



DEPARTMENT OF THE ARMY
BOARD FOR CORRECTION OF MILITARY RECORDS
1901 SOUTH BELL STREET 2ND FLOOR
ARLINGTON, VA 22202-4508

September 8, 2010

AR20100000688, O'Brien, Michael M.

Mr. Michael M. O'Brien
3000 Spout Run Parkway
C-407
Arlington VA 22201

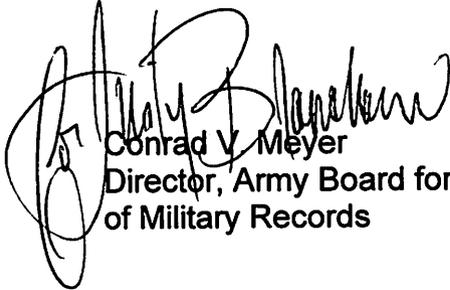
Dear Mr. O'Brien:

Pursuant to your request for reconsideration of ABCMR Docket Number AR20090009857, the Army Board for Correction of Military Records (ABCMR) reconsidered your case on 2 September 2010. I regret to inform you that the Board denied your request for relief. A copy of the Board's Record of Proceedings which explains the Board's reasons for denying your request is enclosed. This decision in your case is final.

Paragraph 2-15b of Army Regulation 15-185 governs requests for reconsideration by the ABCMR. This regulation allows an applicant to request reconsideration of an earlier ABCMR decision only if the request is received within one year of the original decision and it has not already been reconsidered.

Since your request has now been reconsidered, you are not eligible for further reconsideration of this same matter by this Board. However, you have the option to seek relief in a court of appropriate jurisdiction.

Sincerely,



Conrad V. Meyer
Director, Army Board for Correction
of Military Records

Enclosure

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: OBRIEN, MICHAEL M.

BOARD DATE: 2 September 2010

DOCKET NUMBER: AR20100000688

THE BOARD CONSIDERED THE FOLLOWING EVIDENCE:

1. Application for correction of military records (with supporting documents provided, if any).
2. Military Personnel Records and advisory opinions (if any).

THE APPLICANT'S REQUEST, STATEMENT, AND EVIDENCE:

1. The applicant requests reconsideration of his request that the period of time that he attended the U.S. Military Academy (USMA) at West Point, NY, be included as active duty service on his DD Form 214 (Certificate of Release or Discharge from Active Duty).
2. The applicant states that Title 10, U.S. Code, section 3075 (Regular Army (RA): composition), provides that the RA 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 RA and includes, in pertinent part, the professors, director of admissions, and cadets of the USMA [applicant's emphasis].
 - a. He states that while he was a cadet he carried a green identification card of an active duty service member, he was subject to the Uniform Code of Military Justice (UCMJ), he received military pay from the Department of Defense (DoD), and he wore the uniform of a USMA cadet.
 - b. He states that for the Board to state that his time at the USMA was not active duty demonstrates that the governing statute was not reviewed or that the Board does not know it exists.
 - c. He states the Board based its decision on the fact that his time at the USMA does not count toward time as a commissioned officer, which he is aware of; however, it does not serve as a basis for the Board to conclude he was not on active duty.

d. He states the Board references Army Regulation 635-5 (Separation Documents), which authorizes time at the USMA to be reflected in item 12 (Record of Service), block c (Net Active Service This Period), if a cadet is separated (i.e., never graduated); however, it does not count if a cadet graduates. Based on this logic, he poses the question if it would have been better if he had flunked out of the USMA.

e. He states the governing Army regulation specifically describes what to enter in item 12c, in cases like his, but the Board chose not to follow that guidance in its decision. He adds the Board cites Title 10, U.S. Code, section 971(a), that states time as a cadet cannot be counted toward time as a commissioned officer and is using this as a prohibition against including his active duty time at the USMA.

f. He states he is not requesting that his time at the USMA be counted as commissioned officer time, only that it be included in item 12c to show all of his active duty time.

g. He states that if the Board cannot show where time at the USMA cannot be shown in item 12c of the DD Form 214, then there is no justification for denying his request.

3. The applicant provides no additional documentary evidence in support of his request for reconsideration of his case.

CONSIDERATION OF EVIDENCE:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20090009857, on 12 November 2009.

2. The applicant provides new arguments described above that warrant consideration by the Board.

3. The applicant provided an academic transcript with his original request, which shows he entered the USMA at West Point, NY, on 3 July 1973 and that he graduated on 8 June 1977 with a Bachelor of Science degree.

4. The applicant's DA Form 2-1 (Personnel Qualification Record) shows in item 35 (Record of Assignments) that he attended the USMA as a cadet from 2 July 1973 to 7 June 1977 and he was commissioned as an infantry branch officer in the RA on 8 June 1977.

5. There is no evidence in the applicant's military personnel records that shows he held concurrent enlisted or Reserve status during the period of his attendance at the USMA from 2 July 1973 through 7 June 1977.

6. The applicant's DD Form 214 shows he entered active duty this period on 8 June 1977 and he was honorably discharged on 8 June 1982.

- a. Item 6 (Place of Entry into Active Duty) shows "West Point, NY";
- b. item 12c shows 5 years and 1 day of net active service this period; and
- c. item 18 (Remarks) shows the entry "None."

7. Army Regulation 635-5, in effect at the time of the applicant's separation, prescribes the separation documents prepared for Soldiers upon retirement, discharge, or release from active military service or control of the Army. It also establishes standardized policy for the preparation of the DD Form 214.

a. Paragraph 1-4 (DD Form 214) states, in pertinent part, that a DD Form 214 will be prepared for all personnel at the time of their retirement, discharge, or release from the Active Army. Personnel included are, in pertinent part, each cadet of the USMA who fails to graduate [emphasis added]. It also provides that if a cadet entered the academy from an active duty status [emphasis added], a DD Form 214 will be issued at the end of that term of service.

b. Table 2-1 (DD Form 214 - Preparation Instructions) shows for:

(1) item 12c, that all service entered will be less time lost under Title 10 U.S. Code, section 972, and time lost after expiration of term of service. For cadets, enter the total time between dates entered in item 12a [Date Entered Active Duty This Period], and item 12b [Separation Date This Period], with reference to item 18 [paragraph] h, below; and

(2) item 18, paragraph h, "when a separatee is a cadet, enter "Item 12 includes service as a cadet, USMA, from (date of entrance in USMA) to (date of separation)."

8. Title 10, U.S. Code, section 3075 (RA: composition), states that the RA 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 RA. The RA includes the officers and enlisted members of the RA; the professors, director of admissions, and cadets of the USMA; and the retired officers and enlisted members of the RA.

9. Title 10, U.S. Code, section 971 (Service credit: Officers may not count service performed while serving as a cadet or midshipman), provides in:

a. subsection (a) - prohibition on counting enlisted service performed while at Service Academy or in Naval Reserve, that the period of service under an enlistment or period of obligated service while also performing service as a cadet may not be counted in computing, for any purpose, the length of service of an officer of an armed force; and

b. subsection (b) - prohibition on counting service as a cadet or midshipman, that in computing length of service for any purpose, service as a cadet or midshipman may not be credited to any commissioned officer of the Army.

10. DoD Financial Management Regulation (FMR), Volume 7A (Military Pay Policy and Procedures - Active Duty and Reserve Pay), Chapter 1 (Basic Pay), paragraph 0101 (Creditable Service), shows:

a. subparagraph D (Other Creditable Service with restrictions noted below and in subparagraph 010102.A) states "Service as a cadet or midshipman at a military academy is always creditable service for an enlisted member. See Table 1-1 (Service as Cadet or Midshipman - Officers) to determine whether such service is creditable for commissioned and warrant officers; and

b. Table 1-1 shows when a member currently serving as an officer has had service as a cadet or midshipman in any of the military academies to which appointed and member held no concurrent enlisted and/or Reserve status, then the period involved is not creditable [emphasis added].

DISCUSSION AND CONCLUSIONS:

1. The applicant contends that his request should be reconsidered in that his service at the USMA was active duty service authorized for inclusion in item 12c of his DD Form 214 because the U.S. Code states that the RA consists of persons whose continuous service on active duty in both peace and war includes cadets of the USMA.

2. The U.S. Code the applicant cites shows that the RA 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 [emphasis added]. In the case of cadets of the USMA, their integration into the RA upon graduation is governed by law; therefore, certainly contemplated.

3. The evidence of record shows that:

a. the U.S. Code provides that service as a cadet or midshipman may not be credited to any commissioned officer of the Army;

b. the DoDFMR provides that when a member currently serving as an officer has had service as a cadet or midshipman in any of the military academies to which appointed and the member held no concurrent enlisted and/or Reserve status, then the period involved is not creditable; and

c. the Army Separation Documents regulation shows that service for cadets who fail to graduate will be entered in item 12c, based on the total time between dates entered in item 12a and item 12b.

4. The applicant graduated from the USMA and he was subsequently appointed as a commissioned officer in the RA.

5. There is no evidence that the applicant held a concurrent enlisted or Reserve status during the period of his attendance at the USMA.

6. Records show the applicant served as a commissioned officer in the RA from 8 June 1977 through 8 June 1982 and this period of active duty service equates to 5 years and 1 day. Records also show this active duty service is recorded in item 12c of his DD Form 214.

7. The evidence of record clearly shows that, in the applicant's case, his service as a cadet is not creditable service and this service is not authorized to be included in item 12c of his DD Form 214. In addition, since the applicant was an officer (i.e., not a cadet) at the time of his discharge from active duty, he is not entitled to an entry in item 18 of his DD Form 214.

8. Therefore, in view of the foregoing, the applicant is not entitled to correction of his records in this case.

BOARD VOTE:

_____ GRANT FULL RELIEF

_____ GRANT PARTIAL RELIEF

_____ GRANT FORMAL HEARING

mf sl J _____ DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20090009857, dated 12 November 2009.


CHAIRPERSON

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.