

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 August 2024

DOCKET NUMBER: AR20230012205

APPLICANT REQUESTS: in effect,

- amendment of Headquarters (HQs), 104th Division (Institutional Training (IT)) Orders Number 99-025-015
- retroactive retirement pay beginning 19 October 2011
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- 7th Battalion (Transportation) Memorandum, Subject: Letter of Instructions – Unexcused Absence
- applicant letter in response to unexcused absences
- E-mail to Colonel (COL) O-
- Letter to Senator H-
- U.S. Army Human Resources Command (HRC) Orders Number C08-391028
- HRC letter to Senator H-

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 he requests the amendment of Orders Number 99-025-015 which assigned him to the U.S. Army Reserve (USAR) Control Group (Retired Reserve) and to be paid retroactively his retirement pay beginning on 19 October 2011. When his USAR unit deactivated he was never assigned to the USAR Control Group (Retired Reserve) as he discussed with his commander at the time.
3. A review of the applicant's service record shows:

a. On 29 January 1971, the applicant enlisted in the USAR. He had continuous service through extensions and reenlistments.

b. The applicant's DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows the applicant was ordered to active duty for training, effective 2 April 1971. The applicant was honorably released from active duty on 1 August 1971. His DD Form 214 shows the applicant completed 4 months of active service.

c. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows the applicant was ordered to active duty in support of Operation Desert Shield/Desert Storm, effective 26 February 1991. He was honorably released from active duty on 17 October 1991. His DD Form 214 shows he completed 7 months and 22 days of active service with 4 months of prior active service and 18 years, 3 months, and 12 days of prior inactive service.

d. On 25 January 1999, Orders Number 99-025-015, issued by the HQs, 104th Division (IT), the applicant was assigned to the USAR Control Group (Reinforcement), effective 16 November 1996.

e. On 3 August 2023, Orders Number C08-391028, issued by HRC, the applicant was placed on the retired list, effective 19 October 2011, in the rank of sergeant first class.

f. HRC letter dated 6 August 2023, stated the applicant met the requirements to be entitled to retirement pay under the authority of Title 10 USC, section 12731a (Temporary Special Retirement Qualification). It also stated a statute of limitation restricted the applicant to 6 years of retroactive entitlements. He would have to apply to the ABCMR to request his retirement pay to the day he became eligible for retirement.

4. The applicant provides:

a. On 10 February 1997, the applicant was notified of his unexcused absences for the period 8 through 9 February 1997. If he accumulated 9 unexcused absences within a 1-year period and became an unsatisfactory participant, he may be transferred to the Individual Ready Reserve for the balance of his obligation.

b. On 23 May 1997, the applicant responded to his commander in effect stating the notification of unsatisfactory participation was the first time in a year his unit had communicated with him since his unit was under deactivation. He was advised by his then commander that June 1996 would be his last unit training assembly and he was informed he would be eligible for a 15-year retirement. However, his paperwork would not be processed until the unit officially deactivated in the fall.

c. E-mail to COL O- requesting assistance in obtaining his retirement pay. He also stated he never received his 15-year retirement letter or orders which transferred him to the USAR Control Group (Retired Reserve). COL O- responded he would need some time to research the applicant's issued.

d. Applicant's letter dated 26 September 2023 to the Honorable M- H- which stated he appreciated the assistance with the correction of his records and the publication of his retirement orders. He went on to state he and his wife went to Fort Bliss, TX, to obtain retirement identification cards. A problem was found which prevented the correction of his records. He believed he needed to obtain an order which would reassign him to the USAR Control Group (Retired Reserve) to close the gap in his service between 1 June 1999 and 19 October 2011.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive review based on law, policy, and, regulation. Upon review of the applicant's petition and available military records, the Board determined the applicant met the requirements to be entitled to retirement pay under the Temporary Special Retirement Qualification Authority in concurrence with the U.S. Army Human Resources Command (HRC). The Board reviewed the applicant's retirement order, dated 3 August 2023 and effective 19 October 2011 from HRC. However, due to the statute of limitations restriction for retroactive entitlement, HRC was bound to the 19 October 2011 retirement date. The Board concluded the applicant was entitled to retired pay, effective upon his reassignment on 16 November 1996 and granted relief with entitlement to retroactive pay as determined by the Defense Finance and Accounting Service.

2. The applicant's request for a personal appearance hearing was carefully considered. In this case, 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.

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 the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of Army records of the individual concerned be corrected by amending Order 99-025-015 published by Headquarters, 104th Division (IT) on 25 January 1999 to reflect

- Reason: Voluntary Retirement
- Pay Grade: E-7
- Effective Date: 16 November 1996

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. Army Regulation (AR) 15-185 (Army Board for Correction of Military Records (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 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.
3. 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 Board for Correction of Military Records (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.
4. Department of Defense Financial Management Regulation 7000.14-R, Volume 7b (Military Pay Policy – Retired Pay), provides information for the specific qualifications and entitlement for military retired pay, describes the basic types of retirement (regular, non-regular, and disability), discusses voluntary and involuntary retirements, and explains basic qualifications for the differing military retired pay programs.
 - a. Paragraph 2.2.2, for a member entitled to retired pay for non-Regular (Reserve/Guard) service, the final basic pay or the high-36 average is usually determined using the rates to which the member was actually paid or to which the member would have been entitled if serving on active duty immediately before the date when retired pay is to begin. However, if a person opted to be discharged from the Service upon meeting service requirements for eligibility for retired pay but before meeting the age requirements for eligibility for retired pay, that person is a former member at the age of eligibility to receive retired pay, and, if that person entered the military service on or after 8 September 1980, the applicable rates are those in effect at the time of discharge.

b. Paragraph 3.8.5, a temporary special retirement qualification authority, Title 10 USC, section 12731a, authorized the Secretary of the Military Department concerned to treat a member as having met the 20-years of service requirement if the member completed at least 15 years of service and requested transfer to the Retired Reserve, during the period beginning on 23 October 1992, and ending on 31 December 2001.

c. Paragraph 9.1.4, (Non-Regular Retirement), reservists are entitled to pay effective on the date on which the requirements for age and service have been met, or on the first day of any later month that the retiree may elect.

5. Title 10 USC, section 12731a (Temporary special retirement qualification authority), (a) (Retirement With At Least 15 Years of Service), the Secretary concerned may: (1) during the period described in subsection (b), determine to treat a member of the Selected Reserve of a reserve component of the armed force under the jurisdiction of that Secretary as having met the service requirements of that section and provide the member with the notification required by subsection (d) of that section if the member: (A) as of 1 October 1991, has completed at least 15, and less than 20 years of service; or (B) after that date and before the end of the period described in subsection (b), completes 15-years of service computed under that section; and (2) upon the request of the member submitted to the Secretary, transfer the member to the Retired Reserve. The period referred to in subsection (a)(1) is the period beginning on 23 October 1992, and ending on 31 December 2001.

//NOTHING FOLLOWS//