DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
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Matter of: Public Health Service (PHS) - Barring Act

File: Department of Defense General Counsel Opinion:
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REDACTED COPY

Thomas E. White, Ph.D
Executive Secretary
Board for Correction of
PHS Commissioned Corps Records
Department of Health and Human Services
Program Support Center
Rockville, MD 20857

Dear Dr. White:

This is in response to your October 30, 1996, letter to Ms. Jean Smallin, an attorney at the General Accounting Office (GAO), requesting GAO's views on two issues pertaining to the statute of limitations and the appropriate jurisdiction of correction boards. As a result of the transfer of functions from GAO to the executive branch mandated by Public Law No. 104-316, GAO no longer has the personnel or resources to respond to such inquiries; therefore, your letter was forwarded to this office for a response. We, of course, have no jurisdiction over matters involving PHS correction board actions. However, in an effort to assist you in resolving the issues in question, we are providing the following discussion based on our interpretation of the general guidance found in relevant Comptroller General decisions and other pertinent sources.

BARRING ACT APPLICABILITY TO CORRECTION BOARD DECISIONS

The two issues in question are set forth in a memorandum from Admiral Dahlman, which was attached to your correspondence, concerning the case of [redacted]. The first issue concerns whether the "Barring Act" found in 31 U.S.C. § 3702(b) is applicable to certain correction board decisions. In pertinent part, section 3702(b) provides that a claim against the Government generally must be received in the appropriate office "within 6 years after the claim accrues." It follows that the key to determining when the statute of limitations begins to run in a particular case is identifying when the claim first

"accrued." The accrual date of a claim "is the date on which all events fixing the liability of the United States have occurred." (Comp. Gen. B-198713, July 29, 1980; see also 42 Comp. Gen. 337 (1963).)

With regard to actions involving a correction of military records, however, the accrual date of a claim will depend on the nature of the correction action. If a correction board changes a member's record so that the record as corrected gives rise to a monetary entitlement that was not present before, then the member's claim for that entitlement accrues as of the date of the record correction action, not when the actual events giving rise to the claim occurred. (See 71 Comp. Gen. 398, 400 (1992); B-198713, July 29, 1980; 42 Comp. Gen. 389, 391 (1963).)

A good illustration of the principles discussed above is found in one of the Comptroller General decisions cited in Admiral Dahlman's memorandum, B-262050, November 14, 1995. In that case, a member who had been given an undesirable discharge in 1954 had his records corrected in 1993 to show an honorable discharge. Incident to the record correction, the member claimed certain items, including arrears of pay, travel allowances, and leave benefits. After reviewing the matter, the Defense Finance and Accounting Service (DFAS) authorized payment of only a travel allowance from the member's place of discharge to place of enlistment.

Upon appeal, the Comptroller General upheld the DFAS action, noting that the only amounts payable in the member's case were those that had become due him as a result of the record correction action. Because of his original undesirable discharge, the member had not been entitled to separation travel allowances; however, the change to an honorable discharge gave him such entitlement for the first time. Consequently, his claim for that benefit accrued as of the date of the record correction and was not barred by the statute of limitations.

With regard to the claim for arrears of pay, however, it was noted that the member's entitlement to any arrears that were due him for his military service would have been payable to him at the time of his discharge, regardless of the nature of that discharge. Therefore, since his claim for such amounts accrued at the time of discharge, it was barred 6 years from that date. Put another way, since the correction board action had no effect on the member's entitlement to arrears of pay, no new claim for such amounts accrued at the time of the board's action.

The Comptroller General decision also addressed one other concept that often is involved in these types of cases, which is

the fact that records may have been destroyed after a long period of time. In this case, there was an indication that the member had forfeited accrued leave as a result of the undesirable discharge. Therefore, his claim for such amounts first accrued as of the date of his discharge upgrade, and it was not barred under 31 U.S.C. § 3702(b). However, because of the long passage of time since the original discharge, the records that would show how much accrued leave the member forfeited had been destroyed. Consequently, since there was no evidence to substantiate an entitlement, the Comptroller General upheld the disallowance of the member's claim for such amounts.

Another important point to be kept in mind when considering the interaction between the statute of limitations and correction board actions is that there must have been an actual change to a record that gives rise to a monetary entitlement that was not present before. In numerous decisions over the years, the Comptroller General has stressed that in order for an action to create a new entitlement, the board's action "must, without exception, be a change of facts as set out in the original record, or an addition to, or a deletion of some of, those facts." (50 Comp. Gen. 125, 127 (1970); see also 39 Comp. Gen. 178, 180 (1959).)

In line with the above, a correction that results from a change in a law or a shift in agency interpretation does not give the individual a new claim, since it does not involve an actual correction of the member's records. (See B-191650, May 18, 1978; B-179467, May 2, 1974.) Also, action that merely affirms or recites facts already in a record, or that states a legal conclusion but changes no facts, is not a final and conclusive action under section 1552 that can give rise to a new entitlement. (See 71 Comp. Gen. 439 (1992); B-179467, May 2, 1974; 48 Comp. Gen. 235 (1968).) The Comptroller General has especially viewed with disfavor attempts by a correction board to avoid the operation of a statute of limitations by means of a recital of facts in an existing record. (See 45 Comp. Gen. 538, 540 (1966); 39 Comp. Gen. 178, 180 (1959).)

The difficulty that can sometimes be encountered in determining accrual dates is clearly illustrated by three of the Comptroller General decisions cited in the Admiral's memorandum, all of which involve the same general issues and arise from a complicated set of factual circumstances and legal principles. Those cases, 71 Comp. Gen. 398 (1992), B-260702, April 18, 1995, and B-260207.2, November 6, 1995, involve survivor annuity claims arising under the holding in Barber v. United States, 676 F.2d 651 (Ct. Cl. 1982), a case which held that certain surviving spouses were entitled to military annuities if they were not

notified of their spouses' election not to participate in the annuity program. Because of the court's holding that the surviving spouse has an immediate, automatic annuity entitlement upon the member's death if the notice requirement was not met, the Comptroller General concluded that there was no need for a subsequent record correction action in these cases. Consequently, a widow claiming annuity benefits under the Barber holding must have submitted a claim within 6 years of the member's death, or the claim is barred, and any action by a correction board to attempt to extend the entitlement period is without effect. Because the holdings in these decisions are based on a very specific set of circumstances and legal principles, their precedential relevance to other cases is limited.

There is an additional factor to be considered in determining the application of the statute of limitations in a case such as [redacted]. The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. §§ 501-593, provides, at section 525, that periods of military service are not to be included in computing the accrual date of any claim arising prior to or during such periods of service. Thus, regardless of when a claim actually accrued during a member's term of active duty, the accrual date for purposes of the statute of limitations in 31 U.S.C. § 3702(b) is computed as of the date of the member's discharge from active service. (See B-198713, July 29, 1980; 36 Comp. Gen. 645, 648 (1957).)

With regard to the scope of the 1940 Act, 50 U.S.C. § 511 states that it is applicable to, among others, "all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy." Further, 42 U.S.C. § 213(a) states that commissioned officers of the PHS shall, with respect to active service performed by such officers on detail for duty with the Army, Navy, Air Force, Marine Corps, or Coast Guard, be entitled to all rights, privileges, immunities, and benefits provided by law to commissioned officers of the Army.

The provisions of 42 U.S.C. § 213(a) have been interpreted as extending to PHS officers on detail with the Armed Forces the identical Federal rights available to commissioned Army officers, including those protections provided by section 525 of the Soldiers' and Sailors' Civil Relief Act. (See Wanner v. Glen Ellen Corp., 373 F. Supp. 983 (D. Vt. 1974).) Consequently, if [redacted] has been detailed on active duty with the Armed Forces during all or a portion of the period covered by the record correction action, that fact potentially could have an impact on the effects of a record correction action and the pay consequences resulting therefrom.

SCOPE OF AUTHORIZED CORRECTION BOARD ACTION

The second issue raised in the admiral's memorandum concerns the extent to which 10 U.S.C. § 1552 authorizes a correction board to fashion a remedy for the sole purpose of granting monetary compensation to an officer in the absence of a record correction that results in the establishment of an entitlement due the officer. If we understand the issue properly, what is being asked is whether a board has the authority to correct a record when the sole purpose of the correction action is to provide the member a monetary benefit that the board believes is equitably due the member.

The pertinent statutory provisions in 10 U.S.C. § 1552 state that the Secretary concerned, acting through appropriate boards, may correct any military record when considered necessary to correct an error or remove an injustice, and that, except when procured by fraud, a correction under the section is final and conclusive on all officers of the United States. (See 40 Comp. Gen. 502, 504 (1961).) In accordance with the statutory provisions, the Comptroller General has stated that, while the appropriate Federal courts may review a correction board's actions to determine whether they are arbitrary, capricious, or not in accordance with law, GAO has no such jurisdiction. (62 Comp. Gen. 406, 408 (1983).) As an example of the judicial authority in this area, GAO has noted the court holding that, while section 1552 confers authority to correct a record in a member's favor, it does not confer the authority to correct the record against a member. (See 66 Comp. Gen. 687, 698 (1987).)

In many decisions over the years, however, the Comptroller General has set forth the view that the question of what monetary entitlements may have become due as a result of a record correction action is for determination by the pay officials of the Government, through application of the pertinent laws and regulations to the material facts shown by the records as so corrected by the board. (62 Comp. Gen. 406, 408 (1983); 51 Comp. Gen. 191, 194 (1971); 38 Comp. Gen. 208, 210 (1958); 34 Comp. Gen. 7, 12 (1954).) In other words, the facts as reflected by the corrected records determine the rights of the members involved, as if the corrected records reflect the true facts. (44 Comp. Gen. 143, 146 (1964); 42 Comp. Gen. 582, 584 (1963); 38 Comp. Gen. 208, 210 (1958).) Thus, when a correction board has attempted to make determinations or issue guidance governing amounts payable to a member as a result of a record correction, the Comptroller General has held that such determinations are outside the scope of the board's authority. (See 50 Comp. Gen.

180, 183 (1970); 42 Comp. Gen. 252, 254 (1962); 34 Comp. Gen. 7, 12 (1954).)

Finally, as was noted earlier, the Federal courts do have the authority to review a correction board's actions to determine if they are arbitrary, capricious, or not in accordance with law. While such review usually occurs in situations where a member is challenging a board's determination not to grant the member the requested correction action, the courts have also recognized that a correction board action that is favorable to an individual, but that is based on unsupported findings or grounded in an erroneous interpretation of the statute, is not binding for the purpose of supporting a claim for a money judgment. (See, e.g., Bridgman v. United States, 399 F.2d 186 (Ct. Cl. 1968); Russell v. United States, 314 F.2d 809 (Ct. Cl. 1963).)

We hope the above information will assist your agency in resolving the issues in question.

Sincerely,

Philip M. Hitch

Philip M. Hitch
Deputy General Counsel (Fiscal)