May 5, 1998

DOHA Claims Case No. 97091101

[Redacted]

This will acknowledge receipt of your request that I immediately reconsider the Claims Appeals Board's (Board) decision in DOHA Claims Case No. 96121102 (August 22, 1997).

In its decision, the Board found that former Section 1331(c) of title 10 of the United States Code (10 U.S.C. 1331(c))[(1)], applied to your claim for non-Regular retired pay. This statute requires that a service member who was in a Reserve component prior to August 16, 1945, had to serve on active duty during a specified period of conflict as a precondition to receiving non-Regular retired pay. The record indicates that you did not serve during World War I, World War II, or the Korean Conflict by the time you had retired on October 1, 1970. Because you did not satisfy the wartime active service requirement until Congress added Vietnam era active duty non-training service in Public Law 98-94 on September 24, 1983, your claim for retired pay did not accrue until then. It has been your position that Section 1331(c) did not apply to you at any time, and that you should have received retired pay from October 1, 1970. You contend that none of your service prior to August 16, 1945, was service in a Reserve component. Alternatively, you contend that the service secretary should have notified you that you were eligible for retired pay as soon as Public Law 98-94 became law, and that retired pay should have been paid to you from 1983. Because you did not re-apply for retired pay until May 6, 1994, the Comptroller General had authorized back payment only to 1988.[(2)]

In your request for reconsideration, you have specifically asked me to review the following main issues in which you believe that the Board committed error: First, whether the Board incorrectly considered your service in the New York State National Guard between 1928 and February 1929 as service for purposes of non-Regular retirement. Second, whether the Board incorrectly failed to find that the government was required to abide by its promise in a 1955 National Guard Bureau pamphlet (referred to herein as a "folder") that guaranteed a "pension" to an honorably discharged Veteran with 4 or more years of active duty who re-enlisted in the National Guard and who completed 20 or more years of service. Third, whether the Board incorrectly found that the service secretary was not required to notify you when you met the wartime active duty service requirements after the passage of Public Law 98-94. And, fourth, whether the Board acted incorrectly in accepting the Army Board for Correction of Military Records' (ABCMR) written factual finding that your service from February 1929 until March 1935 was service in the United States Army Reserve despite your contention to the contrary.

Having reviewed the decision of the Board and the record of your claim, I find that the Board made no error in fact or law, and I affirm its decision. First, the record contains adequate evidence to support the Board's finding that your 1928-1929 service with the New York State National Guard was Reserve Component service. As explained below, the ABCMR found that you had enlisted in the Army National Guard on January 9, 1928. The copy of the Honorable Discharge certificate you provided us with your request for reconsideration is entitled "National Guard of the United States and the State of New York." The seal of the United States government appears on the top with this heading. You point out that your discharge was not on an Army or Army Reserve Form 214, but the appropriate form number of the modern honorable discharge form is DD Form 214; DD stands for Department of Defense, which as you know did not exist in 1929. Your discharge certificate was on a War Department, Militia Bureau Form 55 (March 15, 1924). Clearly, this was a Federal form.

You point out that the Board was not specific about Federal recognition for the Battery in which you served, but the official who signed your discharge certificate indicated in handwritten form that you were in either Battery B or C in Brooklyn, New York. Both of these Brooklyn batteries were Federally recognized in 1920 (see the *Official National Guard Register for 1928* at page 664).

Second, you state that your active duty service between 1929 and 1935 was in the United States Army and not in the United States Army Reserve. You recognize that the ABCMR found that your service during this period was in the United States Army Reserve, but you contend that you pointed out to the Board that the ABCMR had made a mistake. The ABCMR made the following finding of fact in proceeding AC77-0402B:

"The applicant's military records show that . . . he enlisted in the Army National Guard (ARNG) on January 9, 1928. He was honorably discharged on 6 February 1929 to enlist in the Army Reserve (USAR) on 7 February 1929. He served in the USAR until 6 February 1932 and again from 19 arch 1932 to 18 March 1935."

While you were on active duty during the 1929-1935 period, you may have served in a Reserve enlistment even though you were on active duty. But, even if the ABCMR had made an erroneous determination, the Board and this Office are required by law to accept the ABCMR's factual findings. The fact that you had enlisted in the United States Army Reserve, rather than in the Regular Army, from 1929-1935 is a factual finding. Section 1552(a)(4) of title 10 of the United States Code, 10 U.S.C. § 1552(a)(4), specifically states unless it is procured by fraud (and there is no indication of that here), "a correction under this section is final and conclusive on all officers of the United States." If the ABCMR made a mistake, you need to address this with that body.

Third, the one page folder *Retirement Policy for Guardsmen*, which you suggest induced you to re-enlist in the Army National Guard in 1955, is a statement of policy from the Office of Public Affairs, National Guard Bureau. It does not mention the exception that prevents payment of retired pay without wartime service when a service member had service in a Reserve component prior to August 16, 1945. On its face, it states that a member is "automatically guaranteed a nice, sure source of income every month when you retire," but it also states in large letters on the front of the folder that "This policy sets forth the monthly retirement income that **may** be earned by a member of the National Guard" (emphasis added). It refers the member to other publications (National Guard Regulation 23 and Air National Guard Regulation 35-01) for complete information on how to qualify for retired pay.

The policy folder, as such, did not legally obligate the United States to pay you or any Guard member retired pay if retired pay is not otherwise authorized by law. Fairly read, the folder appears to be a summary statement to make the public aware of possible benefits that were available if a former service member re-enlisted in the Guard. Clearly, it was never intended as a definitive explanation of military benefits nor was it intended to explain all of the exceptions to qualification for retired pay. The Federal courts have specifically rejected claims based on the same type of arguments as the ones you are making from other service members affected by Section 1331(c). In effect, you and the other claimants have asked the Federal courts to estop the government from denying benefits when the military service actively sought the member's participation by issuing policy brochures and not advising the member that he would not qualify for retirement. However, the courts have stated that the service member cannot rely on the generalized statements of service officials or on those in a retirement brochure concerning qualification for retirement. Service members must be familiar with all of the statutory and regulatory requirements that may apply to them. See Mayer v. United States, 201 Ct. Cl. 105 (1973). See also File v. United States, 17 Cl. Ct. 823, 829 (1989). Viewed another way, even if the policy folder had been an interpretative regulation (which it was not), the folder would not have had the force and effect of law and would be meaningless because to the extent that it suggested that you would receive retired pay notwithstanding Section 1331(c), it was inconsistent with this governing statute. Compare Jeffrey v. Horner, 823 F. 2d 1521, 1529-1530 (Fed. Cir. 1987). In fact, the prohibition against disbursements not authorized by statute is so strong that even if the folder, or an actual government official, had clearly misrepresented to you that you would have been entitled to retired pay without the need for wartime service, you still would not have had the right to collect retired pay. See OPM v. Richmond, 496 U.S. 414 (1990), reh'g denied, 497 U.S. 1046 (1990).

Finally, you asked me to review the finding of the Comptroller General in B-274195, supra, adopted by the Board, which found that the service secretary was not required to notify you under 31 U.S.C. § 1331(d) when you met the requirements for retired pay after the passage of Public Law 98-94. I note that the Comptroller General had authority at the time to render such a decision because the matter had been referred to him as a request for advance decision under 31 U.S.C. § 3529, and none of the Comptroller General's advance decision authority was transferred from him until October 19, 1996. See Pub. L. No. 104-316, § 204, 110 Stat. 3826, 3845-3846 (1996).

On the substance, the Comptroller General explained that the only statutory duty imposed on the services under 10 U.S.C. § 1331(d) was to notify the member that he had completed 20 years of service required to be eligible for irregular retired pay. The Comptroller General found that the legislative history of Section 1331(d) shows that the notice requirement was originally enacted by Section 1 of Pub. L. No. 89-562, 80 Stat. 902 (October 14, 1966) to advise the service member that the service was satisfied that the member had met the requirement of 20 years of creditable service

to qualify for retired pay. The notice requirement is not related to the wartime service requirement in Section 1331(c). Additionally, I have noted the Supreme Court's discussion of the purpose of Section 1331(c) in Alexander v. Fioto, 430 U.S. 634, 637 (1977). The Court stated in Fioto that Section 1331(c), originally enacted with the general retirement scheme in the Army and Air Force Vitalization and Retirement Equalization Act of 1948, is a description of persons not eligible for retired pay. It is not concerned about periods of service which may or may not be counted toward eligibility. The subject of Section 1331(d), in contrast, is periods of service counting toward eligibility. The two subsections were enacted at two different times for two different purposes. Thus, there is support for the Comptroller General's interpretation of the applicability and legislative history involving Section 1331(d). You have presented no contrary legal authority; therefore, I must affirm the Comptroller General's views in this matter.

I hope that I have addressed the concerns that you raised.

Sincerely yours,

Signed: Leon J. Schachter

Leon J. Schachter

Director

1. While I will refer to Sections 1331(c) and (d) throughout this decision, the current law is codified in title 10, United States Code, Sections 12731(c) and (d) respectively (10 U.S.C. § 12731(c)-(d)).

2. In B-274195, Oct. 8, 1996, the Comptroller General considered your claim under the advance decision authority in Section 3529 of title 31 of the United States Code (31 U.S.C.§ 3529). Among other things, the Comptroller General found that your claim for non-Regular retired pay based on your May 6, 1994, application was subject to the 6-year barring act now codified at Section 3702(b) of title 31 of the United States Code (31 U.S.C. § 3702(b)); therefore, you could not have obtained any retired pay that accrued prior to May 6, 1988.