG. The authors family has a good history with the ALARNG. Their father was full time with the National Guard obtaining the rank of lieutenant colonel. He worked out of the armory in Jasper, AL, and at one time was the Executive Commanding Officer of that Battalion. Their father passed away in 1982 before the FSM reached his 20 years of service. the author is sure if his father had been alive at the time of the FSM's retirement, he would have been able to correct this error.

(2) The author served in the ALARNG for 8 years obtaining the rank of specialist five. The author is a retired minister of 37 years with a Master of Divinity degree from The Southern Baptist Theological Seminary in Louisville, KY. Since the FSM was given false information about his time of service, he hopes his beneficiary listed in his will (the applicant) may be able to collect his unpaid retirement pension that he was entitled to receive.

5. On 14 March 2024, in the processing of this case, the NGB, Chief, Special Actions Branch, provided an advisory opinion stating in pertinent part:

a. After review of the FSM's records, the FSM did receive a Notification of Eligibility (NOE) dated 3 October 1986. The FSM was incorrectly notified as he only had 19 years of creditable service but once a Soldier receives a NOE, eligibility cannot be denied or revoked unless it resulted directly from fraud or misrepresentation per Title 10 United States Code (USC), section 12738.

b. Upon recalculation the FSM has 19 years of qualifying service and retirement pay should be calculated on 19 years of service from age 60 until death. Eligibility cannot be revoked however retired pay calculation may be adjusted to correct any error per Title 10, USC, section 12738.

c. It is the recommendation of this office that the applicant's request be approved and the FSM's family be paid retirement pay from 6 July 2007 to 29 June 2022. The FSM received a NOE making him eligible for non-regular retirement pay calculated on 19 years of qualifying service. This office recommends waiving the six-year statute of limitation per Title 31, USC, section 3702 as this issue is of no fault of the FSM and he was incorrectly advised by ALARNG that he was ineligible.

d. The NGB Retirements Branch concurs with the advisory opinion.

6. On 15 April 2024, the applicant was provided with a copy of the advisory opinion for comment or rebuttal.

7. The applicant responded to the advisory opinion in effect concurring with the advisory opinion.

BOARD DISCUSSION:

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

2. 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 SM served in the ALARNG from 1966 to 1986 and was transferred to the Retired Reserve. He did not complete 20 qualifying years of service but for some reason was still issued a Notification of Eligibility (NOE) for Retired Pay at Age 60 (20-Year Letter), dated 3 October 1986. The SM turned 60 years of age on in 2007.

a. According to the NGB, he was incorrectly notified as he only had 19 years of creditable service but once a Soldier receives a NOE, eligibility cannot be denied or revoked unless it resulted directly from fraud or misrepresentation per 10 USC section 12738. According to the NGB, the SM's NGB Form 23B shows he completed 19 years of qualifying service towards non-regular retirement. His NGB Form 22 shows he completed 10, years, 9 months, and 3 days of net service, with 9 years, 4 months, and 6 days of prior Reserve Component service, and 20 years, 1 month, and 9 days of total service for pay. Contrary to the NGB's opinion, by law, in order to receive non-regular retirement at age 60, the member must have completed 20 qualifying years of service.

b. However, based on his honorable service, it seems apparent that if he had fully understood the retirement points system or if he had been counseled properly, he would not have neglected completing the appropriate number of qualifying years of service. Unfortunately, he was 17 retirement points short during Retirement Year 25 August 1973 to 24 August 1974 (the SM received 33).

c. The SM earned in excess of 50 retirement points during Retirement Year 25 August 1974 to 24 August 1975. From a pure equity standpoint, the Board determined there is no harm to the Army or the Soldier if 17 excess points were redistributed from his "good" year 25 August 1974 to 24 August 1975 (currently 71 points) to his Retirement Year 25 August 1973 to 24 August 1974, which would credit him with 50 retirement points for that year and would make him eligible for a 20 year non-regular retirement.

d. The law requires completion of 20 qualifying years of service in order to be eligible for non-regular retirement at age 60. A retirement point redistribution could result in at least 20 qualifying years of service, which could lead to placing him on the retired list on his 60th birthday.

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:

- redistributing 17 of the applicant's excess RC retirement points from retirement year ending 25 August 1974 to 24 August 1975 to retirement year ending 25 August 1973 to 24 August 1974 to provide him with a full qualifying year of service for this retirement year
- placing him on the retired list effective his 60th birthdate with entitlement to back retired pay

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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, USC, 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) states:

a. A person is entitled, upon application, to retired pay computed under section 12739 of this title, if the person— (1)has attained the eligibility age applicable under subsection (f) to that person; (2)has performed at least 20 years of service computed under section 12732 of this title; (3)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, the Fleet Reserve, or the Fleet Marine Corps Reserve, 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; and (4)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.

b. Application for retired pay under this section must be made to the Secretary of the military department, or the Secretary of Homeland Security, as the case may be, having jurisdiction at the time of application over the armed force in which the applicant is serving or last served.

c. The Secretary concerned shall notify each person who has completed the years of service required for eligibility for retired pay under this chapter. The notice shall be sent, in writing, to the person concerned within one year after the person completes that service.

3. Title 10, USC, section 12738 (Limitations on revocation of retired pay)

a. After a person is granted retired pay under this chapter, or is notified in accordance with section 12731(d) of this title that the person has completed the years of service required for eligibility for retired pay under this chapter, the person'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 service performed as required by section 12731(a)(2) of this title, unless it resulted directly from the fraud or misrepresentation of the person.

b. The number of years of creditable service upon which retired pay is computed may be adjusted to correct any error, miscalculation, misinformation, or administrative determination and when such a correction is made the person is entitled to retired pay in accordance with the number of years of creditable service, as corrected, from the date the person is granted retired pay.

4. Title 31, USC, section 3702, is the 6-year barring statute for payment of claims by the government. In essence, if an individual brings a claim against the government for monetary relief, the barring statute says that the government is only obligated to pay the individual 6 years from the date of approval of the claim. Attacks to the barring statute have resulted in litigation in the U.S. Court of Federal Claims. In the case of *Pride versus the United States*, the court held that the BCMR is not bound by the barring act, that the BCMR decision creates a new entitlement to payment and the 6 years starts running over again, and that payment is automatic and not discretionary when a BCMR decision creates an entitlement.

5. Army Regulation (AR) 135-180 (Qualifying Service for retired Pay Non-Regular Service) implements statutory authorities governing the granting of "retired pay" to Soldiers and former Reserve Component Soldiers. Chapter 2 provides eligibility criteria and states, in pertinent part, that in order to qualify for non-regular retirement, a member must have attained age 60 and completed a minimum of 20 years of qualifying service. Paragraph 2-8 defines qualifying service and states, in pertinent part, that an Reserve Component Soldier must earn a minimum of 50 retirement points each retirement year to have that year credited as qualifying service.

6. AR 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//