

December 7, 2009

Conrad V. Meyer
Director
Army Board for Correction of Military Records
1901 South Bell Street
2nd Floor
Arlington, Virginia 22202-4508

Dear Mr. Meyer,

I am in receipt of your letter dated November 18, 2009. I was not aware of the three year time period a person has to file a petition, and appreciate the Board's waiver of that in my case.

Your letter, and the Board's decision to decline my request to amend my DD Form 214 to include my four years at West Point, are egregious. I will explain why.

Included in the Board's rationale is the conclusion that my time at West Point was not active duty. This is totally incorrect. Title 10 of the United States Code, Section 3075, defines "active duty," and who falls under this definition. It states:

"§3075. Regular Army: composition

(a) The Regular Army is the component of the Army that consists of persons whose continuous service on active duty in both peace and war is contemplated by law, and of retired members of the Regular Army.

(b) The Regular Army includes—

- (1)** the officers and enlisted members of the Regular Army;
- (2)** the professors, director of admissions, and **cadets of the United States Military Academy**; and
- (3)** the retired officers and enlisted members of the Regular Army."

The bold and underlined emphasis are mine.

Based on this very specific wording, a cadet at West Point is on active duty in the United States Army. While a cadet I carried a green ID card of an active duty service member, I was subject the Uniform Code of Military Justice, I received military pay from the Department of Defense, and I wore the uniform of a United States Army cadet. How could I have done this if I was not on "active duty?"

For the Board to state that my time at West Point was not active duty, Title 10 U.S.C., Section 3075 was either never consulted during the Board's deliberations, or the Board doesn't know it exists. This is inexcusable.

In addition to the Board's erroneous statement that my time at West Point is not active duty, the Board also based its decision on the fact that my time there does not count toward time as a commissioned officer. I am aware that it doesn't. But the Board is using this to conclude that my time at West Point was not active duty, and therefore can't be put on my DD Form 214. Where does the Board make this connection? I can't find it in it your letter.

Army Regulation 635-5 authorizes time at West Point to be reflected on the DD Form 214, at the same time clearly noting that it doesn't count toward time as a commission officer.

Army Regulation 635-5 addresses circumstances exactly like mine. That is why I sent my request to the Board. The Board ignored the very Army regulation that applies to my case, instead of using it to grant my request. It also ignored Section 3075 of Title 10, U.S.C., which it is supposed to follow when making its decisions.

The Board cites the DD Form 214 for use when a period of military service ends. Neither I, nor any other graduate of West Point, received a DD Form 214 when we left the academy because we were not ending a period of service. We were continuing to serve on active duty, but in a different status. But that does not mean our time at West Point was not active duty. The reason for my application to your Board is to correct this gross oversight, i.e., that cadets at West Point are on active duty but this time is not reflected on their DD Form 214's. Army Regulation 635-5 specifically addresses this error, but the Board refuses to follow it to help the service member it exists to serve.

This gross mistake needs to be corrected, but the Board obviously does not agree. Or, worse, it simply ignored my request and doesn't know Army regulations and the United States Code. If the Board doesn't know that Section 3075 exists, how can it do its job? If it doesn't know time at West Point is active duty time, how can it state in its finding that it isn't? Therefore, upon what basis does the Board disagree with my request?

There is nothing in Army Regulation 635-5 that says my time at West Point can not be reflected in block 12c on the DD Form 214. Furthermore, my time at West Point was active duty. Therefore, the Board's finding is nullified.

To justify its conclusion, the Board states that Army Regulation 635-5 allows use of the DD Form 214 for time at West Point if a cadet is "separated." Where does Army Regulation 635-5 specifically state that Block 12c can only be used if a cadet is "separated," but not if the cadet graduates? Is the Board saying the DD Form 214 can be used if a cadet leaves West Point prior to graduation, but not if he graduates? If so, where in Army Regulation 635-5 is the Board getting this? Following the Board's rationale my time at West Point would have counted as military service if I had never graduated, but it doesn't count because I did! Would it have been better if I had flunked out?

If the Board can't show where time at West Point can not be reflected on the DD Form 214 if a cadet graduates, then the Board has no justification denying my request.

Army Regulation 635-5 specifically describes what to put in Block 12C in cases like mine. It states: "BLOCK 12C INCLUDES SERVICE AS A USMA CADET FROM (date) to (date). SERVICE NOT CREDITABLE FOR ANY PURPOSE IN COMMISSIONED OFFICER STATUS." Section 3075 of Title 10, U.S.C., clearly states that I was on active duty as a USMA cadet. What gives the Board the right to say I was not on "active duty," and therefore I am not allowed to have my West Point time on my DD Form 214? How can Army Regulation 635-5 have this wording in it, clearly indicating that time at West Point is active duty service, yet the Board concludes it is not? Simply put, the Board is not following Army Regulation 635-5, and appears to be completely ignorant of Section 3075 of Title 10, U.S.C., the law that governs the United States Army, and the law the Board is charged with following.

The Board cites Title 10, U.S.C., section 971(a), that states time as a cadet can not be counted toward time as a commissioned officer. Yet, the board is using this as a prohibition against putting my time at West Point, which does not count as commissioned officer time but is active duty time, on my DD Form 214. My application is not asking that my time at West Point be applied to time as a commissioned officer. I am only asking that my time at West Point be shown on my DD Form 214, reflecting the fact that I was on "active duty" as a cadet for four years, which I am authorized to request per Army Regulation 635-5 using the wording from it shown above.

The wording of Army Regulation 635-5 is so specific, it is clear that its purpose is to include time at West Point on the DD Form 214, but not to allow that time to count as commissioned officer time. Section 3075 proves my time at West Point was active duty time, and Section 971 states that time does not count as commissioned officer time. Army Regulation 635-5 takes into account both of these sections from Title 10, U.S.C., and provides the specific wording to amend the service member's DD Form 214 to include their time at West Point as time on active duty military service, and not count it as commissioned officer time for purposes of calculating their retirement benefits. This is clear, yet the Board seems not to understand this simple process.

What is so ludicrous about the Board's finding is its reference to "justice." What is just about having served on active duty for four years at West Point only to be told by the Board it doesn't count as "active duty" military service, which is in complete contradiction to Title 10, U.S.C., Section 3075? What is just about being told that if I had been "separated" from the academy (i.e., kicked out, resigned, etc.), that time would have counted and been reflected on my DD Form 214, but it can't be if I graduated? What is just about my citing the Army Regulation that specifically supports my request, only to be told by your Board that it doesn't? Last, what is just about requesting the Board's help, only to realize it doesn't even know what is clearly stated in section 3075 of Title 10, U.S.C., the law of the United States that pertains to the Army?

Your letter states the DD Form 214 is a "snapshot in time," and a reflection of the applicant's record of military service at the time of his separation from active duty. Yet, in the final paragraph of the Board's statement it says that my "service as a cadet at West Point was not active duty." On one hand the Board is saying I am not on active duty at West Point, but then says the DD Form 214 is used to reflect time at West Point if a cadet is "separated." If time at West Point is not active duty, why does a separated cadet get a DD Form 214 at all? The fact is, time at West Point is active duty, and therefore the Board's rationale in reaching its decision is doubly erroneous.

I request my DD Form 214 be amended to reflect my four years on active duty at West Point, from July 2, 1973 to June 8, 1977, per Army Regulation 635-5. If my request is not granted, I will have no choice but to initiate a Congressional enquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael M. O'Brien". The signature is fluid and cursive, with the first name "Michael" and last name "O'Brien" clearly distinguishable.

Michael M. O'Brien