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VOLUME 7A**MILITARY PAY POLICY AND PROCEDURES - ACTIVE DUTY AND
RESERVE PAY****JULY 1996****UNDER SECRETARY OF DEFENSE (COMPTROLLER)**Interim Volume 7A Changes**TABLE OF CONTENTS**

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PART ONE

BASIC AND SPECIAL PAY

★CHAPTER 01

CREDITABLE SERVICE0101 SERVICE WHICH IS CREDITABLE010101. General

A. The military pay and personnel systems use a variety of dates to determine various entitlements. Among them is the date which denotes how much service a member has for the purpose of determining longevity pay rates. The Army refers to this as the pay entry basic date, the Navy and Marine Corps refer to this as the pay entry base date, while the Air Force calls it simply the pay date. This chapter will refer to it as the basic pay date, which is defined as reflecting all service which is creditable towards longevity.

B. The member's servicing personnel office is responsible for providing, when necessary, a statement of service which can include the basic pay date, total active Federal military service date, total commissioned Federal military service date, and a variety of other dates, depending on the nature of the individual member's service. This regulation details only the computation of the basic pay date, since service personnel regulations control the computation of all other dates.

010102. Computation of Creditable Service. For most members who enter and serve on active duty without a break in service, the basic pay date is the date the member enters active or inactive service. If however, there is a break in service, the time between periods of service usually is not included. Also, there are statutory periods when service in a particular component may not be counted. Conversely, there are periods for which some members are given constructive service, even though they were not actually serving on active or inactive duty. Use the following to compute basic pay date when there has been a break in service of any kind or if there is a need to include constructive service.

010103. Creditable Service Periods. Include active or inactive service in any of the following components without restriction:

- A. Air Force, Army, Naval, Marine Corps, and Coast Guard Reserves.
- B. Air Force of the United States (service without specification of component).
- C. Air National Guard.
- D. Air National Guard of the United States.
- E. Army of the United States (service without specification of component).
- F. Army National Guard.
- G. Army National Guard of the United States.
- H. National Guard.
- I. National Guard of the United States.
- J. Nurse Corps and Nurse Corps Reserve of the Public Health Service.
- K. Public Health Service and Reserve Corps of the Public Health Service.
- L. Regular service in the Army, Air Force, Navy, Coast Guard, and Marine Corps.

010104. Other Creditable Service (With Restrictions as Noted). Include the following periods of service:

- A. Officer, deck officer, or junior engineer service in the National Oceanic and Atmospheric Administration, including similar periods of service in the former corps of the Environmental Science Services Administration and the US Coast and Geodetic Survey.
- B. Service on a military service retired list, temporary disability retired list, or honorary retired list of any uniformed service, or service as a member of the Fleet Reserve or Fleet Marine Corps Reserve.

C. Any period of service during which a member is entitled to retired, retirement, or retainer pay from any Uniformed Service.

D. Any period of service during which the member is entitled to compensation from the Department of Veterans Affairs on account of service.

E. Periods after 11 December 1941, when an enlisted member is retained after expiration of term of service of an Armed Force for medical care or hospitalization for disease or injury incident to service. Do not credit such periods of service if the underlying medical condition requiring medical care or hospitalization was due to the member's misconduct.

F. Service otherwise creditable that is performed before a member reaches the statutory age for enlistment unless the enlistment contract was voided or invalidated for fraud.

G. Active service performed as a temporary member of the Coast Guard Reserve.

H. Service terminated by desertion or dishonorable discharge, unless the enlistment was fraudulent and was voided for that reason.

I. Service as a cadet or midshipman at a military service academy is always creditable service for an enlisted member. See table 1-1 to determine whether such service is creditable for commissioned and warrant officers.

J. Periods of service when a member is detailed to and receiving pay and allowances from any other agency of the United States, even though accrual of military pay and allowances is suspended.

K. Service as a member of the Army, Navy, or Air Force Reserve Officers' Training Corps, provided the member has concurrent Reserve status. Do not credit such service after 13 October 1964, for commissioned or warrant officers.

L. Effective 26 December 1974, service as an aviation midshipman under the Act of 13 August 1946, 60 Stat. 1057, (reference (a)).

M. Service as an enlisted member in the Reserves before beginning active duty in a Regular component, provided the member enlisted in the Reserve component before 1 January, 1985. This is frequently referred to as the delayed enlistment program.

N. Inactive service as an enlisted member in the Reserves between the time of enlistment and the date the member began active duty, or active duty for training, in a Reserve component, provided the member enlisted in the Reserve component before 28 November 1989. If the enlistment began after 27 November 1989, it is creditable service only if the enlisted Reserve member performed inactive duty training before beginning service on active duty for training.

O. Any period of service which was creditable under a law in effect on 10 January 1962.

010105. Constructive Service

A. Some medical and dental officers are entitled to extra credit for longevity purposes to reflect the time spent in medical or dental school. Medical and dental officers must meet one or more of the following criteria to be entitled to the constructive credit:

1. On or before 15 September 1981, the officer already had the constructive service credit; the credit is not lost if there is a break in service either before or after that date. This includes PHS officers.

2. On 14 September 1981, the individual was enrolled in either the Armed Forces Health Professions Scholarship Program or the Uniformed Services University of Health Sciences, completes such program, and is appointed as a medical or dental officer.

3. On 14 September 1981, the individual was participating in a program which credits years of service and leads to an appointment as an officer in the Army, Navy, Air Force or Marine Corps.

B. Medical and dental officers who meet the criteria in paragraph A above are entitled to 4 years' constructive service credit. Also, those

medical officers who have completed medical internship or its equivalent, or who entered military status while serving such an internship, are entitled to a fifth year of constructive service credit.

C. Where a member is entitled to service credit for a period covered by the constructive credit, reduce the constructive service credit by an amount equal to the actual service credit.

010106. Examples:

A. An individual completes dental school on 11 June 1977, and accepts commission as a dental officer on 3 August 1977. Credit the member with 4 years of constructive service and set basic pay date at 3 August 1973.

B. An individual completes medical internship on 30 June 1979, and accepts commission as a medical officer on 11 August 1979. Credit the member with 5 years constructive service and set basic pay date at 11 August 1974.

C. An individual enters medical school in 1970, and accepts a commission on 12 January 1972; he graduates from medical school on 10 June 1974, and completes a civilian residency during the period from 1 July 1974, through 30 June 1975. Compute basic pay date as follows:

First compute dual status period, which is the period of time between date of commission and date of graduation.

	<u>YR</u>	<u>MO</u>	<u>DAY</u>
Graduated:	74	06	10
Commission Date:	72	01	12
Dual Status Period:	02	04	28+1 (inclusive day)

Then compute constructive service credit, which is the 4 years constructive credit less the time already credited as commissioned service:

Maximum constructive service credit:	03	11	30
Less dual status time:	02	04	29
Constructive Credit:	01	07	01

The member's basic pay date is 1 year, 7 months, and 1 day before his commission date of 12 January 1972, or 11 June 1970.

D. The scenario is the same as in C above, except the member accepts the commission on 12 July 1974, after starting the internship, so he is entitled to 5 years of constructive service credit instead of 4.

	<u>YR</u>	<u>MO</u>	<u>DAY</u>
Date finished internship:	75	06	30
Commission date:	74	07	12
Dual status period:	00	11	17+1 (inclusive day)
Maximum constructive service credit:	04	11	30 (5 years)
less dual status time:	00	11	18
Constructive credit:	04	00	12

The member's basic pay date is 4 years, no months, and 12 days before his commission date, or 1 July 1970.

E. An officer who had been commissioned on 19 November 1962, enters dental school on 9 September 1970, and graduates 28 May 1974. To compute constructive service credit:

First, compute dual status:

	<u>YR</u>	<u>MO</u>	<u>DAY</u>
Graduated:	74	05	28
Started School:	70	09	09
Dual Service:	03	08	19+1 (inclusive day)

Then deduct the dual service from the 4-year constructive credit period to arrive at net constructive service credit.

	<u>YR</u>	<u>MO</u>	<u>DAY</u>
Maximum constructive service credit:	03	11	30 (4 years)
less Dual Service:	03	08	20
Constructive credit:	00	03	10

Change the member's basic pay date 3 months and 10 days before his previous one (19 November 1962) to 10 August 1962.

0102 SERVICE NOT CREDITABLE

010201. In general, do not use any service which is not listed as creditable service to compute a basic

pay date. The following list includes a few types of service which are not creditable:

A. Time served in an enlistment which is terminated, voided, or invalidated as fraudulent.

B. Time served as a commissioned officer in the Philippine Army.

C. The constructive time authorized by the Act of 28 December 1945 (59 Stat 664), (reference (b)), for determining grade and eligibility for promotion.

D. The period of time a member was on the Emergency Officers Retired List.

E. Time an individual was a member of a state, home, or territorial Guard.

F. For commissioned officers, any period of service after 13 October 1964, in the Reserve Officers' Training Corps, even if such member held concurrent Reserve status.

G. Time an individual was a member of the inactive National Guard. This does not apply to an individual who was a member of the National Guard Reserve and the National Guard of the United States. Time during which the individual had dual status, enlisted or commissioned, in the inactive National Guard and the National Guard of the United States is creditable.

H. The time a member serves while enrolled in the Armed Forces Health Professions Scholarship and Financial Assistance Programs, (reference (c)), or while a student at the Uniformed Services University of Health Sciences (USUHS). Use any time creditable on the date the member enters USUHS to compute basic pay for longevity purposes while a student, not to exceed the limit of grade O-1 as shown in table 2-5 or O-1E as shown in table 2-6.

I. The time between the date of enlistment in the Delayed Enlistment Program and the date the member begins serving on active duty in a regular component, if the date of enlistment in the Reserve component is after 31 December 1984.

J. For Reserve enlistments after 27 November 1989, the time served in a Reserve

component prior to the member's entry on active duty or active duty for training. This time is creditable however, if the member performs inactive duty training between the date of enlistment in the Reserve component and the date of entry on active duty, or active duty for training.

010202. Effect of Absence from Duty on Creditable Service

A. A commissioned or warrant officer is entitled to credit for every day in a commissioned or warrant status, without regard to absence of any kind, whether authorized or unauthorized, and including confinement prior to and during trial. In addition, absence during which a member was serving on active duty as an enlisted member is creditable if the enlisted member is also a Reserve officer.

B. See table 1-2 to determine the creditability for absence while in enlisted status.

C. Enlisted members must make up any lost time. The period of service during which a member makes up lost time is creditable service. However, the time a member is held in a non-duty status while awaiting trial, as well as the time during trial, does not count towards making up lost time and is not creditable.

0103 COMPUTATIONS OF CREDITABLE SERVICE

010301. Computing a Basic Pay Date

A. All basic pay date computations start from the date of the member's most recent entry on duty without a break in service. Use the following dates:

1. For enlisted members the date of enlistment, but see paragraphs 010104.M and N, and 010201.I and J for service under a delayed entry program.

2. For officers, the date of acceptance of a commission. The date of acceptance for officers graduating from a service academy is the date of graduation.

3. For officers entitled to count service as an acting assistant surgeon, intern, or

hospital steward in the Public Health Service or the Public Health Marine Hospital Service, the date of acceptance of the appointment. Do not count service performed before that date.

B. After determining initial basic pay date, compute creditable service for all service prior to that date. Use the following to compute basic pay date. If the member had any periods of service during which there was lost time, do not use those periods here. Instead, compute according to paragraph C below.

1. List beginning dates of service for each separate period of service, without changing any of them, then add them together.

2. List all ending dates. If the day is the 31st day of the month, change it to 30. If the day is 28 February in a non-leap year, change it to 30 February for computation purposes. If the day is 29 February, change it to 30 February for computation purposes. Do not change 28 February of a leap year to 30 February. Then add all ending dates together.

3. Subtract the result in 1 above from the result in 2.

4. For each noncontinuous period of service add 1 day to account for inclusive days. Explanation: Any period of service is at least one day. If, for example, the member had one day of service on 17 January 1962, the computation would look like this:

	<u>YR</u>	<u>MO</u>	<u>DAY</u>
Ending Day:	62	01	17
Less Beginning Day:	<u>62</u>	<u>01</u>	<u>17</u>
	00	00	00

It is necessary to add one day for inclusive days to avoid this erroneous answer.

5. Convert to full years, months, and days. The result is years of service creditable for pay purposes.

EXAMPLE:

Member served as follows:

	<u>From:</u>	<u>To:</u>
RA (enlisted)	1 Jan 51	28 Feb 54
AUS (Com)	1 Jun 54	26 May 61

AFUS (Com)	1 Aug 63	31 Mar 68
ESAF (Com)	1 Apr 68	4 June 75

Beginning dates:			Ending Dates:		
<u>YR</u>	<u>MO</u>	<u>DAY</u>	<u>YR</u>	<u>MO</u>	<u>DAY</u>
51	01	01	54	02	30
54	06	01	61	05	26
<u>63</u>	<u>08</u>	<u>01</u>	<u>75</u>	<u>06</u>	<u>04</u>
168	15	03	190	13	60

Convert 28 February 1954, to 30 February 1954, since 1954 was not a leap year. Convert 31 March 1968, to 30 March 1968, since the 31st day of a month does not count as an ending date, though it would count as a beginning date. The period from 1 August 1963, through 4 June 1975, is continuous, so it is all included in the third line of the computation.

Subtract total of beginning dates from total of ending dates:

<u>YR</u>	<u>MO</u>	<u>DAY</u>
190	13	60 (total of ending dates)
189	25	60 (borrowed twelve months from year column)
<u>-168</u>	<u>15</u>	<u>03</u>
21	10	57

Add one day for each of the 3 periods used in the computation. The result is 21 years, 10 months, and 60 days, which converts to exactly 22 years of creditable service.

C. Computations involving lost time. When a member has lost time, compute the creditable service for the period served separately, as shown below. Add the results to any creditable service computed separately under paragraph B above.

1. When there is a period of lost time that has not been made good, compute the lost time on a 30-day month basis; but, if the lost time begins on the 31st day of a month, include that day as a lost day. Compute as follows:

Determine the years, months and days of lost time and deduct that amount from the total service during the period.

Example 1: Member enlisted for 4 years on 18 July 1970, but was absent without leave (AWOL) from 10 February 1973, through 16 March

1973. Member received a hardship discharge on 10 August 1973, without making up the lost time. Member reenlisted 20 February 1975. Compute creditable service and basic pay date as follows:

First compute the lost time:

	<u>YR</u>	<u>MO</u>	<u>DAY</u>
Ended AWOL:	73	03	16
Began AWOL:	<u>73</u>	<u>02</u>	<u>10</u>
Lost Time:	00	01	06+1 (inclusive day)

Then compute first period of service.

Discharged:	73	08	10
Entered AD:	<u>70</u>	<u>07</u>	<u>18</u>
Subtotal:	03	00	22+1 (inclusive day)
Deduct lost time:	<u>01</u>	<u>07</u>	
Creditable Service:	02	11	16

Subtract 2 years, 11 months, and 16 days from reenlistment date of 20 February 1975, to arrive at a new basic pay date of 4 March 1972.

2. A member who makes good lost time, does so on a day-to-day basis. When the member makes good lost time and completes the enlistment or contract period, compute the period of lost time on both a 30-day month basis and a day-to-day basis and use the result that is most to the member's advantage. To illustrate, if a member is AWOL on 30 March through 1 April, it would be 3 days on the day-to-day basis but only 2 days on a 30-day month basis. Compute creditable service as follows (and separately from periods of service which do not have lost time):

First step: Compute total lost time on both a 30 day basis and a day-to-day basis. Convert the day-to-day basis computation to years, months, and days and compare it to the computation on the 30-day basis. Discard the one which shows a higher total of days lost.

Second step: Compute the gross amount of service during the period by subtracting the entry date from the discharge date and adding one day for inclusive day.

Third step: Subtract the lost time from the result of the second step. If the result is at

least as long as the enlistment contract, use this amount. If the result is less than the enlistment contract, increase it to equal the enlistment contract.

Fourth step: Add this creditable service to any other periods and use the total to figure the member's basic pay date.

Example 2: Assume the member in example 1 had not received a hardship discharge; instead he had completed the enlistment contract, including making good the lost time. He made up the 35 days of lost time computed on a day-to-day basis. The days served to make good the lost time were 18-31 July 1974 (14 days), and 1-21 August 1974 (21 days).

When member reenlists on 20 February 1975, compute creditable service as follows:

<u>YR</u>	<u>MO</u>	<u>DAY</u>	
74	08	21	(ending date of last period of service)
-70	07	18	(beginning date of last period of service)
04	01	03+1	(inclusive day)

Result: 4 years, 1 month, and 4 days before deducting lost time. Note the lost time computed on a 30-day month basis was 37 days, but was only 35 days when computed on a day-to-day basis. Subtract the 35 days lost time from the period of service computed above.

<u>YR</u>	<u>MO</u>	<u>DAY</u>
04	01	04
-00	01	05
03	11	29 (total service)

The result is less than the enlistment contract of 4 years, but since the member completed the enlistment contract, he is entitled to credit for the entire 4 years. Set basic pay date at 20 February 1971, when the member reenlists on 20 February 1975.

Example 3: A member enlisted on 18 July 1970, for 4 years. She was AWOL from 28 July 1973, through 3 September 1973, which is 38 days on a day-to-day basis (28-31 July, 4 days; 1-31 August, 31 days; and 1-3 September, 3 days). She

is discharged on 24 August 1974, after making good the 38 days of bad time by serving 18-31 July (14 days) and 1-24 August (24 days).

When she reenlists on 20 February 1975, compute prior service as follows:

YR	MO	DAY	
74	08	24	(ending date of last period of service)
-70	07	18	(beginning date of last period of service)
04	01	06+1	(inclusive day)

Result is 4 years, 1 month, and 7 days before deducting lost time.

Lost time on a day-to-day basis was 38 days. Lost time on a 30-day month basis is:

28-30 Jul 1973	03 days
1-30 Aug 1973	30 days
1-3 Sep 1973	03 days
Total	36 days

Following the rule set out in step 2 above, deduct the lost time in the manner most beneficial to the member.

YR	MO	DAY	
04	01	07	(service before deducting lost time)
-00	01	06	(lost time)
04	00	01	

Set basic pay date at 19 February 1971, when the member reenlists on 20 February 1975.

D. Adjusting Basic Pay Date when Member has Lost Time. Lost time does not change an officer's basic pay date. However, when an enlisted person returns to duty after a period of lost time, add the number of days lost time to the member's basic pay date to reflect the lost time.

Example: An enlisted member with no prior service enlisted on 18 July 1973. He was AWOL from 10 February 1975, through 16 March 1975. When member returns to duty status change his basic pay date as follows:

Compute lost time:

10-30 February	21 days
1-16 March	16 days
	37 days lost time

YR	MO	DAY	
73	07	18	(original basic pay date)
+00	01	07	
73	08	25	

New basic pay date is 25 August 1973.

010302. Procedure when basic pay date falls on 29 February. When basic pay date falls on 29 February, entitlement to longevity increases begins on 1 March in non-leap years and on 29 February in leap years.

SERVICE AS CADET OR MIDSHIPMAN—OFFICERS				
R U L E	A	B	C	D
	When a member currently serving as an officer has had service as a cadet or midshipman in	to which appointed	and member	the period involved is
1	any of the military academies		held no concurrent enlisted and/or Reserve status	not creditable.
2		after 25 Jun 1956	had an enlistment contract or period of obligated service that was not terminated	
3		as a permanent midshipman before 26 Jun 1956		
4			concurrently retained a commission or warrant in the Army or Air Force Reserve	creditable.
5		on or after 1 Jan 1953	concurrently retained a commission or warrant in the Naval Reserve	
6		before 26 Jun 1956	concurrently held an enlisted status in the Army or Air Force Reserve	
7		on or after 1 Jan 1953 and before 26 Jun 1956	concurrently held an enlisted status in the Naval Reserve	creditable.
8		as a temporary midshipman or Naval Reservist before 26 Jun 1956		
9	an aviation cadet program	in the grade of aviation cadet	performed active service	
10		as an enlisted aviation cadet on or after 3 Jun 1941		
11	a U.S. Merchant Marine or State Maritime Academy	under the Naval Reserve Act of 1938	concurrently held an inactive Naval Reserve status	not creditable.
12	NROTC program	as a temporary midshipman before 26 Jun 1956	concurrently held a Reserve status in a Uniformed Service	creditable through 13 Oct 1964.
13		as a contract student		
14	AROTC and AFROTC program	before 14 Oct 1964		

Table 1-1. Service As Cadet Or Midshipman—Officers

ABSENCE FROM DUTY IN ENLISTED STATUS			
R U L E	A	B	C
	When the absence is	and	the period of absence is
1	authorized leave or authorized excess leave		creditable.
2	unauthorized absence of more than 1 day (24 consecutive hours) (including detention of Army or Air force members by or for civil authorities)	is administratively excused as unavoidable	
3		is not administratively excused as unavoidable	not creditable (note 2).
4	civil detention of a Navy or Marine Corps member	occurred before 24 Jul 1956 and the member was not acquitted or released without trial, and without making restitution	
5		occurred on or after 24 Jul 1956 and the member was absent under sentence or awaiting (and during) trial which resulted in conviction (note 1)	
6	inability to perform duty for more than 1 day (24 consecutive hours) because of intemperate use of alcohol or drugs, or disease or injury resulting from misconduct		
7	desertion		
8	because of confinement for more than 1 day (24 consecutive hours) while awaiting trial (if the trial results in conviction) or confinement as the result of a court-martial sentence (note 4)	the member was member of the Army or Air Force	
9	absence of a Navy or Marine Corps member because of confinement of more than 1 day (24 consecutive hours) while awaiting trial (if the trial results in conviction) or confinement as the result of a court-martial sentence	the confinement occurred on or after 24 Jul 1956 (note 4)	
10		the confinement occurred before 24 Jul 1956	(note 3).

NOTES:

1. If the member is released without trial or acquitted, or if conviction is set aside on legal grounds (as distinguished from clemency), the period of absence is creditable. If the member is released upon agreement to make restitution or is later convicted by court-martial on the same facts, the period of absence is not creditable.
2. Absence during which a member was serving on active duty as an enlisted person and was also a Reserve officer is creditable.

3. The period of absence is not creditable only if the confinement was under general court-martial sentence and/or while awaiting (and during) trial which resulted in a sentence by a general court-martial to confinement and total loss of pay and allowances.
4. Period spent in confinement is creditable when the member is acquitted or the sentence is set aside or disapproved.

Table 1-2. Absence From Duty In Enlisted Status

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CHAPTER 02

COMPUTATION OF PAY0201 BASIC PAY ENTITLEMENTS

020101. When Entitled to Basic Pay. The pay of Service members is prescribed by law. Members are entitled to receive pay according to their pay grades and years' service, if they are:

- A. On active duty in a pay status.
- B. Not prohibited by law from receiving such pay.

020102. Employment of Members in Another CapacityA. Employment Under the Government

1. Unless otherwise provided by law (such as during the period a member is on terminal leave pending retirement, separation or release from active duty under honorable conditions), a member may not be employed in another capacity by the government, and receive pay therefor, other than the pay and allowances which accrue by reason of the military status. A member may be employed, however, on a voluntary basis, during off-duty hours in connection with nonappropriated fund activities.

2. Under agreements such as that between the Department of Defense and the Agency for International Development (AID), Department of State, military members may be detailed to agencies such as AID for certain types of service for specified periods. As provided in pertinent agreements, members so detailed are entitled to the pay and allowances of employees of the agency (AID foreign service personnel in the case of that agency) holding comparable positions. Such members are paid by the agency in question, not by the Service involved.

B. Acceptance or Holding Civil Office

1. An officer of an armed force on active duty may not be employed on civil functions, if the civil duties separate the member from the parent organization or interfere with the performance of military duties. This applies to

employment on civil works or internal improvements, by an incorporated company, or as acting paymaster or disbursing agent of the Bureau of Indian Affairs.

2. Unless otherwise provided by law, an officer of a regular component of the Army, Navy, Air Force or Marine Corps may not hold a civil office by election or appointment under the United States, a territory, possession or state. Acceptance of such position terminates the officer's appointment and any further entitlement to receive pay and allowances whether or not the officer continues to fulfill the duties as an officer subsequent to accepting the office.

C. Medical Officers. Medical officers on active duty who receive any compensation or stipend payments for services they perform as interns or resident physicians in private or public institutions (state, county, municipal, or privately owned hospitals) receive such payments for the benefit of the United States. Collect these payments from the officer for deposit in the Treasury of the United States. See table 26-3, rule 24; table 26-8, rule 2; and table 25-1, rules 6 and 7, for BAQ and BAS payments.

020103. Formal Acceptance of Appointment-Officers

A. Pay and allowances generally accrue from the date of acceptance of appointment as an officer. The normal methods of acceptance is taking the oath of office. Commencement of travel in compliance with an order is considered acceptance for pay purposes, but payment will not be made until formal signing of the oath of office. See table 2-1 for specifics and for graduates of the academies.

B. An officer need not take the oath of office upon promotion if service has been continuous since last oath.

020104. Restriction Against Dual Payments

A. A Reserve member who is called to active duty for more than 30 days in time of war or national emergency is entitled while on that active

duty to the pay and allowances prescribed for active duty. Exception is authorized if the member is entitled to a pension, retired pay, or disability compensation for earlier military service, in an amount greater than that prescribed for active duty.

B. Except as prescribed in A above, a Reserve member who is entitled to payments for earlier military service, and is called to active duty and is entitled to pay, may elect to receive either:

1. The payments for the earlier military service; or

2. If member specifically waives those payments, the pay and allowances authorized for the active duty.

020105. Posthumous Promotions. Members may be promoted posthumously. The amount of bonus, gratuity, pay, or allowances is not changed by these promotions. This payment restriction does not apply to promotions of members while in a missing status where a Secretarial determination is subsequently made that the member died before the date of the promotion.

0202 COMPUTING MONTHLY PAY

020201. Monthly Pay

A. Service of 30 Days or More. Compute monthly compensation as if each month had 30 days. When service begins on an intermediate day of the month, pay for the actual number of days served during that calendar month, but only through the 30th day of that month. If active military service begins on the 31st day of any month, compensation does not accrue for that day. Any person who enters active service during February and serves until the end of the month is entitled to 1 month's (30 days) pay, less the prorated amount for the number of days expired before entry on duty. If the service ends before the last day of February, pay the member only for the actual number of days served.

B. Service of Less Than 30 Days. Members of the Uniformed Services entitled to receive compensation for continuous periods of less than 1 month are entitled to pay and allowances for each day of the period at the rate of 1/30

of the monthly amount of such pay and allowances. Include the 31st day of a calendar month in the computation. Members who are obligated to serve on active duty for 30 days or more, but who were released before performing such active duty for at least 30 days, are entitled to receive pay and allowances on a day-to-day basis.

020202. Absence Without Pay

A. Deduct 1/30 of 1 month's pay for each day's absence in a nonpay status.

B. No pay is lost for unauthorized absence on the 31st day of a month, except when it is the first day of absence or when the member is paid for the day under subparagraph 020201B.

C. Absence in a nonpay status on the 28th of February in a non-leap year results in loss of pay for 3 days. If member is absent on only the 28th day of February in a leap year, deduct 1 day's pay for the 28th. If absence occurs on the 29th of February, deduct 2 days' pay. When payment is made under paragraph 020201B on the basis of each day actually served, deduct only for the actual period of unauthorized absence.

020203. Annual Salary. Annual salary is divided into 12 equal installments. One installment represents the pay for each calendar month. The daily rate is 1/30 of the monthly rate. The above instructions for monthly pay also apply to annual salary.

020204. Basic Pay Rates

Pay Tables. Tables 2-5 through 2-8 contain monthly rates of basic pay.

0203 SAVED PAY

020301. Saved Pay and Allowances

A. Enlisted. An enlisted member who accepts an appointment as an officer will, following appointment, be paid the greater of:

1. The pay and allowances to which such member would be entitled if the member had remained in the last enlisted grade held before appointment as an officer and continued to receive increases in pay and allowances authorized for that grade; or

2. The pay and allowances to which the member thereafter becomes entitled as an officer.

B. Warrant Officers. A warrant officer who accepts an appointment as a commissioned officer will, following appointment, be paid the greater of:

1. The pay and allowances to which the member thereafter becomes entitled as a commissioned officer; or

2. The pay and allowances to which such member would be entitled if the member had remained in the last warrant officer grade held before appointment as a commissioned officer and continued to receive increases in pay and allowances authorized for that grade; or

3. In the case of an officer who was formerly an enlisted member, the pay and allowances to which entitled, under subparagraph A1 above, before appointment as an officer.

C. Restrictions

1. A member entitled to saved pay is not authorized the pay for one grade and an allowance for another grade.

2. The saved pay amount may be reduced when the member loses entitlement to specific items; however, these specific items shall be included in saved pay if the member again qualifies for such items. (See 8 below.)

3. In the case of a temporary officer, a member is not entitled to an increase in saved pay because of a promotion to a higher grade.

4. BAQ may be continued as an item of saved pay, and will be paid whenever it is not forfeited because the member is assigned to government quarters.

5. For enlisted members, basic allowance for subsistence (BAS) is the alternative for subsistence in kind. Since officers are not authorized subsistence in kind, a member eligible for saved pay is entitled to the appropriate BAS rate (including the "when permitted to mess separately rate" even when subsistence in kind

would otherwise be provided or made available) under the conditions prevailing for enlisted members at their permanent station. Credit BAS at the "when permitted to mess separately rate" at all times except when the member would otherwise be entitled to a different rate. (See subparagraphs 250102C and E.)

6. Special duty assignment pay, incentive pay for hazardous duty, special pay for diving duty, and sea and foreign duty pay may be retained as an item of saved pay only for as long as the member continues to perform the duty and would be eligible to receive payment had the member remained in the former status.

7. The enlisted cash clothing allowances prescribed in part three, chapter 29, may not be included in the saved pay computation if the officer is entitled to the initial uniform allowance prescribed in section 3002.

8. FSA-I may be continued as an item of saved pay under the same conditions as BAQ. See 4 above. If the member was entitled to FSA-II due to enforced separation from the member's family at the time of appointment, the allowance may be included in the computation of saved pay until entitlement ends. FSA-R, FSA-S, or FSA-T may be reinstated for future periods if the member again qualifies for FSA-II due to enforced separation from the family. Similarly, other items of overseas station allowance and/or special or incentive pay may be reinstated if a member again qualifies for them.

D. Breaks in Service. A break in service (released from active duty, discharged) does not disqualify an officer for the saved pay and allowances entitlements of this section.

0204 INCREASED BASIC PAY DURING PERIOD OF SERVICE ESSENTIAL TO PUBLIC INTERESTS

020401. Entitlement to Increased Basic Pay. This section applies only to enlisted members of the Regular Navy or Marine Corps, or Naval or Marine Corps Reserve, whose enlistments expire while serving on a naval vessel in foreign waters.

A. Retention in Service. Such members may be retained on active duty until the naval vessel returns to the CONUS, if the period of

retention is determined "service essential to the public interests." The senior officer present afloat determines this.

B. Pay and Allowances. During the period of retention, members are entitled to regular pay and allowances, plus a 25 percent increase in the basic pay to which they were entitled on the day before the period of retention began.

020402. Members Not Eligible for Increase

A. Enlisted members are not entitled to the increased basic pay if retained on active duty after expiration of enlistment:

1. At shore stations.
2. On ships on duty in waters in or around possessions and territories of the United States.
3. On ships on duty in ports or waters within the sovereign jurisdiction of the United States.

1. Due to lack of transportation.
2. Merely because it is desirable to continue their services, or some benefit may be derived therefrom.

B. A member of the Naval Reserve or Marine Corps Reserve is not entitled to the 25 percent increase while retained beyond period of obligated service, as distinguished from normal date of expiration of enlistment.

020403. Inclusion of Increase in Death Gratuity Include the 25 percent increase in basic pay in computing amount of death gratuity payable.

020404. Restrictions in Use. Do not use the 25 percent increase in computing:

- A. Cash settlement for unused leave on discharge.
- B. Physical disability, or temporary disability retired pay.
- C. Disability severance pay.

D. Reenlistment bonus.

020405. Termination of Increase in Basic Pay

A. The 25 percent increase in basic pay continues through:

1. Date of discharge, if the member is discharged within 30 days after arrival in CONUS.

2. Date of transfer to a hospital for treatment.

B. See table 2-3, rule 19, for the date of termination of normal pay and allowances.

0205 ALLOWABLE TRAVEL TIME FOR RESERVE MEMBERS CALLED TO OR RELEASED FROM ACTIVE DUTY

020501. Pay and Allowances Entitlement for Allowable Travel Time

A. Reserve members called to active duty are entitled to active duty pay and allowances for time allowed for necessary travel:

1. From home to a first duty station; and
2. From last duty station to home (except when released from active duty for retirement, or dismissal, when discharged, or upon resignation).

B. Pay and allowances for allowable travel time is an earned entitlement. The payment for the return home may be made upon the member's release from such duty without regard to actual performance of the travel.

If the member dies after payment, but before payment would otherwise be due, no part of the payment will be recovered by the United States.

020502. Terms and Special Conditions

A. Allowable travel time is considered active duty for all purposes normally ascribed to active duty. The computation of allowable travel time, whether actual or constructive will:

1. For periods of active duty of 30 days or less, be based upon the rules contained in table 2-4.

2. For periods of active duty if more than 30 days, be based upon the rules and provisions of the JFTR, Vol I (reference (d)).

B. A member of a reserve component who:

1. is ordered to perform active duty training (ADT);

2. performs authorized inactive duty training (IDT) immediately before or after ADT at or near the same site; and

3. receives orders which direct performance of necessary travel to and from the ADT site immediately before and after combined ADT/IDT, is entitled to active duty pay and allowances for allowable travel time, if any. The travel date will be specified in the active duty orders. Full retirement point credit is earned for the period of IDT performed.

WHEN ACTIVE DUTY PAY BEGINS					
R U L E	A	B	C	D	E
	then active duty pay and allowances				
	When a person is	in the	and	begin on:	are authorized for:
1	originally appointed as a permanent officer	Regular Army, Navy, Marine Corps or Air Force (note 1)		date of formal acceptance of appointment (see paragraph 020103).	
2	an enlisted member temporarily appointed to a warrant or commissioned officer grade	Navy or Marine Corps			
3	an enlisted member or warrant officer on active duty appointed to a commissioned officer grade under 10 U.S.C. 593	Reserve			
4	enlisted, reenlisted, or inducted	Regular Army, Navy, Marine Corps, or Air Force		date of enlistment, reenlistment, or induction.	
5	Service academy graduate commissioned as a second lieutenant or ensign	Regular Army or Air Force		date of graduation (note 2).	
6		Regular Navy or Marine Corps		date of formal acceptance of appointment.	
7	Reserve or retired member called or recalled to active duty	Army, Navy, Marine Corps, or Air Force		date member necessarily complies with active duty order (note 3).	
8	AUS or USAF without component temporary officer called to active duty	Army or Air Force		date member necessarily complies with active duty orders (note 3)	
9	Reserve or retired member ordered to active duty to take a physical examination incident to being ordered to active duty for more than 30 days	Navy, Marine Corps, Army, or Air Force			period of the examination, and allowable travel time in connection therewith (notes 3, 5, 6, and 7).
10	ARNG or ANG member called into Federal Service	Army or Air Force	the period of Federal Service is 30 days or less	date of reporting at place of rendezvous.	
11			the period of Federal Service is more than 30 days or an indefinite period	date member necessarily complies with active duty orders (notes 3 and 4).	
12	separated Service academy cadet required to serve a period of enlisted active duty	Regular Army, Navy, Marine Corps, or Air Force		date following date separated from the academy is approved.	

NOTES:

1. Original appointments include officers appointed from warrant officer, enlisted member, or civilian status.
2. Pay accrues from date of graduation even though appointment is issued and accepted at later date.
3. See section 0205 of this chapter and table 2-4 for allowable travel time to include in computation. Pay and allowances do not accrue if the member begins travel or reports earlier than the travel time necessary to comply with the active duty orders.
4. Pay status does not begin if the ARNG or ANG member is unable to respond to the call to active duty because of illness

or other reason.

5. If member passes the physical examination, pay and allowances accrue for travel time to first duty station when later ordered to active duty for more than 30 days.
6. If the member fails the physical examination, pay and allowances accrue for period required for the examination and travel time to and from the examination.
7. If the member is ordered to active duty solely to take a physical examination, not incident to being ordered to active duty, then active duty pay and allowances do not accrue.

Table 2-1. When Active Duty Pay Begins

INCREASES IN PAY ON PROMOTION OR RESTORATION OF GRADE					
R U L E	A	B	C	D	E
	When member is a(n)	and action is	in the	and	then effective date of increase in pay and allowances is
1	officer	designation of special assignment under 10 U.S.C. 601(a)	Army, Air Force, or Marine Corps as General or Lt General; or Navy as Admiral or Vice Admiral		date officer assumes the designated duty (note 1).
2	Reserve officer not on the active duty list	promotion to grade above O-2	Navy or Marine Corps		date officer becomes eligible for promotion to the higher grade.
3		promotion to grade O-2			date of rank.
4	officer	promotion to grade above O-1	Uniformed Services		effective date of the promotion.
5	Reserve officer on active duty (other than for training) (but not on the active-duty list)	permanent promotion to a higher Reserve grade	Army or Air Force	officer is ordered to serve on active duty in the higher permanent Reserve grade	effective date of orders to serve on active duty in the higher permanent Reserve grade (note 2).
6				officer is serving on active duty and assigned to a position requiring a grade equal to or higher than the grade to which promoted	effective date of orders or letter announcing promotion (note 3).
7		temporary promotion to a higher Reserve grade			effective date of orders announcing promotion; or date shown in special orders confirming verbal orders.
8	enlisted member	advancement in rank or rating	Navy	effective date is specified in the letter authorizing the advance	effective date is stated, or date of the letter, whichever is later (note 4).
9				effective date is not stated in letter	date advance was actually effected, but not before date member's commander receives the authority (note 4).
10			Marine Corps	effective date is specified in the directive authorizing the advance	effective date as stated in the directive or date of the directive, whichever is later (note 4).
11				promotion is not effected by directive	date certificate of appointment is signed by issuing authority (note 4).
12		appointment or promotion to a higher grade	Army or Air Force		1. date cited in orders, or date of orders, whichever is later (note 5); or 2. date of oral appointment or promotion, if later confirmed in writing (note 4).
13		restoration of former grade		reason for reduction was non-judicial punishment	may be retroactive to date of reduction.
14	reason for reduction was inefficiency			date of restoration orders.	

Table 2-2. Increases In Pay On Promotion Or Restoration Of Grade

NOTES:

1. If the officer's assignment is terminated because of:
 - a. Assignment to another position also designated a special assignment, the officer will continue to draw the pay rate of the terminated assignment through the day before assuming the new position.
 - b. Hospitalization, the officer will continue to draw the pay rate of the terminated assignment for the full period of hospitalization, but for not more than 180 days.
 - c. Retirement, the officer will continue to draw the pay rate of the terminated position through the day before retirement, but for not more than 90 days.
2. A retroactive amendment of active duty orders is authority to serve in the higher grade from date of the amendment only. Increased pay and allowances are authorized from that date. Such orders do not create entitlement to increased pay and allowances for the retroactive period.
3. A retroactive promotion date is to be used only for consideration of seniority and time in grade for future promotions. Such orders do not create entitlement to increased

pay and allowances for the period between the eligibility date for promotion and the effective date of the promotion order or letter. The effective date of promotion for purposes of entitlement to increased pay and allowances must not be earlier than the date the officer is assigned to a position requiring a grade equal to or higher than the grade to which promoted.

4. An appointment, promotion, or advancement to a higher grade with an effective date beyond the expiration date of the current enlistment and which is contingent upon the member's extension of enlistment or reenlistment, entitles the member to increased pay and allowances from the effective date of extension or reenlistment, whichever is later. Payment for the higher rank or rating is not authorized for a period prior to date of current enlistment.

5. This restriction does not prevent payment to enlisted members for retroactive promotions or advancements that are made pursuant to 10 U.S.C. 1552(a)(2) (retroactive promotion or advancement without decision of the Board for Correction of Military Records), effective 23 Oct 1992.

Table 2-2. Increases In Pay On Promotion Or Restoration Of Grade (Continued)

TERMINATION OR REDUCTION OF ACTIVE DUTY PAY AND ALLOWANCES					
R U L E	A	B	C	D	E
	If member is in the	and status is an	and action is	and reason for retention is	then pay and allowances are authorized through date
1	Regular Army, Navy, Marine Corps, or Air Force	officer holding permanent appointment	resignation, discharge, or dismissal		1. shown as official date of separation in official notice; or 2. officer receives official notice, if no official date of separation is shown (note 1).
2			discharge or dismissal from permanent status		of termination of appointment.
3			resignation		before date placed on the retired list
4			transfer to Fleet Reserve, or Fleet Marine Corps Reserve (note 7)		
5			involuntary retirement under Officer Personnel Act of 1947		
6			retirement on last day of month after month member completed 30 years of active service		
7			retirement, other than as shown in rules 5 and 6 includes physical disability retirement		before date of acceptance of permanent appointment.
8			permanent appointment as an officer		
9			termination of appointment for any other reason		of termination of appointment.
10	Army, Navy, Marine Corps, or Air Force Reserve	officer or enlisted member	release from active duty		of allowable travel time after release (see table 2-4).
11			release from active duty for retirement		before date placed on retired list.
12			discharge, dismissal, or a resignation		shown in official separation notice, or date member receives official notice of separation.
13	Army, Navy, Marine Corps, or Air Force	enlisted member	retirement (including physical disability retirement)		before date placed on retired list.
14			transfer to Fleet Reserve or Fleet Marine Corps Reserve		of transfer.
15			discharge		of discharge (note 2).
16			retention in service after expiration of term of service (note 3)	convenience of the government	of the period of retention.
17				to make good lost time	of the period of retention, if retained in full duty status or if authorized to perform duty.
18				probation after confinement	of the probational period, if duty is performed during such period.

Table 2-3. Termination Or Reduction Of Active Duty Pay And Allowances

R U L E	A	B	C	D	E
	If member is in the	and status is an	and action is	and reason for retention is	then pay and allowances are authorized through date
19				medical care or hospitalization (with member's consent)	of release from medical care or hospitalization (note 4).
20				service is essential to public interest (section 0204, this chapter)	of discharge (note 5).
21				court martial action	see paragraph 030207.
22					before date of demotion orders at the higher rate; and at the reduced rate on and after date of demotion orders.
23		officer or enlisted member	death		of death.
24			revoking a promotion (erroneous promotion through administrative error)		before date of discovery at the higher rate; at the reduced rate on or after date of discovery (note 6).
25			retirement	late delivery of retirement orders	retirement orders are delivered or member is notified that retirement orders were issued.

NOTES:

1. Discharge orders do not of themselves relieve the government of its obligation to an officer. The officer must have received actual or constructive notice by the effective date, unless the officer willfully avoids notice of separation. If kept in service without fault, in ignorance of an order of dismissal, the officer is entitled to all salaries and benefits of the office. If held in service under orders after the date shown in separation orders, the officer is entitled to pay if there is nothing in the records showing nonentitlement.
2. Includes discharge for underage enlistment. Does not include discharge for fraudulent contract of enlistment. (See chapter 4.)
3. A member whose enlistment is extended involuntarily by law comes under rule 15, not rules 16-21.
4. If medical care or hospitalization was due to member's misconduct, pay and allowances terminate on date of expiration of term of service.
5. See subparagraph 020405 for date of termination of the 25 percent increase in basic pay.

6. An erroneous promotion is later voided by revoking promotion orders (certificates of appointment or other documents used by the service concerned to administratively effect promotions) from the original effective date. Payment of the pay and allowances of the higher grade through the date prior to the date of discovery is contingent, in each case, upon an administrative determination of the commander that service performed while serving in the higher grade may be regarded as service performed in a "de facto" status, that is, the member was promoted by competent authority and performed duties of the higher grade. (See procedural regulations of the Service concerned.)

7. A member who reverts from a temporary officer appointment to a permanent enlisted or warrant officer grade is entitled, if otherwise proper, to the active duty pay and allowances of the temporary officer grade through and including the date of reversion.

Table 2-3. Termination Or Reduction Of Active Duty Pay And Allowances (Continued)

ALLOWABLE TRAVEL TIME—TRAVEL BETWEEN PLACES WITHIN THE UNITED STATES					
R U L E	A	B	C	D	E
	If ordered active duty is for	and travel by	and total distance is	then travel time allowed is	using
1	30 days or less	all transportation is reasonably available (note 3)		computed on the basis of air transportation (not more than 1 day for travel between places within the continental United States) (note 4)	actual commercial air schedules, and including the actual or estimated time to travel to and from air terminal(s) (but not more than 2 hours for each trip) (notes 1 and 2).
2		air transportation is not reasonably available for entire travel (note 3)		computed as if actually performed by public surface transportation	actual schedules of fastest available mode (notes 1 and 2).

NOTES:

1. Travel is not expected to start or end between midnight and 0600.
2. Travel days will not exceed the computed travel time. In the computation of travel time, use existing commercial schedules to determine the latest departure time that would permit arrival at the duty station on the reporting date and hour. On release from active duty, use earliest schedule after release which would permit arrival home by fastest available means, without regard to actual performance of travel. A member of a Reserve component who:
 - a. is ordered to perform active duty training (ADT),
 - b. performs authorized inactive duty training (IDT) immediately before or after ADT at or near the same site, and
 - c. receives orders which direct performance of

necessary travel to and from the ADT site immediately before and after combined ADT/IDT is entitled to active duty pay and allowances for allowable travel time per paragraph 020502. The travel date will be specified in the active duty orders. Full retirement point credit is earned for the period of IDT performed.

3. When the air terminal is within 50 miles of the active duty station and direct or connecting flights are obtainable within 50 miles of the place from which ordered to active duty.

4. Additional time may be allowed when there is an actual delay in air travel. The delay must have been due to reasons beyond the control of the member, such as mechanical failure, adverse weather conditions, excess passenger load, cancelled flights, illness of other passengers, etc.

Table 2-4. Allowable Travel Time - Travel Between Places Within The United States

MONTHLY RATES OF BASIC PAY—COMMISSIONED OFFICERS, AVIATION CADETS, ACADEMY CADETS, MIDSHIPMEN, AND ROTC MEMBERS—EFFECTIVE 1 JAN 1996 (Notes 1 and 5)										
Rank	Pay Grade		Cumulative Years of Service							
			2 or Less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10	Over 12
Gen-ADM	O-10 (note 2)	BP	\$7145.70	\$7397.10	\$7397.10	\$7397.10	\$7397.10	\$7681.20	\$7681.20	\$8106.80
Lt Gen-VADM	O-9	BP	6333.30	6498.90	6637.50	6637.50	6637.50	6806.10	6806.10	7089.30
Maj Gen-RADM (UH)	O-8	BP	5736.00	5908.20	6048.30	6048.30	6048.30	6498.90	6498.90	6806.10
Brig Gen-RADM (LH)	O-7	BP	4766.10	5090.40	5090.40	5090.40	5318.70	5318.70	5626.80	5626.80
Col-Capt	O-6	BP	3532.50	3881.10	4135.50	4135.50	4135.50	4135.50	4135.50	4135.50
Lt Col-CDR	O-5	BP	2825.40	3317.40	3546.90	3546.90	3546.90	3546.90	3654.00	3851.10
Maj-LCDR	O-4	BP	2381.40	2900.10	3093.60	3093.60	3150.90	3289.80	3514.50	3711.90
Capt-Lt	O-3	BP	2213.10	2474.40	2645.40	2926.80	3066.90	3176.70 (Note 3)	3348.90	3514.50
1st Lt-LT(JG)	O-2	BP	1929.90	2107.50	2532.30	2617.20	2671.50 Maximum			
2nd Lt-ENS	O-1 (notes 3 & 4)	BP	1675.50	1743.90	2107.50	2107.50	2107.50 Maximum			
Aviation Cadets (see sec 4002) (note 5)		BP	1081.20 Maximum							
Academy Cadets/ Midshipmen		BP	558.04 Maximum							
ROTC Members/ ROTC Applicants (see para 580801)		BP	558.04 Maximum							

★Table 2-5. Monthly Rates Of Basic Pay--Commissioned Officers, Aviation Cadets, Academy Cadets, Midshipmen, and ROTC Members—Effective 1 Jan 1996 (Notes 1 and 5)

Rank	Pay Grade		Cumulative Years of Service						
			Over 14	Over 16	Over 18	Over 20	Over 22	Over 24	Over 26
Gen-ADM	O-10 (note 2)	BP	\$8106.80	\$8686.50	\$8686.50	9268.20	\$9268.20	\$9268.20	\$9845.40
Lt Gen-VADM	O-9	BP	7089.30	7681.20	7681.20	8106.60	8106.60	8106.60	8686.50 Maximum
Maj Gen-RADM (UH)	O-8	BP	6806.10	7089.30	7397.10	7681.20	7870.50 Maximum	7870.50	7870.50
Brig Gen-RADM (LH)	O-7	BP	5908.20	6498.90	6945.90 Maximum	6945.90	6945.90	6945.90	6945.90
Col-capt	O-6	BP	4276.20	4952.40	5205.00	5318.70	5626.80	5817.00	6102.60 Maximum
Lt Col-CDR	O-5	BP	4109.10	4416.60	4669.50	4811.40	4979.40 Maximum	4979.40	4979.40
Maj-LCDR	O-4	BP	3881.10	4051.80	4163.10 Maximum				
Capt-Lt	O-3 (note 3)	BP	3600.60	3600.60 Maximum					

NOTES:

1. Basic pay is limited to the rate of basic pay for Level V of the Executive Schedule, which is \$9,016.80.
2. Basic pay for pay grade O-10 is \$9,016.80 regardless of years of service when they are serving as:
 - a. Chairperson or Vice Chairperson (effective 1 Oct 1986) of the Joint Chiefs of Staff
 - b. Chief of Staff of the Army
 - c. Chief of Naval Operations
 - d. Commandant of the Marine Corps
 - e. Chief of Staff of the Air Force

3. These rates do not apply to officers credited with over 4 years of active enlisted and/or warrant officer service. See table 2-6 for applicable rates.
4. These rates apply while a student of the Uniformed Services University of Health Sciences.
5. Basic pay rates for:
 - a. Aviation Cadets - \$1081.20.
 - b. Academy Cadets/Midshipmen - \$558.04.
 - c. ROTC members/applicants - \$558.04.

★Table 2-5. Monthly Rates Of Basic Pay—Commissioned Officers, Aviation Cadets, Academy Cadets, Midshipmen, and ROTC Members—Effective 1 Jan 1996 (Notes 1 and 5) (Continued)

MONTHLY RATES OF BASIC PAY—COMMISSIONED OFFICERS CREDITED WITH OVER 4 YEARS' ACTIVE DUTY ENLISTED AND/OR WARRANT OFFICER SERVICE—EFFECTIVE 1 JAN 1996 (Note)								
Rank	Pay Grade		Cumulative Years of Service					
			Over 4	Over 6	Over 8	Over 10	Over 12	Over 14
Capt-Lt	O-3E	BP	\$2926.60	\$3066.90	\$3176.70	\$3348.90	\$3514.50	\$3654.00 Maximum
1st Lt-Lt (JG)	O-2E	BP	2617.20	2671.50	2756.10	2900.10	3011.10	3093.60 Maximum
2nd Lt-ENS	O-1E	BP	2107.50	2251.80	2334.60	2419.20	2503.20	2617.20 Maximum

NOTE: These rates apply while a student of the Uniformed Services University of Health Sciences.

★Table 2-6. Monthly Rates Of Basic Pay —Commissioned Officers Credited With Over 4 Years' Active Duty Enlisted And/Or Warrant Officer Service—Effective 1 Jan 1996

MONTHLY RATES OF BASIC -COMMISSIONED OFFICERS CREDITED WITH OVER 4 YEARS' ACTIVE DUTY ENLISTED AND/OR WARRANT OFFICER SERVICE--EFFECTIVE 1 JAN 1996 (NOTE)								
Rank	Pay Grade		Cumulative Years Service					
			Over 16	Over 18	Over 20	Over 22	Over 24	Over 26
Cap-Lt	O-3E	BP	\$3654.00	\$3654.00	\$3654.00	\$3654.00	\$3654.00	\$3654.00
1st-Lt (JG)	O-2E	BP	3093.60	3093.60	3093.60	3093.60	3093.60	3093.60
2nd Lt-ENS	O-1E	BP	2617.20	2617.20	2617.20	2617.20	2617.20	2617.20

★Table 2-6. Monthly Rates Of Basic Pay —Commissioned Officers Credited With Over 4 Years' Active Duty Enlisted And/Or Warrant Officer Service—Effective 1 Jan 1996 (continued)

MONTHLY RATES OF BASIC PAY—WARRANT OFFICERS— EFFECTIVE 1 JAN 1996										
Rank	Pay Grade		Cumulative Years of Service							
			2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10	Over 12
Chief Warrant Officer	W-5									
Chief Warrant Officer	W-4	BP	\$2254.80	\$2419.20	\$2419.20	\$2474.40	\$2586.90	\$2700.90	\$2814.30	\$3011.10
Chief Warrant Officer	W-3	BP	2049.30	2223.00	2223.00	2251.80	2277.90	2444.70	2586.90	2671.50
Chief Warrant Officer	W-2	BP	1794.90	1941.90	1941.90	1998.30	2107.50	2223.00	2307.30	2391.90
Warrant Officer	W-1	BP	1495.20	1714.50	1714.50	1857.60	1941.90	2025.00	2107.50	2194.50
Cumulative Years of Service										
Rank	Pay Grade		Over 14	Over 16	Over 18	Over 20	Over 22	Over 24	Over 26	
Chief Warrant Officer	W-5	BP				\$3848.10	\$3993.90	\$4109.40	\$4282.50	
Chief Warrant Officer	W-4	BP	\$3150.90	\$3261.60	\$3348.90	3456.90	3572.70	3684.00	3851.10 Maximum	
Chief Warrant Officer	W-3	BP	2756.10	2838.60	2926.80	3041.10	3150.90	3150.90	3261.60 Maximum	
Chief Warrant Officer	W-2	BP	2474.40	2561.40	2645.40	2728.50	2838.60 Maximum	2838.60	2838.60	
Warrant Officer	W-1	BP	2277.90	2362.80	2444.70	2532.30 Maximum	2532.30	2532.30	2532.30	

★Table 2-7. Monthly Rates of Basic Pays—Warrant Officers—Effective
1 Jan 1996

MONTHLY RATES OF BASIC PAY —ENLISTED MEMBERS—EFFECTIVE 1 JAN 1996									
Pay Grade (note 1)		Cumulative Years of Service							
		2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10	Over 12
E-9 (note 2)	BP							\$2623.20	\$2682.00
E-8	BP						\$2199.60	2262.90	2322.90
E-7	BPA	\$1535.70	\$1658.10	\$1719.00	\$1779.60	\$1840.20	1898.70	1959.60	2020.80
E-6	BP	1321.20	1440.30	1500.00	1563.90	1622.70	1680.90	1742.70	1832.40
E-5	BP	1159.50	1262.10	1323.30	1380.90	1471.80	1531.80	1592.10	1650.90
E-4	BP	1081.20	1142.10	1209.30	1302.60	1354.20 Maximum			
E-3	BP	1019.10	1074.90	1117.50	1161.90 Maximum	1161.90			
E-2	BP	980.70 Maximum	980.70	980.70	980.70	980.70			
E-1 (4 months or more active duty)	BP	874.80 Maximum	874.80	874.80	874.80	874.80			
E-1 (Less than 4 months' active duty)	BP	809.10 Maximum							
Pay Grade (note 1)		Cumulative Years of Service							
		Over 14	Over 16	Over 18	Over 20	Over 22	Over 24	Over 26	
E-9 (note 2)	BP	\$2742.60	\$2805.60	\$2868.60	\$2924.10	\$3077.40	\$3197.40	\$3377.10 Maximum	
E-8	BP	2382.60	2445.60	2501.40	2562.90	2713.50	2834.40	3015.90 Maximum	
E-7	BP	2112.00	2172.00	2232.00	2261.40	2413.20	2533.20	2713.50 Maximum	
E-6	BP	1890.00	1950.90						
E-5	BP	1680.90 Maximum	1680.90						

NOTES:

1. For rank titles, see Appendix 2, Comparable Terms
2. Basic pay for grade E-9 is \$4104.90 regardless of years of service while serving as:
 - a. Sergeant Major of the Army.
 - b. Master Chief Petty Officer of the Navy.
 - c. Chief Master Sergeant of the Air Force.
 - d. Sergeant Major of the Marine Corps.

If a member is placed on terminal leave pending retirement immediately following the completion of service as the senior enlisted member of a Military Department, then the member is entitled to the higher pay rate (\$4104.90) up to a maximum of 60 days.

★Table 2-8. Monthly Rates of Basic Pay—Enlisted Members—Effective 1 Jan 1996

CHAPTER 08

SPECIAL PAY—PROFICIENCY PAY AND SPECIAL DUTY
ASSIGNMENT PAY—ENLISTED MEMBERS0801 ENTITLEMENT PROVISIONS AND
POLICY080101. Entitlement

A. Proficiency Pay. An enlisted member entitled to basic pay and proficient in a designated military skill may qualify for proficiency pay unless the member occupies one of the grade E-9 positions listed in the DoDFMR, Vol 7A, table 2-8, note 2. A member entitled to proficiency pay may receive such pay in addition to any other pay or allowances to which entitled. Proficiency pay status is awarded according to the applicable regulations of the Service concerned. Only members entitled to proficiency pay on 30 September 1984, may continue to be paid such pay if otherwise entitled. However, no member may be paid proficiency pay and special duty assignment pay.

B. Special Duty Assignment Pay. An enlisted member entitled to basic pay may qualify for special duty assignment pay when the member performs duties designated by the Secretary concerned as extremely difficult or involving an unusual degree of responsibility. A member entitled to special duty assignment pay may receive such pay in addition to any other pay or allowances to which entitled. Special duty assignment pay status is awarded according to the applicable regulations of the Service concerned.

C. Certification. Appropriate authorities annually review eligibility and payment authority for each member receiving proficiency pay and special duty assignment pay. Payment stops automatically on the annual anniversary date of either pay if positive certification is not made that a member is still eligible for proficiency pay or special duty assignment pay.

080102. DefinitionsA. Military Specialty

1. An element of the enlisted classification structure (MOS, AFS, rating, Navy

enlisted classification, career field subdivision, career management field, and occupational field, as appropriate to the military service concerned) that identifies an individual position or a group of closely related positions on the basis of the similarity of the duties involved. It is also the primary identifier of individuals who possess the ability, knowledge and other occupational qualifications required for effective performance in such positions.

2. A military specialty provides occupational standards for procurement, training, classification, and career development; identifies military skills so closely related that a degree of interchangeability exists between members assigned to the military specialty; provides a normal career progression pattern for members within that military specialty.

B. Special Duty Assignment. A duty assignment characterized by extremely demanding duties or duties demanding an unusual degree of responsibility.

C. Continuous Active Duty. Active Federal military service (other than active duty for training as a Reserve), without a break in service of more than 3 months as computed in the DoDFMR, Vol 7A, subparagraph 090301C.

D. Career Personnel

1. Members of the Army, Marine Corps, and Air Force on second or subsequent terms of active duty enlisted service and first term personnel who are serving in an enlistment, an enlistment as extended, or an extension of enlistment that will total 6 or more years of active service.

2. Members of the Navy on second or subsequent terms of active duty enlisted service and first term personnel who are serving in an enlistment, an enlistment as extended, or an extension of enlistment that will total 7 or more years of active service.

080103. Reserved080104. Retired and Reserve Personnel

A. Retired enlisted members, Navy/Marine Corps Fleet Reserve members, and members of other Reserve components, may be awarded proficiency pay when they are on extended active duty beyond obligated periods of active service. Those members recalled to active duty on or after 1 October 1984, are not entitled to proficiency pay.

B. Enlisted members of the Reserve components are eligible to receive special duty assignment pay when on active duty. This includes active duty defined under subparagraph 560101A (other than active duty for training for less than 180 days).

080105. Maximum Monthly Rates

A. Proficiency Pay. The amount of proficiency pay may not exceed the maximum applicable rate shown in this subparagraph:

<u>Proficiency Rating</u>	<u>Monthly Rate</u>
P-1	\$50
P-2	100
P-3	150

B. Special Duty Assignment Pay. The amount of special duty assignment pay may not exceed the maximum applicable rate shown in this subparagraph:

<u>Special Duty Assignment</u>	<u>Monthly Rate</u>
SD-1	\$55
SD-2	110
SD-3	165
SD-4	220
SD-5	275

C. The specific current monthly rates for each proficiency and special duty assignment rating are prescribed in the applicable regulations of the Service concerned.

D. Designations of military specialties for proficiency pay and special duty assignment pay are in the applicable regulations of the Service concerned. The criteria for designation of military specialties are in DoD Instruction 1304.22, 7 August 1985 (reference (u)).

0802 CONDITIONS OF ENTITLEMENT

080201. Eligibility Requirements. A member who meets the requirements in table 8-1 may be awarded a proficiency pay rating or a special duty assignment rating under procedures in regulations of the Service concerned.

080202. Conditions Affecting Entitlement

A. Conditions affecting entitlement to proficiency pay and special duty assignment pay are shown in table 8-2.

B. Detailed instructions on maintenance, retention, and termination of proficiency pay status are specified in regulations issued by the Secretary of each military department:

1. AR 600-200 (reference (v))
2. NGR 600-200 (reference (w))
3. OPNAVINST 1160.2 Series (reference (x))
4. MCO 7220.12 Series (reference (y))
5. AFR 39-45 (reference (z))

080203. Date to Stop Proficiency Pay and Special Duty Assignment Pay. Table 8-2 tells how to determine the last day on which proficiency pay or special duty assignment pay accrues to a member. Stop proficiency pay or special duty assignment pay on the date shown in this table, unless an earlier date is specified in the order terminating such pay status.

080204. Effect of Proficiency Pay and Special Duty Assignment Pay on Other Computations. As special pay, neither proficiency pay nor special duty assignment pay is used in the computation for reenlistment bonus, severance pay, separation pay, or cash settlement of accrued leave. However, as special pay, either is included in the computation for death gratuity.

080205. Collection of Erroneous Payments. Collect from a member when a purported proficiency rating assignment or special duty assignment is revoked because either assignment was made without original basis of authority.

080206. Removal From Rating Status Without Original Basis of Authority. Service administrative regulations allow certain authorities to revoke orders which removed a member from proficiency rating or special duty assignment rating if the removal was without original basis of authority. When orders are so revoked, the member is entitled to proficiency pay or special duty assign-

ment pay for the entire period involved (if otherwise entitled to either pay).

080207. Tax. Proficiency pay or special duty assignment pay is subject to withholding of income tax. Neither is subject to withholding of FICA taxes.

ELIGIBILITY REQUIREMENTS FOR PROFICIENCY PAY AND SPECIAL DUTY ASSIGNMENT PAY			
R U L E	A	B	C
	When an enlisted member	and	then
1	is on active duty (other than for training as a Reservist) in a pay status; has completed a minimum of 21 months of active service, other than active duty for training (note 1); is a career member (subparagraph 080102D) (note 2); is serving in pay grade E-3 or higher; is qualified and serving in a designated military specialty; has a minimum of 6 months' continuous active service immediately before award of proficiency pay (subparagraph 080102A); and is not receiving proficiency pay of another type	meets other conditions of eligibility as prescribed by the Secretary of the military department	member may be awarded shortage specialty (Proficiency Pay) through 30 Sep 1984 (note 4).
2	is on active duty in a pay status; is serving in pay grade E-3 or higher, is qualified for and serving in the designated special duty assignment; and is not receiving proficiency pay		member may be awarded special duty assignment pay.
3	attains eligibility under rule 2 above, before the date of termination of award in any special duty assignment designated for termination of award		

NOTES:

1. The 21-month limitation does not apply to a Reservist ordered to EAD who has completed service obligation under section 651, title 10 U.S.C.
2. The requirement to be a career member does not apply to a member of Reserve components ordered to active duty.
3. The requirement for completion of 6 months' continuous active service immediately before a ward of proficiency pay

may be waived for members of Reserve components ordered to EAD, if after entry on active duty they meet the standards for the specialty to which assigned. (See chapter 8, part 1.)

4. Only members entitled to proficiency pay on 30 Sep 1984 may continue to be paid such pay until discontinued under paragraph 080203.

Table 8-1. Eligibility Requirements For Proficiency Pay And Special Duty Assignment Pay

CONDITIONS AFFECTING ENTITLEMENT TO PROFICIENCY AND SPECIAL DUTY ASSIGNMENT PAY					
R U L E	A	B	C	D	E
	When a member receiving proficiency pay or special duty assignment pay	and the pay is	and	then proficiency pay status or special duty assignment pay status	and entitlement to proficiency pay or special duty assignment pay
1	has proficiency pay rating or special duty assignment pay rating withdrawn for any reason	proficiency pay or special duty assignment pay		is withdrawn	continues through the date stated in the order withdrawing the proficiency pay rating or special duty assignment pay rating.
2	fails to maintain the minimum level of qualification required for satisfactory performance in the military skill				stops on the date established by the authority determining the level of qualification does not meet established standards.
3	is discharged or relieved from active duty			does not reenlist within 24 hours	continues through the date of discharge (note 1).
4	is confined			confinement is result of court-martial sentence or non-judicial punishment	continues through the day prior to the date of approval of the court-martial sentence or the day prior to the date of confinement resulting from non-judicial punishment.
5	is AWOL			continues	stops during all of AWOL.
6	is reported in a missing status			continues (note 2)	continues.
7	is in a patient status, including convalescence leave	proficiency pay or special duty assignment pay	patient status is due to disease resulting from intemperate use of alcohol or habit-forming drugs	continues	stops while member is in a patient status or convalescent leave status.
8				will be withdrawn on the first day of the 13th month when a patient status continues to exist (note 2)	continues through the last day of the 12th month.
9	is demoted			grade to which reduced is below that for which either pay is authorized	continues through the day prior to the date of demotion.
10	is on temporary duty or temporary additional duty			is not performing duties requiring use of skills on which either pay is based	continues through 90th day of TDY or TAD.
11				is performing duties requiring use of the skills on which either pay is based	continues through entire period of TDY or TAD.

Table 8-2. Conditions Affecting Entitlement To Proficiency And Special Duty Assignment Pay

R U L E	A	B	C	D	E
	When a member receiving proficiency pay or special duty assignment pay	and the pay is	and	then proficiency pay status or special duty assignment pay status	and entitlement to proficiency pay or special duty assignment pay
12	is reassigned (PCS or PCA without PCS) or detailed to duty not requiring use of skills on which proficiency pay or special duty assignment pay is based	proficiency pay	commanding officer determines the reassignment or detail is permanent (over 90 days)	is terminated on the date of reporting to the new assignment or detail	continues through the day before the date member arrives at the new duty station.
13			commanding officer determines the reassignment will be less than 90 days, but it exceeds 90 days	is terminated on the 91st day of the reassignment or detail	continues through the 90th day of the detail or reassignment.
14		special duty assignment pay	commanding officer determines the reassignment or detail is permanent (over 90 days)	is withdrawn on date of departure from special duty assignment	continues through the day prior to the date of departure from special duty assignment.
15			commanding officer determines the reassignment will be less than 90 days, but it exceeds 90 days	is terminated on the 91st day of the reassignment or detail	continues through the 90th day of the detail or reassignment.
16	enters retraining status	proficiency pay	the military skill into which member is retraining is designated for proficiency pay	continues	will be at the current award level in the member's prior skill or the award level in the skill into which retraining, whichever is lower.
17			the military skill into which member is retraining is not designated for proficiency pay or special duty assignment pay	is withdrawn	continues through the day prior to the date member enters retraining status.
18		special duty assignment duty			
19	is reclassified out of the military skill on which the pay is based	proficiency pay or special duty assignment pay	the military skill to which reclassified is not designated for an award of proficiency pay or special duty assignment pay	is withdrawn on the date of reclassification	continues through the pay prior to the date of reclassification.

Table 8-2. Conditions Affecting Entitlement To Proficiency And Special Duty Assignment Pay (Continued)

	A	B	C	D	E
R U L E	When a member receiving proficiency pay or special duty assignment pay	and the pay is	and	then proficiency pay status or special duty assignment pay status	and entitlement to proficiency pay or special duty assignment pay
20	is attending a course of instruction	proficiency pay or special duty assignment pay	the course of instruction is directly related to the military skill on which the proficiency pay is based or is necessary for member's continued qualification in the special duty assignment	continues	continues.
21			the course of instruction is not directly related to the military skill on which the proficiency pay is based or is not necessary to qualify the member for special assignment in the military skill, but the member will be reassigned to the military skill on which the pay is based upon completion of the training	continues for no more than 90 days	continues through the 90th day.
22			the course of instruction is not directly related to the military skill on which the proficiency pay is based or not necessary to qualify the member for a special assignment in the military skill and the member will not be reassigned to the military skill on which the pay is based upon completion of training	is withdrawn on the date of departure for training	continues through the date of departure for training.
23	is attending a course of instruction	proficiency pay or special duty assignment pay	the course of instruction leads to commission or warrant officer status	is withdrawn	stops on the date of departure for entry into training.
24	is on authorized leave			continues	continues.
25	is serving in military specialty designated for termination of award		member continues qualified and serves in the military specialty		continues at one-half rate for 1-year period following effective date of the termination.
26	is serving in military specialty designated for reduction of award	special duty assignment pay			continues at rate for reduced award on the effective date of the reduction.
27	is reassigned PCS requiring use of skills on which pay is based		member continues qualified and performs the special duties		continues during leave en route, for periods of allowable travel time between assignments and for duty at new permanent duty station.

NOTES:

1. If a Navy member fails to reenlist on board, either proficiency pay or special duty assignment pay continues through date of discharge or release from active duty.

2. Either proficiency pay or special duty assignment pay may be awarded, withdrawn, increased, or decreased while member, otherwise eligible, is in a patient or missing status.

Table 8-2. Conditions Affecting Entitlement To Proficiency And Special Duty Assignment Pay (Continued)

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CHAPTER 09

SPECIAL PAY--ENLISTMENT AND REENLISTMENT BONUS--ENLISTED MEMBERS0901 ENLISTMENT BONUS

090101. Basic Conditions of Enlistment. An enlistment bonus may be paid to an enlistee when an enlistee meets the following conditions:

A. Enlists for a period of 4 years or more for the purpose of qualifying and serving in a military specialty designated as critical, as specified by the Secretary of the military department concerned.

B. Is one of the following:

1. Non-Prior Service Enlistee.

This term applies to a person who has never served or has served less than 180 days on active duty as a member of the Armed Forces. A non-prior Service enlistee who has received an enlistment bonus under the Selected Reserve Incentive Program (SRIP) retains eligibility for the Regular component enlistment bonus under this section if other eligibility criteria are met.

2. Prior-Service Enlistee. This

term applies to a person who has not previously received an enlistment or reenlistment bonus or who is not currently entitled to a reenlistment bonus; or

3. Reservist not on active duty

who enlists in the Regular component of the Service concerned and has not previously received an enlistment or reenlistment bonus or is not currently entitled to a reenlistment bonus. (A Reservist who has received an enlistment or reenlistment bonus under the Selected Reserve Incentive Program (SRIP) retains eligibility for the Regular component enlistment bonus if the Reservist meets all other eligibility criteria in the paragraph.)

C. Is not a Delayed Entry Program Reservist currently obligated to any other military service.

D. Qualifies for award of one of the designated military specialties.

E. Meets such additional eligibility criteria as may be prescribed by the Secretary of the military department concerned.

090102. Amount of the Enlistment Bonus. The enlistment bonus is an amount prescribed by the Secretary concerned, but not more than \$12,000.

090103. Time of Payment. An enlistment bonus may be paid upon completion of training and award of the designated military specialty in periodic installments, as determined by the appropriate Secretary, except that the first installment may not exceed \$7,000 and the remainder shall be paid in equal periodic installments which may not be paid less frequently than once every 3 months. Prior Service enlistees who require formal training of 30 days or more may be paid their enlistment bonus upon completion of that formal training. Prior Service enlistees who do not require military specialty training may not receive payment earlier than 30 days after arrival at the first permanent duty station following reentry on active duty.

090104. Reduction and Termination of Award

When a military specialty is designated for reduction or termination of award, an effective date for reduction or termination of awards is established and announced at least 30 days in advance. All awards on or after that effective date in military specialties designated for reduction or termination of award level are at the bonus level contracted on the date of enlistment.

090105. Determinations Affecting Enlistment Bonus Payments

A. When a member enlists in a Reserve component under the Delayed Enlistment Program (DEP) with a concurrent commitment to serve in a Regular component for a period of at least 4 years in a skill designated as critical, the award level of the enlistment bonus is fixed on the date of enlistment in the DEP, rather than on the date of entry on active duty.

B. When a member dies before receiving the full amount of the enlistment bonus due, the remaining unpaid balance is payable as a lump sum for inclusion in the settlement of the deceased member's final military pay account.

C. Unpaid installments of the enlistment bonus are payable to members separated prior to completion of enlistment when separated under conditions which do not require recoupment. (See section 0904.)

0902 SELECTIVE REENLISTMENT BONUS (SRB) (37 U.S.C. 308 (reference (a)))

090201. Reenlistment Zones. Three zones of consideration are established. Zone A is composed of those reenlistments falling between 21 months and 6 years of active service. Zones B and C are composed of those reenlistments or extensions falling between 6 and 14 years of active service.

A. General Eligibility. Enlisted members are eligible to receive a selective reenlistment bonus (SRB) if they meet all of the following conditions and the conditions of Zones A, B, or C eligibility:

1. Are qualified in a military specialty designated by the Secretary of the military department concerned for award of the SRB;

2. Are serving in pay grade E-3 or higher;

3. Reenlist within 3 months (or within a lesser period if so prescribed by the Secretary of the military department concerned) after the date of their discharge or release from compulsory or voluntary active duty (other than for training) (see subparagraph 090301C for computation of 3-month period); or extend their enlistment; or enlist in a Regular component within 3 months (or within a lesser period if so prescribed by the Secretary of the military department concerned) after the date of discharge or release from active duty (other than active duty for training) as a member of the Reserve component. Veterans with more than a 3-month but less than a 4-year break in active duty may qualify for a broken service Selective Reenlistment Bonus Program in accordance with regulations prescribed

by the Secretary of the military department concerned.

4. Attain eligibility before the effective date of termination of awards in any military specialty designated for termination of the award. (Members must attain eligibility before the effective date of a reduction of award level to be eligible for the higher award level. Eligibility attained through any modification of an existing Service obligation, including any early discharge granted under 10 U.S.C. 1171 (reference (c)), must have been attained before the effective date of the termination or reduction of award in the military specialty); and

5. Meet such additional eligibility criteria as may be prescribed by the Secretary of the military department concerned.

6. An exception to 1 and 4 above is available to members who agree to train and reenlist for service in a military specialty which, at the time the agreement is executed, is designated by the Service concerned for award of the SRB. Upon completion of qualification training and reenlistment in the specialty in which trained, if otherwise qualified, the member may be paid the bonus even if that specialty is no longer designated for award of the SRB. The bonus may be paid at the award level in effect at the time the agreement to train is executed or the award level in effect at the time of reenlistment, whichever is higher.

B. Zone A Eligibility. The enlisted member must:

- *1. Have completed at least 21 months of continuous active duty (other than active duty for training as a Reserve) but not more than 6 years of active duty on the date of reenlistment or beginning of an extension of enlistment. Continuous active duty is active Federal military service (other than active duty for training as a Reserve), without a break in service of more than 3 months. A break in service of less than 3 months is considered continuous active duty; however, the actual period of the break in service is not included in the computation of continuous active duty. Effective 9 December 1994, the following applies for Marine Corps members: When computing the 6 years of active service for Zone A eligibility, prior active service in any other Military Department is

excluded and only active service in the Marine Corps is included. However, this exclusion does not apply to the 14-year service cap on Marine Corps members' eligibility which considers a member's total active service.

2. Reenlist or voluntarily extend an enlistment in the Regular component of the Service concerned for a period of at least 3 years provided the reenlistment or extension, when coupled with existing active service, provides a total period of active service of at least 6 years.

3. Not have previously received a Zone A SRB.

4. Except for members serving in the Navy 6-YO Program, not have previously received a variable reenlistment bonus (VRB).

C. Zone B Eligibility. The enlisted member must:

1. Have completed at least 6 but not more than 10 years of active duty on the date of reenlistment or beginning of an extension of enlistment.

2. Reenlist or voluntarily extend an enlistment in the regular component of the Service concerned for a period of at least 3 years provided the reenlistment or extension, when coupled with existing active service, provides a total period of active service of at least 10 years.

3. Not have previously received a Zone B SRB.

D. Zone C Eligibility. Enlisted members must:

1. Have completed at least 10 but not more than 14 years of active duty on the date of reenlistment or beginning of an extension of enlistment.

2. Reenlist or voluntarily extend enlistment in the regular component of the Service concerned for a period of at least 3 years, provided the reenlistment or extension, when coupled with existing active service, provides a total period of active duty of at least 14 years.

3. Not have previously received a Zone C SRB.

E. Special Conditions

1. Members with exactly 6 years of active duty at 2400 on the date before the date of reenlistment or beginning of an extension of enlistment are entitled to a Zone A bonus if otherwise eligible and they have not previously received a Zone A bonus. If members have received a Zone A SRB or no Zone A bonus is designated, they are entitled to a Zone B bonus if all other eligibility requirements are met. Members with exactly 10 years of active duty at 2400 on the date before the date of reenlistment or beginning of an extension of enlistment are entitled to a Zone B bonus if otherwise eligible and they have not previously received a Zone B bonus. If they have received a Zone B bonus or no Zone B bonus is designated, they are entitled to a Zone C bonus if all other eligibility requirements are met. Members with exactly 14 years of active duty at 2400 on the date before the date of reenlistment or beginning of an extension of enlistment will be entitled to a Zone C bonus if otherwise eligible.

2. Two or more extensions may not be combined to gain entitlement to an SRB. Additionally, entitlement gained through an extension cannot be increased by future extensions.

3. For the purposes of determining the eligibility of a member for a selective reenlistment bonus and of computing the amount of that bonus, under regulations prescribed by the Secretary of the Service concerned, the following may be considered as part of an immediately subsequent term of reenlistment (or as part of an immediately subsequent voluntary extension of an enlistment):

a. Any period of enlistment (including any extension of an enlistment) that is incurred by a member for the purpose of continuing to qualify for continuous submarine duty incentive pay under part two, chapter 23, section 2302, or

b. Any unserved period of 2 years or less of an extension of an enlistment

for which no bonus has been paid or for which no bonus is otherwise payable, provided the immediately subsequent term of reenlistment or immediately subsequent voluntary extension of an enlistment provides additional obligated service of at least 2 years.

4. Members who reenlist or extend to gain sufficient obligated service to participate in a program leading to a commissioned or warrant officer status are not entitled to an SRB.

5. Officers of Uniformed Services who reenlist in the Service concerned within 3 months after their release from active duty as an officer are entitled to an SRB provided they served on active duty as an enlisted member in that Service immediately before serving as an officer and meet all other eligibility criteria. Pay grade for bonus computation is the grade of reenlistment.

6. Members who have received readjustment pay, severance pay, or separation pay are not eligible to receive an SRB.

7. The SRB is not payable for an enlistment in a Regular component, following a discharge from a Reserve component, during or at the completion of the period of active duty for training.

8. A member who is also eligible for the Regular reenlistment bonus is paid either bonus, whichever the member elects. (See subparagraph 090303B.)

9. Members receiving nuclear petty officer continuation pay are not eligible to receive an SRB.

090202. Amount of Payment. Bonus payments are based on multiples, not to exceed ten, of the member's monthly basic pay at the time of discharge, release from active duty, or the day before beginning of extension, multiplied by years of additional obligated service.

A. Additional Obligated Service

1. Additional obligated service is defined as any active service commitment beyond

an existing contractual Service agreement. Existing contractual Service agreements include enlistments, extensions of enlistment, enlistment as extended, and reenlistments. However, members who entered into an extension agreement before 10 May 1974, and who cancel the extension before it becomes operative to immediately reenlist for a period of at least 2 years beyond the extension agreement, are allowed to use the period of the extension for SRB computation.

2. An extension of enlistment which is cancelled by the Service concerned before becoming operative is not considered as previously obligated service for SRB computation purposes. This applies only to cancellations initiated by the Service concerned and not to cancellations initiated by the member. Service-initiated cancellations occur when the basis for the extension no longer exists. An example of a Service-initiated cancellation would be a member who extends an enlistment for a special duty assignment and before the extension becomes operative the Service denies the member the assignment.

3. Under authority provided to the Chief of Naval Operations, certain nuclear trained and qualified enlisted members of the Naval Service who enter into an extension agreement on or after 10 May 1974, and who cancel the extension before it becomes operative to immediately reenlist for a period of at least 2 years beyond the extension agreement are allowed to use the period of the extension for SRB computation.

4. Members discharged before expiration of enlistment or operative extension may not receive an SRB based on any unserved full months of obligated service of the enlistment or extension when such discharge is specifically for the purpose of immediate reenlistment.

Example 1: Member discharged 30 June 1982 from an enlistment which expires 29 October 1982 and reenlisted 1 July 1982 for 4 years, would be paid for 3 years and 8 months of additional obligated service. (Subtract date following old ETS from the new ETS date.)

Members discharged within 3 months of their normal ETS for the purpose of immediate reenlistment are considered to have completed that contract, but the unserved period within the last 3

months is considered as existing obligated service when computing the SRB entitlement. (A member who is discharged no more than 3 days early, in accordance with the regulations of the Service concerned, is considered to have completed current enlistment for SRB computation.)

Example 2: Member discharged 2 months and 3 days before expiration of enlistment, and immediately reenlisted for 4 years, could not receive an SRB for 3 months of the reenlistment period.

5. Members discharged involuntarily before expiration of enlistment or operative extension in connection with Service early separation programs, who are reenlisted immediately following discharge, are considered to have completed their Service agreement under the prior contract. The unserved period under the prior contract is considered to terminate on the date of involuntary discharge. Any Service member who elects an option for an early discharge, as opposed to being required to separate early, is not considered to have been involuntarily discharged and therefore the provisions of this subparagraph do not apply.

B. Computation Factors. Specifically, the selective reenlistment bonus (SRB)

1. Is paid in the amount of 1 month's basic pay times the multiple assigned to the military specialty (not to exceed ten), times the years, or fractions of years (months), of additional obligated service as defined above. In the case of a member reenlisting after release from active duty as an officer, use the basic pay rate applicable on the day of reenlistment. (See subparagraph 090201E5.)

2. Is not paid for obligated active service (including active duty for training) in excess of 16 years.

Example: Member with 13 years, 3 months, and 15 days active duty; 3 months, 5 days active duty for training; and 2 months, 15 days of existing obligated service, who reenlists for 4 years, can be paid an SRB (Zone C) based on 2 years, 2 months as follows:

	<u>YR</u>	<u>MO</u>	<u>DAY</u>
Active duty:	13	3	15
Active duty for training:		3	5
Existing obligated service:		2	15
Total:	13	8	35
or:	<u>13</u>	<u>1</u>	<u>5</u>
Maximum SRB years:	16	0	0

3. Does not exceed a maximum amount of \$45,000 per bonus. However, no more than 10 percent of the bonuses awarded during any fiscal year shall exceed \$20,000. (See maximum SRB years in example above.)

	<u>YR</u>	<u>MO</u>	<u>DAY</u>
Less obligated active service (partial months count as a whole month):	<u>13</u>	<u>10</u>	<u>0</u>
Time for which SRB (Zone C) is payable:	2	2	0

4. Is not paid more than once within each zone of eligibility.

C. Computation Factors for Commissioning Program

1. Any member in the commissioning program with a class start date before 1 June 1983 is unaffected.

2. Any member with a class start date on or after 1 June 1983, bonus payments are suspended.

Example 1: Assume member reenlisted 820404 for 4 years. SRB Due: \$16,000. Member was paid first installment of \$8,000 (50 percent) 820404, and second installment of \$2,666.66 on 830404. Total SRB paid to date: \$10,666.66.

Member entered officer training school (OTS) with class start date of 830601. Member's third and fourth installments would be suspended pending completion of OTS and commissioning. Given

successful completion, the member would forfeit the remaining installments. However, had the member washed out of the program and returned to enlisted status in the same bonus skill, the remaining installments would be payable but at a rate reduced by the number of days spent in the OTS program. Computation is as follows:

Initial Bonus Information:

SRB Entitlement: \$16,000
 No. Days Paid: 1440
 Daily Rate: \$11.1111 (\$16,000 / 1440)
 No. Days in OTS: 96 (member washed out of OTS 830906 (30-day basis))
 New No. Days Paid: 1344 (1440-96)
 New SRB Entitlement: \$14,933.32 (1344x\$11.1111)

Balance to be paid over remaining two (2) installments: \$4,266.66 (\$14,933.32 - \$10,666.66 paid to date)

Due Final Two (2) Installments: \$2,133.33 (\$4,266.66 divided by 2).

Example 2: Assume member reenlisted 811229 for 4 years. SRB Due: \$8,000. Member was paid first installment of \$4,000 (50 percent) 811229, and second and third installments 821229 and 831229 of \$1,333.33 each installment. Total SRB paid to date \$6,666.66.

Member entered education and commissioning program (ECP) with class start date of 840101. Member's fourth installment would be suspended pending completion of ECP and commissioning. Given successful completion, the member would forfeit the remaining installments. However, had the member washed out of the program and returned to the enlisted status in the same bonus skill the remaining installments would be payable but at a rate reduced by the number of days spent in the ECP program. Computation is as follows:

Initial Bonus Information:

SRB Entitlement \$8,000
 No. Days Paid: 1440
 Daily Rate: \$5.5555
 No. Days in ECP: 430 (member washed out of ECP 850310 (use 30-day basis))
 New No. Days Paid: 1010 (1440 - 430)
 New SRB Entitlement: \$5,611.06 (1010 x \$5.5555)

Balance to be paid over remaining installment: 0. (Member due \$5611.06; paid previously \$6,666.66). No overpayment exists, however, for recoupment purposes. Member is permitted to keep payments received before entrance in ECP.

Example 3: Assume member reenlisted 820604 for 4 years. SRB Due: \$16,000. Member was paid first installment of \$8,000 (50 percent) 820604, and second installment is due 830604.

Member entered OTS with class start date of 830610. Member's acceptance in OTS was granted 830310. Under this set of circumstances, the member would be due the second installment as it fell due before the class start date. Member should be paid the second installment, but the third and fourth installments would be suspended pending completion of the commissioning program.

Example 4: Assume member reenlisted 820604 for 4 years. SRB Due: \$16,000. Member was paid first installment of \$8,000 (50 percent) 820604, and second installment is due 830604.

Member entered ECP with class start date of 830602. Member's acceptance in ECP was granted 830310. Under this set of circumstances, the member would not be due the second installment as it fell due after the class start date. The member's second, third, and fourth installments would be suspended pending the completion of the commissioning program.

Example 5: Assume member enlisted 830101 for 4 years. Member completed training 830331, and was awarded military specialty, entitled to enlistment bonus (EB) of \$6,000. Paid first installment of \$5,000, 830401.

Member entered OTS with class start-date 830601. Member washed out of the commissioning program 831130. Computation is as follows:

Initial Bonus Information:

EB Entitlement: \$6,000
 No. Days Paid: 1440
 Daily Rate: \$4.1666 (\$6,000 / 1440)
 No. Days in OTS: 180 (member washed out of OTS 831130 (use 30-day basis))
 New No. Days Paid: 1260 (1440 - 180)

New EB Entitlement: \$5,249.92 (1260 x 4.1666)
Balance to be Paid: \$249.92 (\$5,249.92 - \$5,000
paid to date)

090203. Method of Payment. Selective reenlistment bonus (SRB) payments are paid by installments. Under regulations prescribed by the Secretary concerned, up to 50 percent of the total bonus may be paid as the first installment with the remaining portion paid in equal annual amounts over the remainder of the reenlistment period. The initial payment will normally be made on the day of reenlistment or the date a member begins serving in the extension. Initial payment of selective reenlistment bonus to an eligible individual who reenlists with a break in active duty greater than 24 hours will be made no earlier than 30 days after arrival at the first permanent duty station following reenlistment. Later installments of Zones A and B SRB are payable on the anniversary date in each year of the reenlistment. Later installments of Zone C SRB are payable on the anniversary dates of the reenlistment which occur before the individual completes 16 years of active service. In either case where there is lost time, the subsequent installment payments will be delayed by the number of days of lost time. Discharge for the purpose of immediate reenlistment does not affect a member's entitlement to subsequent installment payments.

090204. Reduction and Termination of Awards. When a military specialty is designated for reduction or termination of award, an effective date for reduction or termination of award shall be established and promulgated to the field at least 30 days in advance. Except as provided in subparagraphs 090201A6 and 090205C, all awards on and after the effective date in military specialty designated for reduction of award will be at the reduced level, and no new awards will be made on or after the effective date in a military specialty designated for termination of award.

090205. Determinations Affecting SRB Payments

A. When a member dies before receiving the full amount of the SRB due, the remaining unpaid balance is payable as a lump sum for inclusion in the settlement of the deceased member's final military pay account.

B. Once a member establishes a right to SRB upon reenlistment on or before 30 June 1977, the member is entitled to continued receipt of annual installment payments without further qualification in a critical military skill. The continued receipt of such payment does not depend upon performance of duties in the specialty for which the bonus is authorized. SRB payments for reenlistments on and after 1 July 1977 are subject to recoupment when a member is not technically qualified in the skill for which a bonus was paid as provided in section 0904 of this chapter.

C. When a member extends an enlistment, SRB payments are based on the award level multiplier in effect on the date the extension agreement is executed rather than on the date the extension agreement becomes operative.

D. Unpaid installments of SRB are payable to members separated prior to completion of enlistment when separated under conditions which do not require recoupment. (See section 0904.)

0903 REGULAR REELISTMET BONUS (RRB) (37 U.S.C. 308 (REFERENCE (aa)))

090301. Basic Conditions of Entitlement. This section is applicable only to members who were on active duty on 1 June 1974.

A. To determine the number of reenlistments for which regular reenlistment bonuses (RRB) are payable, count the following:

1. An enlistment in the Regular component of the Service concerned within 3 months from date of discharge or separation, on or after 1 October 1949, after compulsory or voluntary active duty (except active duty for training) in the Service concerned. See C below for computation of 3-month period.

2. A reenlistment between 1 October 1949 and 15 July 1954 in a Regular component following extended active duty of 1 year or more as a member of a Reserve component.

3. A voluntary extension of an enlistment for 2 years or more. (For combined enlistment extension coverage, see paragraph 090304.)

4. An enlistment or reenlistment on or after 1 October 1949 for which a member received an enlistment allowance instead of a reenlistment bonus because the former was the greater amount.

5. Any former reenlistment for which a reenlistment bonus was payable by another Uniformed Service.

6. An enlistment in the Regular component, on and after 16 July 1954, within 3 months after release from active duty as a commissioned or warrant officer under an appointment made on or after 12 October 1949. The commissioned or warrant service must have immediately followed active enlisted service in the same branch of Service.

B. Do not count:

1. Any enlistment or reenlistment entered into before 1 October 1949 for which an enlistment allowance was paid.

2. Any reenlistment for which a reenlistment bonus was not authorized, even if an erroneous payment was made and then remitted.

3. Any enlistment for which a minority discharge was issued.

C. The period of 3 months prescribed in this section (and in section 0902) begins on the day following the date of discharge or separation and ends with the day of the month 3 months later corresponding to the date of discharge or separation.

1. Example: Member discharged 3 September 1978; period of computation begins 4 September 1978 and ends 3 December 1978.

2. If members are kept in the Service beyond the date their term of service would normally end for the purpose other than rendering service (retained for purposes of trial by court-martial, etc.) the 3-month period begins on the day following their normal expiration of term of service instead of the actual date of separation. (Example Member's ETS date is 3 September 1978; member is retained for trial by court-martial 4 September 1978 and discharged 3 November 1978; period of computation begins on 4 September

1978.) There is no authority to waive the 3-month limitation on eligibility to receive an RRB or SRB.

090302. To Whom Payable. A regular reenlistment bonus (RRB) may be paid to an enlisted member who was on active duty on 1 June 1974, and who:

A. Enlists or reenlists in the Regular component of the same Service within 3 months from the date of discharge or separation after compulsory or voluntary active duty (except active duty for training). This includes members enlisting under subparagraph 090301A6. See paragraph 090301C for computation of 3-month period.

B. Was paid a reenlistment bonus under a prior law for a reenlistment on or after 16 July 1954, and who during that enlistment elects to be paid, if otherwise eligible, the difference between the amount received and that which would have been due as an RRB under this section.

C. Was inducted into the Armed Forces and who before the expiration of required service, was discharged in order to immediately enlist in the Regular component of the same Service.

D. Was inducted into the Armed Forces, completed required service, and enlists in the Regular component of the same Service within a 3-month period.

090303. Computing Regular Reenlistment Bonus

A. Compute RRB as provided in table 9-1. (See paragraph 090304 for restrictions.)

B. Members who also are eligible for the selective reenlistment bonus (SRB) maybe paid either bonus, whichever they elect. If members receive the SRB in an amount less than \$2,000 and if for a subsequent reenlistment they are eligible for the RRB under this section, they may at that time be paid the RRB, but only in an amount which when added to the award of the SRB (and RRB, if any) previously received, does not exceed a total of \$2,000.

090304. Extensions of Enlistments. Compute RRB as for actual reenlistment when members voluntarily extend their enlistment for 2 years or more. This includes combined extensions of

enlistment as provided below. When part of a year is involved, compute the bonus by using as a multiplier the total number of years and fractions of years for which the enlistment was extended. Members who were paid an RRB when they first extended their enlistment for at least 2 years, but less than 4 years, are entitled to an additional RRB for later extensions. The additional bonus payable is computed on the basis of the combined extensions, not to exceed 4 years. Compute at pay rate applicable on day before they begin serving on the first extension. Deduct the bonus paid for the first extension. A single extension for less than 2 years, or a combination of extensions totaling less than 2 years, does not constitute a reenlistment for bonus purposes. Time lost made good is not considered an extension of enlistment. When members reenlist and qualify for RRB after completing an extension, compute the bonus at the rate of basic pay they received on the date of actual discharge. If extensions entered into total 2 years or more, they constitute a reenlistment as provided in A and B below.

Example 1: Members who extend for 20 months, and subsequently for 6 months, are entitled to a bonus on the day they start serving the 6 month extension. No bonus is payable for the 20 month extension if, before entry on the 6-month extension, the 6-month extension is cancelled.

Example 2: Members who extend their enlistment for 11 months, and then for 6 additional months, and then for 12 months are entitled to a bonus on the day they start serving the third extension.

A. Army and Air Force. Before 2 January 1968, Army and Air Force members could not combine extensions of enlistment to get an RRB. Two or more extensions entered into on or after 2 January 1968 are treated as a single extension. If the extensions total 2 years or more, they constitute a reenlistment. For the purpose of combining extensions of an enlistment, an extension entered into prior to 2 January 1968 may not be combined with extensions entered into on or after 2 January 1968.

B. Navy and Marine Corps. Two 1-year extensions of an enlistment before 10 August 1956 did not constitute a reenlistment. On or after 10 August 1956, extensions of 1 year or less which,

when combined, equals 2 years or more, constitute one reenlistment for entitlement to RRB.

090305. Time of Payment. Payment of regular reenlistment bonus is normally made on the day the member reenlists. Members who extend their enlistment for 2 years or more are not paid the bonus for the extension until they actually begin serving the extension. Members who become entitled to an RRB by having extended for two or more times for a combined total of 2 years or more may not be paid a bonus until they actually begin serving the extension that, when combined with the previous extension(s), results in a service commitment of 2 years or more.

090306. Restrictions

A. Grade

1. Members in pay grade E-1 on date of last discharge or release from active duty are entitled to a regular reenlistment bonus for a first reenlistment computed on the basis of only two-thirds of their monthly basic pay on date of last discharge or release from active duty.

2. A member in pay grade E-1 or E-2 on date of last discharge or release from active duty is not entitled to a bonus for second or subsequent reenlistments.

3. A member in pay grade E-3 on date of last discharge or release from active duty is not entitled to a bonus for a third or subsequent reenlistment.

B. Length of Service. RRB may not be paid to members who reenlist:

1. During their prescribed period of basic recruit training (while a resident at a basic military training school where they receive both processing and training), or

2. After completing a total of 20 years of active Federal service. Active Federal service includes active duty for training.

3. After a break in service greater than 3 months subsequent to 1 June 1974. However, this is not a bar to entitlement for a subsequent reenlistment within 3 months of separation.

C. Cumulative Amount. The cumulative amount of RRB paid to a member under any provisions of law may not exceed \$2,000.

1. Include any reenlistment bonus paid by one or more of the Uniformed Services, less any portion later recouped, in determining the cumulative total payable under this section.

2. Any amount of erroneous payment (no entitlement to bonus existed) or overpayment (amount in excess of that authorized) made under this section, which is later remitted, is not counted as part of the \$2,000 cumulative amount.

3. Amounts of any unearned RRB requiring recoupment which are remitted must be included in determining the cumulative amount of \$2,000.

4. Amounts paid as enlistment allowances after 1 October 1949 are not included in the \$2,000 cumulative amount limitation.

D. Discharge From Another Service RRB is not payable for an enlistment entered into following discharge or separation from another branch of the Uniformed Services.

E. Members on Temporary Disability Retired List. A member whose name was placed on the temporary disability retired list, and was later discharged and reenlisted in a Regular component of the Uniformed Services more than 3 months after date of placement on such list, is not entitled to an RRB.

F. Members on Active Duty for Training. An RRB is not payable for an enlistment in a Regular component, following a discharge from a Reserve Component, during or at the completion of a period of active duty for training.

G. Reenlistments Which Will Extend Service Beyond 20 Years. The RRB is payable for only the number of years, months, and days needed to complete 20 years' active Federal service.

0904 RECOUPMENT OF ENLISTMENT AND REENLISTMENT BONUS

090401. Legal Requirements. Recoupment of unearned portions of enlistment bonus and reenlistment bonuses (regular and selective) is required:

A. When a member voluntarily or because of misconduct does not complete the term of enlistment, reenlistment extension of enlistment, or anniversary year for which the bonus was paid. Members discharged 3 months or less before expiration of enlistment for reasons set forth in subparagraph 090403N are considered to have completed the terms of enlistment, reenlistment, extension of reenlistment, or anniversary year for which the bonus was paid. For Army, Air Force, and Marine Corps members this provision became effective 2 January 1968. In computing the period "3 months or less," the date of normal expiration of enlistment is excluded.

B. When a member is not technically qualified in the skill for which a bonus was paid (other than a member who is not qualified because of injury, illness, or other impairment not the result of misconduct). This provision was effective 30 June 1977 for members paid an enlistment or selective reenlistment bonus.

090402. Recoupment Not Required

A. A member paid an enlistment bonus, who is discharged and immediately reenlisted prior to the completion of the term of service for which the bonus was paid, is not required to refund the unearned portion of the enlistment bonus provided a regular reenlistment bonus was not paid. The reenlistment must be for a period of at least 2 years beyond the period for which the enlistment bonus was paid.

B. A member paid any reenlistment bonus, who is discharged early for the purpose of immediate reenlistment for which no reenlistment bonus is paid, is not required to refund the unearned portion of the bonus provided the term of the reenlistment following the early discharge includes the remaining period of service in the prior enlistment.

090403. Reasons for Recoupment. For purpose of recoupment of any unearned portions of enlistment or reenlistment bonuses, the term "who voluntarily or because of misconduct" includes (but

is not limited to) members separated for the reasons listed below:

A. Transfer to Fleet Reserve, Fleet Marine Corps Reserve, or the Army or Air Force Reserve (and placement on the retired list of the regular Army or Air Force) with release to inactive duty before expiration of the number of years' service for which a bonus was paid. Retirement for disability is excluded.

B. Marriage-female member.

C. Resignation-separation by reason of acceptance of member's resignation (includes resignation for the good of the Service in lieu of trial by court-martial).

D. As a result of a writ of habeas corpus.

E. Reduction to permanent grade member voluntarily separated, or transferred to a Reserve component if required by law, following reduction to a lower permanent grade from a higher temporary grade in which the member was erroneously reenlisted.

F. Disability not in the line of duty.

G. Approved sentence of court-martial or conviction by a civil court.

H. Misconduct.

I. Homosexuality.

J. Defective enlistment (includes erroneous and fraudulent enlistments).

K. Entry level performance and conduct.

L. Unsatisfactory performance.

M. Drug and alcohol rehabilitation failure.

N. As directed by the Secretary of the Service concerned in individual cases. Includes voluntary separation, or transfer to a Reserve component if required by law; and for the convenience of the government upon the application and interest of the member because of special or

unusual circumstances including, but not limited to, the following:

1. To permit attendance at a civilian school.

2. To permit enlistment in another Service. Recoupment of unearned bonus is not required if the member is separated to permit acceptance of, or entry into a program leading to a commission or warrant appointment in the same or another Service; entitlement to additional unpaid bonus is suspended and will terminate upon commissioning or appointment. However, the entitlement to additional unpaid bonus will be reinstated and paid on a pro rata basis if the member is not commissioned or appointed and returns to an enlisted status in the same bonus skill.

a. Commissioning programs are defined as those programs which, upon successful completion, may lead to an appointment as a warrant or commissioned officer of the Armed Forces. These programs include attendance at:

(1) Colleges or universities to fulfill educational requirements for completion of baccalaureate degree, or

(2) Service academy preparatory schools to obtain educational requirements for entrance to Service academy, or

(3) Service schools for the purpose of training and screening eligible applicants for an appointment as a warrant or commissioned officer.

3. To permit enlistment of aliens in the Armed Forces of their country.

4. Sole surviving family member.

5. Conscientious objection.

6. Overweight /obesity or physical fitness.

7. Pregnancy. Recoupment is required only where member is voluntarily separated, not when pregnancy causes loss of qualification in bonus skill.

8. Public office.

9. Parenthood.

EXCEPTIONS: Hardship and dependency separations are considered involuntary for the purposes of this paragraph and do not require recoupment of unearned portions of a bonus.

O. Reasons established by military departments (reasons will be approved by ASD (MI&L)). The decision to recoup will be made by DASD (MP and FM).

P. See the individual Services procedural instructions for a list of separation reasons and the corresponding separation program designator (SPD) codes.

090404. Additional Reasons for Recoupment Except for members not qualified because of injury, illness, or other impairment not the result of their own misconduct, entitlement to the full amount of an enlistment or selective reenlistment bonus awarded after 30 June 1977, will be contingent upon a member maintaining the technical qualification required for effective performance in the military specialty for which the bonus was awarded.

A. A member will be considered not technically qualified in the bonus specialty when no longer classified in that specialty, when the specialty designator is removed from the member's records, and when current and future assignment in that military specialty is precluded for any of the following reasons within the member's control:

1. Refusal to perform certain duties required for effective performance in the military specialty when the member had volunteered for such duties in writing before accepting the bonus.

2. Disciplinary action taken under UCMJ or civil court conviction when such action renders the individual unqualified for future performance in the military specialty.

3. Injury, illness, or other impairment resulting from own misconduct, as established through existing line of duty determination procedures, which interferes with effective performance in the military specialty.

4. Withdrawal of the minimum security clearance, loss of qualification under the Personnel Reliability Program (PRP), or loss of any other mandatory qualification required for effective performance in the military specialty, when such withdrawal or loss is voluntary or caused by the member's own misconduct and results in removal from the military specialty.

B. In addition to the criteria specified in subparagraph A above, a member of the Navy will be considered not technically qualified for duty in connection with the supervision, operation, and maintenance of naval nuclear propulsion plants for the following reasons within the member's control:

1. Removal of Navy Enlisted Classification Code (NEC) as a result of the member's demonstrated inability to maintain the required proficiency, or failure to meet the qualification or requalification measures required for duty in connection with the supervision, operation, and maintenance of naval nuclear propulsion plants.

2. Removal of the NEC as a result of the member's demonstrated lack of reliability for assignment to duty in connection with the supervision, operation, and maintenance of naval nuclear propulsion plants.

090405. Recoupment Due to Lost Time. Time lost during a period for which an enlistment or reenlistment bonus was paid must be made good before discharge or a pro rata part of the bonus must be recouped.

090406. Computation of Recoupment of Enlistment and Reenlistment Bonuses

A. Regular Reenlistment Bonus (37 U.S.C. 308 (reference (aa))). Recoupment is required on a percentage basis for the time remaining to be served. Reduce the amount paid to an amount per month. Multiply the number of months and fractions of months not served, including lost time, by the amount of bonus paid per month. The product is the amount to be recouped. When a member receives a reenlistment bonus for a period less than that for which reenlisted because obligated service would extend beyond 20 years, recoupment is computed on the

basis of the actual period for which paid. For purposes of this computation, a month consists of 30 days.

Example: A member reenlists for 4 years on 16 July 1973. Monthly basic pay on discharge was \$390.60; $\$390.60 \times 4 = \$1,562.40$, the total amount of the reenlistment bonus paid. The amount per month is computed at $\$1,562.40 / 48$ months or \$32.55 per month. This member served 2 years, 11 months, and 15 days and was discharged on 30 June 1976 for a reason requiring recoupment. One year and 15 days were not served. Twelve and one-half months $\times \$32.55 = \$406.88$ --the amount to be collected from the member.

B. **Selective Reenlistment Bonus.** The same principle that is applied to the recoupment of the regular bonus applies to SRB. However, a member who received SRB did not receive an RRB for the same reenlistment. Also, the recoupment of SRB is based on the period of additional obligated service and not on the entire enlistment period. Further, the total amount of SRB is earned upon completion of 16 years of active service.

Example 1: A member reenlisted for 6 years with additional obligated service of 4 years. Member qualified for an SRB totaling \$6,000. Member received the first installment of \$1,000 on reenlistment and additional installments of \$1,000 on the first and second anniversary dates of the reenlistment, or a total of \$3,000. If the member is discharged for a reason requiring recoupment of the bonus after serving 2 years, 6 months of the 6-year reenlistment period, compute the amount due the United States as follows:

The member served only 6 months of additional obligated service. Since additional obligated service was 4 years or 48 months, the SRB was

earned at the rate of \$125 per month during the 6-month period of additional obligated service ($\$6,000 / 48 = \$125$). One-hundred twenty-five dollars per month $\times 6$ months = \$750 earned. Since the member was paid a total of \$3,000 in initial and anniversary payment, \$2,250 is due the United States.

Example 2: A member reenlisted for 4 years with additional obligated service of 3 years 9 months. Member qualified and was paid an SRB of \$4,232.25. If the member is discharged for a reason requiring recoupment of the bonus after serving 1 year, 4 months, 20 days of the 4-year reenlistment period, compute the amount due the United States as follows:

The member served only 1 year, 1 month, and 20 days of the additional obligated service. Since additional obligated service was 3 years and 9 months (45 months), the SRB was earned at the rate of \$94.05 per month ($\$4,232.25 / 45 = \$94.05$). The amount earned for the 1 year, 1 month and 20 days service was \$1,285.35 ($13\text{-}20/30$ months $\times \$94.05 = \$1,285.35$ earned). Since the member was paid a total of \$4,232.25 and \$1,285.35, then \$2,946.90 is due the United States. Although the above example shows the recoupment computation in terms of months, the computation may be made using a daily rate with each whole month converted to 30 days.

C. **Enlistment Bonus.** The same principle that is applied to the recoupment of RRB applies to the enlistment bonus.

D. For all enlistment/reenlistment bonuses, reduce the amount to be recouped by an amount equal to any reduction taken under subparagraphs 350702F or 350802D.

COMPUTATION OF REGULAR REENLISTMENT BONUS—37 U.S.C. 308 (Note 1)					
R U L E	A	B	C	D	E
	When	compute reenlistment bonus by using	at pay rate applicable	multiplied by	to obtain amount payable as
1	an enlisted member reenlists on or after 16 Jul 1954	1 month's basic pay (1st reenlistment); or two-thirds of 1 month's basic pay (2nd reenlistment); or one-third of 1 month's basic pay (3rd reenlistment); or one-sixth of 1 month's basic pay (4th and subsequent reenlistments) (note 2)	on date of discharge or release from active duty	number of years for which member reenlists	1st reenlistment bonus; 2nd reenlistment bonus; 3rd reenlistment bonus; or 4th or subsequent reenlistment bonus, as applicable (note 3).
2	an officer or warrant officer qualified under subparagraph 090301A6, reenlists on or after 16 Jul 1954		to grade in which enlisted (including cumulative years service) (note 4)		
3	an enlisted member's reenlistment or extension extends the active service beyond 20 years		on date of discharge or release from active duty	number of years, months, and days needed to complete 20 years' active Federal service	
4	an enlisted member extends the enlistment for 2 years or more (note 5)		on day before the day member begins serving on the extension	number of full years and fractions thereof (not to exceed 4) for which member extended enlistment	
5	an enlisted member of the Navy or Marine Corps, on or after 10 Aug 1956, or of the Army or Air Force, on or after 2 Jan 1968, has combined enlistment extensions totaling 2 years or more (note 5)		on day before the day member begins serving on first extension		

NOTES:

1. Applicable only to members on active duty on 1 June 1974.
2. Navy and Marine Corps—exclude the 25 percent increase in basic pay provided under section 0204, part one, chapter 2.
3. See subparagraph 090306 for grade, length of service, and cumulative amount payment restrictions.

4. Pay reenlistment bonus at the higher grade when there is a simultaneous promotion to a higher grade effective on the date of reenlistment.

5. Extension of 2 years or more is counted as a reenlistment in computing bonus payable for later reenlistments.

Table 9-1. Computation of Regular Reenlistment Bonus—37 U.S.C. 308

CHAPTER 18

SPECIAL PAY—SEA DUTY1801 CAREER SEA PAY

180101. Entitlement. Effective 1 January 1981, a member entitled to basic pay who is in pay grade E-4 or above may be entitled to career sea pay (CSP) for sea duty as defined in paragraph 180103.

180102. Conditions of Entitlement

See table 18-1.

180103. Definitions. Sea duty, for the purpose of entitlement to career sea pay, is service performed by a member under orders issued by competent authority:

A. While permanently assigned for duty to a ship, ship-based staff, or ship-based aviation unit and serving in a ship whose primary mission is accomplished underway, including periods not to exceed the first 30 consecutive days each while on temporary additional duty ashore.

B. While temporarily assigned for duty to a vessel, ship-based staff, or ship-based aviation unit and serving in a ship whose primary mission is accomplished underway.

C. While permanently or temporarily assigned for duty to a vessel or ship-based staff and serving in a ship whose primary mission is accomplished in port, but only during that period while the ship is away from its home port. A ship is considered away from its home port whenever it is at sea, or it is in port that is more than 50 miles away from the home port.

D. While serving as a member of the off crew of a two-crewed submarine (effective 14 October 1981).

E. The following changes are effective 1 January 1988 for those members stationed aboard category "B" vessels:

1. Entitled to CSP for every day the vessel is at sea or at a port at least 50 miles away from the vessel's assigned home port.

2. Entitled to credit for the cumulative sea-duty counter during the entire period while assigned to the category "B" vessel.

3. The above provisions are not retroactive for time already spent aboard category "B" vessels.

F. The word "vessel" or "ship" shall mean a self-propelled vessel in an active status, in commission or in-service.

180104. Rates

A. The monthly rates of career sea pay for commissioned officers are in table 18-2.

B. The monthly rates of career sea pay for warrant officers are in table 18-3.

C. The monthly rates of career sea pay for enlisted members are listed in tables 18-4, 18-4A, and 18-4B. These tables apply to:

1. Members with less than 5 years of sea duty:

a. Members assigned to sea duty and in receipt of career sea pay for any period of time between 1 October 1987 and 31 December 1987, are entitled to the CSP rates in table 18-4. The entitlement to saved CSP in this table terminates when members are permanently reassigned to duty for which the member would no longer qualify for CSP.

b. Members reporting to sea duty between 1 January 1988 and 30 April 1988 and who were not on sea duty for any period of time between 1 October 1987 and 31 December 1987 are entitled to the CSP rates in table 18-4A.

c. Members reporting to sea duty on or after 1 May 1988 who were not on sea duty for any period of time between 1 October 1987 and 31 December 1987 are entitled to the CSP rates in table 18-4B.

2. Members with more than 5 years of sea duty:

a. Members assigned to sea duty with over 5 years' sea duty on 1 January 1988 are entitled to the CSP rates in tables 18-4/18-4A. The entitlement to saved CSP in these tables terminates when members are permanently reassigned to duty for which the member would no longer qualify for CSP.

b. Members assigned to sea duty with over 5 years' sea duty on 1 May 1988 are entitled to either the CSP rates in tables 18-4/18-4A and CSP premium, or the CSP rates in table 18-4B. CSP premium and the CSP rates in table 18-4B are not allowed. Use the CSP rates that are most advantageous to the member. The following applies:

(1) When a member has less than 3 years' consecutive sea duty on 1 May 1988, then only the CSP rates in table 18-4B apply.

(2) When a member has more than 3 years' consecutive sea duty immediately prior to 30 April 1988, and was on sea duty anytime during the period 1 February 1988 to 30 April 1988, then use either the CSP rates in table 18-4B or the CSP rates in table 18-4 or 18-4A and CSP premium.

180105. Restrictions on Payments

A. Passenger and Travel Status. Do not pay career sea pay to members en route to and from ships outside the CONUS, or on board a ship for transportation, regardless of the length of the period. This restriction applies for the period prior to a member reporting for permanent duty and after being permanently detached from duty on board a ship.

B. Midshipmen, Aviation Cadets, and Academy Cadets. Career sea pay is not payable to midshipmen, aviation cadets, or academy cadets.

C. An enlisted member may not receive both career sea pay and foreign duty pay for the same period of service.

180106. Status of Vessels (Navy). The status of each Naval vessel or craft is designated by the Chief of Naval Operations in accordance with and as defined by Article 0305, Navy Regulations (reference (ak)). When doubt exists as to the status of a vessel or craft for a particular period or when the nature of employment is not known, forward a request for determination of entitlement to career sea pay to the Comptroller of the Navy via the Chief of Naval Personnel.

1802 CAREER SEA PAY PREMIUM

180201. Entitlement

A. All officers, warrant officers and E-4s who are entitled to career sea pay and have served 36 consecutive months of sea duty are entitled to a monthly career sea pay premium for the 37th consecutive month and each subsequent consecutive month of sea duty served by such members.

B. Enlisted members (E-5 to E-9) with at least 3 years, but less than 5 years of sea duty and who have served 36 consecutive months of sea duty, are entitled to a monthly career sea pay premium for the 37th consecutive month and each subsequent consecutive month of sea duty served by such member.

C. Enlisted members (E-5 to E-9) with over 5 years of sea duty and who were on sea duty at anytime between 1 February 1988 and 30 April 1988 and have served 36 consecutive months of sea duty are entitled to career sea pay premium for the 37th consecutive month and each subsequent consecutive month of sea duty served by such members and the CSP rates in table 18-4/18-4A. Under no circumstances will the CSP premium and the CSP rates in table 18-4B be authorized.

180202. Rate Payable. The monthly rate of career sea pay premium is \$100.

180203. Computation of Consecutive Months of Sea Duty. The computation of consecutive months of sea duty is under regulations prescribed by the Secretary concerned.

CAREER SEA PAY—CONDITIONS OF ENTITLEMENT					
R U L E	A	B		C	D
	When an eligible member	and is serving on a ship whose primary mission is accomplished			
		underway	in port	and	then career sea pay
1	reports for permanent duty defined as sea duty	X			starts on date of reporting.
2			X	member is on board when ship departs from home port	accrues from departure date.
3			X	member reports on board while ship is away from home port	accrues from day of re-reporting.
4	is detached from permanent duty defined as sea duty	X	X		terminates on date of detachment provided member is otherwise entitled on that date.
5	is discharged while on sea duty	X	X	immediately reenlists on board	continues to accrue provided member is otherwise entitled.
6	on sea duty is entitled to career sea pay		X	ship returns to home port	accrues through the date the ship returns to home port.
7	on sea duty	X		is on TDY, TAD, temporarily based ashore, under orders, or hospitalized ashore (note 1)	accrues during the first 30 days member is in such status.
8			X		accrues during the first 30 days member is in such status provided member is otherwise entitled and ship remains away from its home port (note 2).
9	on sea duty is on authorized leave	X	X		accrues for the period of leave if otherwise entitled.
10	who is based on or stationed ashore	X		the type of duty is TAD or TDY	accrues from date of reporting through date of detachment (note 3).
11			X		accrues as indicated in rules 2 and 3, as applicable, and terminates as indicated in rule 6 or date of detachment if ship remains away from home port.
12	is suspended or otherwise removed from duty or confined awaiting trial by court-martial	X	X	is acquitted or charges are dismissed	accrues retroactively from first day of confinement, suspension, or removal from duty, provided member is otherwise entitled.
13		X	X	is convicted	does not accrue beginning first day of confinement, suspension, or removal from duty through date prior to day of return to duty from any status above (note 4).

Table 18-1. Career Sea Pay—Conditions Of Entitlement

R U L E	A	B		C	D
	When an eligible member	and is serving on a ship whose primary mission is accomplished		and	then career sea pay
		underway	in port		
14	is confined as a result of court-martial	X	X		does not accrue beginning first day of confinement through date prior to date of release from confinement (note 4).
15	is permanently or temporarily assigned to duty on a ship which is undergoing alterations or repairs	X	X (note 5)	ship remains in an active status (in commission or in-service) (note 6)	continues to accrue.
16	is permanently or temporarily assigned to duty on a ship undergoing inactivation processing	X	X		stops when the ship reverts to inactive status.
17	is assigned to an FMF unit based on or stationed ashore	X		the type of duty is TAD or TDY	accrues from the date of embarkation through the date of debarkation (note 3).

NOTES:

1. Temporarily based ashore refers to a ship-based aviation unit or ship-based staff that has landed ashore with intent to return to a ship.
2. Entitlement terminates when the ship returns to the home port.
3. Further TAD/TDY ashore from ship will not interrupt career sea pay entitlement for the first 30 days member is in such status provided member is otherwise entitled and returns to the ship.

4. Where sentence is changed to restriction to ship and member performs duty, career sea pay is resumed. Nonjudicial punishment does not result in loss of career sea pay.
5. Entitlement accrues only when the ship is away from the home port.
6. OPNAVINST 4700.8 series defines ship status assignments for USN ships.

Table 18-1. Career Sea Pay—Conditions Of Entitlement (Continued)

MONTHLY CAREER SEA DUTY PAY RATES—COMMISSIONED OFFICERS—EFFECTIVE 1 OCT 1985														
Years of Sea Duty														
Pay Grade	Over 3	Over 4	Over 5	Over 6	Over 7	Over 8	Over 9	Over 10	Over 11	Over 12	Over 14	Over 16	Over 18	Over 20
O-1	\$150	\$160	\$185	\$190	\$195	\$205	\$215	\$225	\$225	\$240	\$250	\$260	\$270	\$280
O-2	150	160	185	190	195	205	215	225	225	240	250	260	270	280
O-3	150	160	185	190	195	205	215	225	225	240	260	270	280	290
O-4	185	190	200	205	215	220	220	225	225	240	270	280	290	300
O-5	225	225	225	225	230	245	250	260	265	265	285	300	315	340
O-6	225	230	230	240	255	265	280	290	300	310	325	340	355	380

★Table 18-2. Monthly Career Sea Duty Pay Rates—Commissioned Officers—Effective 1 Oct 1985

MONTHLY CAREER SEA DUTY PAY RATES—WARRANT OFFICERS—EFFECTIVE 1 JAN 1988											
Years of Sea Duty											
Pay Grade	1 or Less	Over 1	Over 2	Over 3	Over 4	Over 5	Over 6	Over 7	Over 8	Over 9	
W-1	\$130	\$135	\$140	\$150	\$170	\$175	\$200	\$250	\$270	\$300	
W-2	150	150	150	150	170	260	265	265	270	310	
W-3	150	150	150	150	170	270	280	285	290	310	
W-4	150	150	150	150	170	290	310	310	310	310	
W-5	150	150	150	150	170	290	310	310	310	310	

Pay Grade	Over 10	Over 11	Over 12	Over 14	Over 16	Over 18	Over 20
W-1	\$325	\$325	\$340	\$360	\$375	\$375	\$375
W-2	340	340	375	400	400	400	400
W-3	350	375	400	425	425	450	450
W-4	350	375	400	450	450	500	500
W-5	350	375	400	450	450	500	500

★Table 18-3. Monthly Career Sea Duty Pay Rates—Warrant Officers—Effective 1 Jan 1988

MONTHLY CAREER SEA DUTY PAY RATES—ENLISTED MEMBERS—EFFECTIVE 1 OCT 1984										
Years of Sea Duty										
Pay Grade	1 or Less	Over 1	Over 2	Over 3	Over 4	Over 5	Over 6	Over 7	Over 8	Over 9
E-4	\$ 50	\$ 60	\$125	\$160	\$175	\$175	\$175	\$175	\$175	\$175
E-5	60	70	140	175	185	190	205	220	220	220
E-6	125	135	170	190	210	215	225	235	245	255
E-7	135	145	215	235	255	260	265	265	270	275
E-8	165	180	225	255	265	270	280	285	290	300
E-9	175	195	235	265	280	290	310	310	310	310

Pay Grade	Over 10	Over 11	Over 12	Over 13	Over 14	Over 16	Over 18
E-4	\$175	\$175	\$175	\$175	\$175	\$175	\$175
E-5	220	220	220	220	220	220	220
E-6	265	265	280	295	310	325	340
E-7	280	300	310	330	350	370	390
E-8	310	310	320	340	360	380	400
E-9	320	330	350	370	390	410	410

Table 18-4. Monthly Career Sea Duty Pay Rates—Enlisted Members
Effective 1 Oct 1984 through 31 Dec 1987

MONTHLY CAREER SEA DUTY PAY RATES—ENLISTED MEMBERS WHO REPORT TO SEA DUTY ON OR AFTER 1 JAN 1988 AND PRIOR TO 1 MAY 1988										
Years of Sea Duty										
Pay Grade	1 or Less	Over 1	Over 2	Over 3	Over 4	Over 5	Over 6	Over 7	Over 8	Over 9
E-4	\$ 50	\$ 60	\$120	\$150	\$160	\$175	\$175	\$175	\$175	\$175
E-5	50	60	120	150	170	190	205	220	220	220
E-6	100	100	120	150	170	215	225	235	245	255
E-7	100	100	120	175	190	260	265	265	270	275
E-8	100	100	120	175	190	270	280	285	290	300
E-9	100	100	120	175	190	290	310	310	310	310

Pay Grade	Over 10	Over 11	Over 12	Over 13	Over 14	Over 16	Over 18
E-4	\$175	\$175	\$175	\$175	\$175	\$175	\$175
E-5	220	220	220	220	220	220	220
E-6	265	265	280	295	310	325	340
E-7	280	300	310	330	350	370	390
E-8	310	310	320	340	360	380	400
E-9	320	330	350	370	390	410	410

★Table 18-4A. Monthly Career Sea Duty Pay Rates—Enlisted Members Who Report To Sea Duty On Or After 1 Jan 1988 And Prior To 1 May 1988

MONTHLY CAREER SEA DUTY PAY RATES—ENLISTED MEMBERS—EFFECTIVE 1 MAY 1988										
Years of Sea Duty										
Pay Grade	1 or Less	Over 1	Over 2	Over 3	Over 4	Over 5	Over 6	Over 7	Over 8	Over 9
E-4	\$ 50	\$ 60	\$120	\$150	\$160	\$160	\$160	\$160	\$160	\$160
E-5	50	60	120	150	170	315	325	350	350	350
E-6	100	100	120	150	170	315	325	350	350	365
E-7	100	100	120	175	190	350	350	375	390	400
E-8	100	100	120	175	190	350	350	375	390	400
E-9	100	100	120	175	190	350	350	375	390	400

Pay Grade	Over 10	Over 11	Over 12	Over 13	Over 14	Over 16	Over 18
E-4	\$160	\$160	\$160	\$160	\$160	\$160	\$160
E-5	350	350	350	350	350	350	350
E-6	365	365	380	395	410	425	450
E-7	400	410	420	450	475	500	500
E-8	400	410	420	450	475	500	520
E-9	400	410	420	450	475	520	520

★Table 18-4B. Monthly Career Sea Duty Pay Rates—Enlisted Members—Effective 1 May 1988

CHAPTER 23

SUBMARINE DUTY PAY2301 INCENTIVE PAY FOR OPERATIONAL SUBMARINE DUTY

230101. Entitlement. Effective 1 January 1981, a member of the Navy who is entitled to basic pay but is not entitled to continuous monthly submarine duty incentive pay under section 2302 of this chapter, is entitled to submarine duty incentive pay for the frequent and regular performance of operational submarine duty required by orders (including a submarine of a foreign nation). Effective 1 January 1988, this paragraph includes members of the Naval Service.

230102. Rates

A. The monthly rates of submarine duty pay for commissioned officers are in table 23-3.

B. The monthly rates of submarine duty pay for warrant officers are in table 23-4.

C. The monthly rates of submarine duty pay for enlisted members are in table 23-5.

230103. Definitions

A. The term "operational submarine duty" means duty:

1. While attached under competent orders to a submarine;
2. While serving as an operator or crew member of an operational submersible (including an underseas exploration or research vehicle);
3. While undergoing training preliminary to assignment to a nuclear-powered submarine;
4. While undergoing rehabilitation after assignment to a nuclear-powered submarine; or
5. In the case of a member qualified in submarines, while attached as a member of a submarine operational command staff, whose

duties require serving on a submarine during underway operations:

a. During 1 calendar month-48 hours. However, hours served underway in excess of 48 hours as a member of a submarine operational command staff during any of the immediately preceding 5 calendar months and not already used to qualify for incentive pay, may be applied to satisfy the 48-hour underway time requirements for the current month.

b. During any 2 consecutive calendar months, when requirements have not been met for the first month-96 hours.

c. During any 3 consecutive calendar months, when requirements have not been met for the first 2 months-144 hours.

6. While receiving instruction to prepare for assignment to a submarine of advanced design; or

7. While receiving instruction to prepare for a position of increased responsibility on a submarine.

B. The term "submarine service" means the service performed under regulations prescribed by the Secretary of the Navy by a member, and the years of submarine service are computed beginning with the effective date of the initial order to perform submarine service.

230104. Submarine Duty Pay Start and Stop Dates. See table 23-1.230105. Submarine Operational Command Staff Members

A. General rules for meeting underway time requirements, including determination of a 2- or 3-month grace period, are substantially the same as those for flying pay. (See part two, chapter 22.)

B. For fractional part of a calendar month, or fractional parts of 2 consecutive calendar months (duty begins in 1 month and ends in the following month), the underway time required,

based on the requirement of 48 hours for a calendar month, will be determined from table 23-2.

230106. Temporary Additional Duty or Authorized Leave. A member who is entitled to submarine duty pay retains entitlement during periods of temporary additional duty or authorized leave. However, a submarine operational command staff member is required to fulfill the underway time requirements to retain entitlement during such periods if not otherwise entitled to continuous monthly submarine duty pay in accordance with section 2302 of this chapter.

230107. Missing Status—Member's Entitlement. A member receiving submarine duty pay when entering a missing status as defined in the Definitions is entitled to submarine duty pay during the period of absence and for the period, not to exceed 1 year, required for hospitalization and rehabilitation after termination of missing status. The member's entitlement to submarine duty pay upon termination of the required period of hospitalization and rehabilitation or the 1-year period after date of return from missing status, whichever is earlier, will be contingent on a determination of continued eligibility under paragraph 230101.

230108. Restriction. An officer who fails selection for assignment as an executive officer or commanding officer of a submarine, or who declines to serve in either such position, may not be paid submarine duty pay except for periods during which such officer is serving on a submarine during underway operations.

2302 CONTINUOUS MONTHLY SUBMARINE DUTY PAY FOR SUBMARINE SERVICE MEMBERS

230201. Entitlement. Effective 1 January 1981, a member of the submarine service (as defined in paragraph 230103B) is entitled to continuous monthly submarine duty pay as follows:

A. Through 26 years of service (as computed under 37 U.S.C. 205 (reference (aa))), except in the case of an officer, periods as an enlisted member before initial appointment as an officer are excluded), a member must perform operational submarine duties for at least 6 of the first 12, and at

least 10 of the first 18 years of submarine service. However, if a member performs the prescribed operational submarine duties for at least 8 but less than 10 of the first 18 years of submarine service, such member is entitled to continuous monthly submarine duty pay for the first 22 years of service (as computed under 37 U.S.C. 205 (reference (aa))).

B. If upon completion of either 12 or 18 years of submarine service it is determined that a member has failed to perform the minimum prescribed operational submarine duty requirements during the prescribed periods of time, entitlement to continuous monthly submarine duty pay ceases. If entitlement to continuous monthly submarine duty pay ceases upon completion of 12 years of submarine service, entitlement to that pay may again commence upon completion of 18 years of submarine service if the minimum operational submarine duty requirements have been met, and such pay shall continue for the period of time prescribed in this section. However, if entitlement to continuous monthly submarine duty pay ceases in the case of any member at the completion of either 12 or 18 years of submarine service, or 26 years of service (as computed under 37 U.S.C. 205 (reference (aa))), except in the case of an officer, periods as an enlisted member before initial appointment as an officer are excluded), such member shall be entitled to that pay in the amount set forth in section 2301 of this chapter for the performance of service as a member of a submarine operational command staff, if such member's duties require serving on a submarine during underway operations.

230202. Rates. The monthly rates of submarine duty pay are the same as indicated in paragraph 230102.

230203. Missing Status—Member's Entitlement. The provisions of paragraph 230107 are also applicable to submarine duty pay entitlement under this section.

230204. Restriction. An enlisted member may not be paid continuous submarine duty pay while serving ashore between submarine sea duty assignments unless the member has a sufficient period of enlistment (including any extension of an enlistment) remaining to be reassigned to submarine sea duty.

SUBMARINE DUTY PAY—START AND STOP DATES				
R U L E	A	B	C	D
	If member under orders for submarine duty is	and	then credit for incentive pay	
			begins on	continues
1	attached to a submarine		day of reporting duty	through day of detachment.
2	assigned as prospective crewmember of submarine under construction			
3	attached to a nuclear-powered submarine manned by two crews or a crew and an augment crew (notes 1 and 2)		day of reporting on-ship or off-ship crew for duty	
4	undergoing instruction to qualify for duty on submarine of advanced design or for duty with increased responsibility (note 3)		day class convenes	through last day of instruction.
5	injured or incapacitated as a result of performing submarine duty	remains assigned to submarine duty		through date of detachment.
6		is transferred to a medical facility on temporary additional duty orders for treatment		for not more than 5 months after date of the incapacity, as determined by medical authorities.
7		is reassigned PCS to a medical activity for treatment during the 5-month period		through day of detachment only.

NOTES:

1. Attachment to a submarine means duty as a crew member either on board the submarine or on duty ashore during periods of rehabilitation after reporting for permanent duty as a crew member, whether to the on-ship or off-ship crew.

2. When an off-crew member in a training and rehabilitation status performs travel in connection with a change of home port of the member's submarine by means other than the submarine, member's entitlement to submarine pay continues during period in transit.

3. This rule also applies to officers who previously qualified in submarines as enlisted members while attending the following: (a) Submarine Officers' Basic Course or Submarine Officers' Indoctrination Course, for the specific purpose of preparing for a position in a nuclear-powered submarine, or (b) a course of instruction, published in SECNAV Instruction 7330.48 series, specifically preparing them for positions of increased responsibility in nuclear-powered submarines.

Table 23-1. Submarine Duty Pay - Start Stop Dates

SUBMARINE OPERATIONAL COMMAND STAFF MEMBERS UNDERWAY TIME REQUIRED FOR FRACTIONAL PART OF MONTH					
Days	Underway Time		Days	Underway Time	
	Hours	Minutes		Hours	Minutes
1	1	36	16	25	36
2	3	12	17	27	12
3	4	48	18	28	48
4	6	24	19	30	24
5	8	00	20	32	00
6	9	36	21	33	36
7	11	12	22	35	12
8	12	48	23	36	48
9	14	24	24	38	24
10	16	00	25	40	00
11	17	36	26	41	36
12	19	12	27	43	12
13	20	48	28	44	48
14	22	24	29	46	24
15	24	00	30-31	48	00

Table 23-2. Submarine Operational Command Staff Members Underway Time Required for Fractional Part of Month

MONTHLY SUBMARINE DUTY PAY RATES—COMMISSIONED OFFICERS—EFFECTIVE 1 JAN 1988							
Years of Service Computed Under 37 U.S.C. 205							
Pay Grade	2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10
O-10	\$355	\$355	\$355	\$355	\$355	\$355	\$355
O-9	355	355	355	355	355	355	355
O-8	355	355	355	355	355	355	355
O-7	355	355	355	355	355	355	355
O-6	595	595	595	595	595	595	595
O-5	595	595	595	595	595	595	595
O-4	365	365	365	405	595	595	595
O-3	355	355	355	390	595	595	595
O-2	235	235	235	235	235	235	355
O-1	175	175	175	175	175	175	355
	Over 12	Over 14	Over 16	Over 18	Over 20	Over 22	Over 26
O-10	\$355	\$355	\$355	\$355	\$355	\$355	\$355
O-9	355	355	355	355	355	355	355
O-8	355	355	355	355	355	355	355
O-7	355	355	540	535	535	410	355
O-6	595	595	595	595	595	595	595
O-5	595	595	595	595	595	595	595
O-4	595	595	595	595	595	595	595
O-3	595	595	595	595	595	595	595
O-2	355	355	355	355	355	355	355
O-1	355	355	355	355	355	355	355

Table 23-3. Monthly Submarine Duty Pay Rates—Commissioned Officers—Effective 1 Jan 1988

MONTHLY SUBMARINE DUTY PAY RATES—WARRANT OFFICERS—EFFECTIVE 1 JAN 1988							
Years of Service Computed Under 37 U.S.C. 205							
Pay Grade	2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10
W-5	235	310	310	355	355	355	355
W-4	235	310	310	355	355	355	355
W-3	235	310	310	355	355	355	355
W-2	235	310	310	355	355	355	355
W-1	235	310	310	355	355	355	355
	Over 12	Over 14	Over 16	Over 18	Over 20	Over 22	Over 26
W-5	355	355	355	355	355	355	355
W-4	355	355	355	355	355	355	355
W-3	355	355	355	355	355	355	355
W-2	355	355	355	355	355	355	355
W-1	355	355	355	355	355	355	355

Table 23-4. Monthly Submarine Duty Pay Rates—Warrant Officers—Effective 1 Jan 1988

MONTHLY SUBMARINE DUTY PAY RATES—ENLISTED MEMBERS—EFFECTIVE 1 JAN 1988							
Years of Service Computed Under 37 U.S.C. 205							
Pay Grade	2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10
E-9	225	225	225	270	295	310	315
E-8	225	225	225	250	270	295	310
E-7	225	225	225	250	255	265	275
E-6	155	170	175	215	230	245	255
E-5	140	155	155	175	190	195	195
E-4	80	95	100	170	175	175	175
E-3	80	90	95	95	140	90	90
E-2	75	90	90	90	90	90	90
E-1	75	75	75	75	75	75	75
	Over 12	Over 14	Over 16	Over 18	Over 20	Over 22	Over 26
E-9	330	345	355	355	355	355	355
E-8	315	330	330	345	345	345	345
E-7	295	310	310	310	310	310	310
E-6	265	265	265	265	265	265	265
E-5	195	195	195	195	195	195	195
E-4	175	175	175	175	175	175	175
E-3	90	90	90	90	90	90	90
E-2	90	90	90	90	90	90	90
E-1	75	75	75	75	75	75	75

Table 23-5. Monthly Submarine Duty Pay Rates—Enlisted Members—Effective 1 Jan 1988

INTERIM CHANGES NOT INCLUDED IN VOLUME 7A OF JULY 1996

CHANGE NO.	Title	Issue Date
5-96	<u>Savings Deposit Program for Operation Joint Endeavor</u>	15 MAR 1996
6-96	<u>Diplomate Pay for Psychologists and Board Certified Pay for Non-Physician Health Care Providers</u>	2 MAY 1996
7-96	<u>Advance Pay for Basic Trainees</u>	12 APR 1996
8-96	<u>Incentive Pay for Flying Duty</u>	21 MAR 1996
9-96	<u>Hazardous Duty Incentive Pay (HDIP) for Air Weapons Controller Crew Members</u>	27 MAR 1996
10-96	<u>Increasing the maximum rate of special pay for enlisted members serving as recruiters</u>	27 MAR 1996
11-96	<u>Financial Assistance Program (FAP)</u>	9 MAY 1996
12-96	<u>Forfeitures Imposed Court Martial Conviction (FAP)</u>	12 APR 1996
13-96	<u>Fiscal Year 1996 Armed Forces Clothing Allowance Procedures</u>	18 APR 1996
14-96	<u>Servicemen's Group Life Insurance</u>	10 MAY 1996
15-96	<u>Extending the Entitlement to Aviation Retention Bonus</u>	9 MAY 1996
16-96	<u>Taxability of Disability Severance Pay</u>	13 MAY 1996
17-96	<u>Clarifying the start date for fines and forfeitures imposed as a result of a court martial conviction</u>	1 JUL 1996
18-96	<u>Forfeiture of Pay and Allowances During Certain Court Martial Confinements</u>	26 JUN 1996
19-96	<u>Stipend and Grant Increase for Armed Forces Health Professions Scholarship and Financial Assistance Programs (AFHPSP/FAP)</u>	26 JUN 1996
20-96	<u>Entitlement to Experimental Stress Duty (ESD) Pay</u>	20 JUN 1996
21-96	<u>Special Pay for Nurse Corps Officers</u>	28 JUN 1996
22-96	<u>Termination of Combat Zone Designation in Vietnam and Waters Adjacent Thereto</u>	3 JUL 1996
23-96	<u>Accrued Leave Pay in the Case of Death of the Member</u>	12 JUL 1996
24-96	<u>Basic Allowance for Quarters</u>	12 JUL 1996
25-96	<u>Technical Corrections to the TRICARE, Family Member Dental Plan (TRICARE-FMDP)</u>	17 JUL 1996
26-96	<u>TRICARE Family Member Dental Plan (TRICARE-FMDP) Rate Change</u>	25 JUL 1996
27-96	<u>Technical Corrections to Part 7</u>	25 JUL 1996
28-96	<u>Board Certified Pay for Nurse Corps Officers</u>	23 JUL 1996
29-96	<u>Members in a Missing Status</u>	24 JUL 1996
30-96	<u>Special Pay - Diving Duty</u>	24 JUL 1996
31-96	<u>Reductions in Grade as a Result of Certain Court Martial Sentences</u>	24 JUL 1996
32-96	<u>Aviation Retention Bonus - Lapsed Authority</u>	2 AUG 1996
33-96	<u>Special Initial Clothing Monetary Allowance</u>	5 AUG 1996

34-96	<u>Regarding Wards</u>	6 AUG 1996
35-96	<u>Board Certified Pay for Navy Radiation Specialists, and Air Force Health Physicists (Medical)</u>	21 AUG 1996
36-96	<u>Enlistment and Reenlistment Bonus</u>	6 SEP 1996
37-96	<u>Standard Policy for Centralized Disbursements and Emergency Partial Payments</u>	5 SEP 1996
38-96	<u>Part Three</u>	6 SEP 1996
39-96	<u>Entitlement to Family Separation Allowance, Type II</u>	11 SEP 1996
40-96	<u>Recoupment of Enlistment and Reenlistment Bonus</u>	11 SEP 1996
41-96	<u>Tax Exclusion for Members Serving in Bosnia-Herzegovina, Croatia, or Macedonia</u>	10 OCT 1996
42-96	<u>Extension of Certain Bonuses for Reserve Forces</u>	2 OCT 1996
43-96	<u>Special Pay for Nuclear-Qualified Officers</u>	4 OCT 1996
44-96	<u>Ready Reserve Mobilization Income Insurance Program (RRMIIP)</u>	8 OCT 1996
45-96	<u>Designated Hostile Fire or Imminent Danger Pay Areas</u>	10 OCT 1996
46-96	<u>Designated Unit Pay for Inactive Duty Training</u>	17 OCT 1996
47-96	<u>Reserve Component Entitlement to Aviation Career Incentive Pay (ACIP) and Hazardous Duty Incentive Pay (HDIP) for Aerial Flight</u>	28 OCT 1996
48-96	<u>Taxability of Separation Payments</u>	1 NOV 1996
49-96	<u>Repay of Advances</u>	31 OCT 1996
50-96	<u>Clothing Monetary Rates for Fiscal Year 1997</u>	7 NOV 1996
51-96	<u>Designated Official for Garnishment</u>	29 NOV 1996
52-96	<u>Legislative Changes to Various Bonus Entitlements</u>	26 NOV 1996
53-96	<u>Dental Officer Special Pays</u>	25 NOV 1996
54-96	<u>Creditable Service for Senior ROTC Cadets and Midshipmen in a Simultaneous Membership Program</u>	26 NOV 1996
55-96	<u>Family Separation Allowance for Married Members</u>	27 NOV 1996
56-96	<u>Certain Places/Foreign Duty Pay for Burundi</u>	29 NOV 1996
1-97	<u>Pay Rates</u>	06 JAN 1997
2-97	<u>Taxation of Government Provided Home-To-Work Transportation and Parking Fringe Benefits</u>	2 JAN 1997
3-97	<u>Aviation Career Incentive Pay - Gate Years</u>	7 JAN 1997
4-97	<u>Waiver of Recoupment of Amounts Withheld for Tax Purposes from Certain Separation Payments</u>	24 JAN 1997
5-97	<u>Designated Hostile Fire or Imminent Danger Pay Areas</u>	30 JAN 1997
6-97	<u>Availability of Basic Allowance for Quarters for Certain Members Without Dependents Who Serve on Sea Duty</u>	4 MAR 1997
7-97	<u>Pay of Senior Noncommissioned Officers of the Military Departments While Hospitalized</u>	24 FEB 1997
8-97	<u>Dental Officer Accession Bonus</u>	24 FEB 1997
9-97	<u>DOD Salary Offset Program</u>	24 FEB 1997

10-97	<u>Disability Entitlement for Reserve Forces</u>	4 MAR 1997
11-97	<u>Cadet and Midshipmen Commuted Ration Rate</u>	4 MAR 1997
12-97	<u>Recent tax law changes effecting employer-provided death benefit exclusions</u>	18 MAR 1997
13-97	<u>Designated Hostile Fire or Imminent Danger Pay Areas,</u>	14 APR 1997
14-97	<u>Savings Deposit Program for Operation Joint Guard</u>	10 JUN 1997
15-97	<u>Family Separation Allowance - II</u>	02 JUN 1997
16-97	<u>Designation of Albania as an Imminent Danger Pay Area</u>	02 JUN 1997
17-97	<u>Designation of Bahrain as an Imminent Danger Pay Area</u>	16 JUN 1997
18-97	<u>Nonphysician Health Care Provider Board Certified Pay for Nurse Corps Officers</u>	17 JUN 1997
19-97	<u>Servicemembers' Group Life Insurance (SGLI) Program Premium Reduction</u>	27 JUN 1997
20-97	<u>Standard Procedures and Dollar Thresholds for Routine Pay Adjustments (DFAS Item -F-65) and Other Clarifying Corrections to Table 50-6</u>	07 JUL 1997
21-97	<u>Stipend and Grant Increase for Armed Forces Health Professions Scholarship and Financial Assistance Programs (AFHPSP/FAP)</u>	07 JUL 1997
22-97	<u>Imminent Danger Pay For Vietnam, Laos, Cambodia, and El Salvador</u>	21 JUL 1997
23-97	<u>Imminent Danger Pay For Sierra Leone</u>	22 JUL 1997
24-97	<u>Deductions and Collections from Waived Forfeitures Paid to Dependents</u>	29 JUL 1997
25-97	<u>Revised Policy for Nonphysician Health Care Provider Board Certified Pay For Physician Assistant and Audiology/Speech Pathology</u>	29 JUL 1997
26-97	<u>Renaming of Servicemen's Group Life Insurance Program</u>	01 AUG 1997
27-97	<u>Regarding - Civilian Clothing Allowance for TDY - Exceptions</u>	14 AUG 1997
28-97	<u>Regarding - Imminent Danger Pay For Qatar</u>	14 AUG 1997
29-97	<u>Clothing Monetary Allowances for Fiscal Year 1998</u>	01 OCT 1997
30-97	<u>Cadet and Midshipman Commuted Ration Rate for FY-98</u>	08 OCT 1997
31-97	<u>Imminent Danger Pay For Rwanda</u>	10 OCT 1997
32-97	<u>Adding TRICARE Selected Reserve Dental Program (TSRDP)</u>	27 OCT 1997
33-97	<u>Special Pays for Medical Officers</u>	31 DEC 1997
1-98	<u>Basic Pay and Basic Allowance for Subsistence Increase Effective January 1, 1998</u>	7 JAN 1998
2-98	<u>Regarding - the Amount of Advance Pay</u>	6 JAN 1998
3-98	<u>Submarine Duty Incentive Pay</u>	16 JAN 1998
4-98	<u>Emergency Payments for Waiver of Forfeiture in Favor of Dependents</u>	16 JAN 1998
5-98	<u>Hazardous Duty Incentive Pay Increase</u>	14 JAN 1998
6-98	<u>Aviator Retention Bonus Increase</u>	14 JAN 1998

7-98	<u>Regarding - Nuclear Bonuses</u>	27 JAN 1998
8-98	<u>Enlistment Bonus</u>	29 JAN 1998
9-98	<u>Variable Special Pay (VSP) and Additional Special Pay (ASP) for Dental Officers</u>	3 FEB 1998
10-98	<u>Imminent Danger Pay For Angola, Chad, Mozambique, Yemen and Turkey</u>	12 FEB 1998
11-98	<u>Multiyear Retention Bonus for Dental Officers</u>	12 FEB 1998
12-98	<u>Special Pays for Medical Officers</u>	18 FEB 1998
13-98	<u>Muster Duty Allowance For Reservists</u>	27 FEB 1998
14-98	<u>Clarification of Various Tax Issues to Include Disability Severance Pay, and Others</u>	27 FEB 1998
15-98	<u>Basic Allowance for Subsistence (BAS)</u>	03 MAR 1998

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DEFENSE FINANCE AND ACCOUNTING SERVICE

1931 JEFFERSON DAVIS HIGHWAY
ARLINGTON, VA 22240-5291

JAN 16 1998

DFAS-HQ/FMM

MEMORANDUM FOR DIRECTOR DEFENSE FINANCE AND ACCOUNTING SERVICE
- CLEVELAND CENTER
DIRECTOR DEFENSE FINANCE AND ACCOUNTING SERVICE
- DENVER CENTER
DIRECTOR DEFENSE FINANCE AND ACCOUNTING SERVICE
- INDIANAPOLIS CENTER
DIRECTOR DEFENSE FINANCE AND ACCOUNTING SERVICE
- KANSAS CITY CENTER

SUBJECT: Change to the DODFMR Volume 7A, regarding Submarine
Duty Incentive Pay, (DFAS Item G-46)

Attached is DFAS Interim Change 3-98 to Chapter 23 of the
DoDFMR, Volume 7A. It is effective February 1, 1998.

This change aligns the DoDFMR with the SECNAV Instruction
7220.80 series that stipulates Continuous Submarine Duty Pay may
continue for 6 months after the date of incapacity vice 5 months
as stated in the regulation now.

We have evaluated your responses to the draft change to the
DODFMR Volume 7A. The attached is the final version of the
change. The assigned interim change number is your authority to
start a procedural modification to effect this change. For
Denver Center, use the attached to initiate the formal printed
change to the DoDFMR and the interim change message. Our point
of contact CDR Maxine Engler may be reached at DSN 327-5058 or
(703) 607-5058.

Roger W. Searce
Brigadier General, USA
Deputy Director for Finance

Attachment:
As stated

cc: DASD (MPP) (Comp)
ODGC (F)
DFAS-DE/DG
Service Liaisons
USCG/NOAA/PHS Liaisons
DJMS-PM

SUBMARINE DUTY PAY-START AND STOP DATES

Make the following change to the existing Table 23-1. Submarine Duty Pay - Start Stop Dates.

Change 6B to read "is transferred to a medical facility on temporary duty orders for treatment, rehabilitation or medical board review."

Change Rule 6D to read, "for not more than 6 months after date of the incapacity, as determined by medical authorities."

Change Rule 7B to read, "is reassigned to Limited Duty for treatment or rehabilitation.".

Change Rule 7D to read, "for not more than 6 months after date of assignment to Limited Duty, or until disqualifying condition is determined to be permanent, whichever is earlier."

UNCLASSIFIED

1-97 PAY RATES

RAAUZYUW RUEDARZ4444 0051500-UUUU--RHMCSUU.

IR UUUUU

X 062200Z JAN 97 ZYB

FM DFAS-DENVER CENTER DENVER CO//FJE//

TO AIG EIGHT SIX TWO ONE

AIG EIGHT SIX TWO FOUR

AIG EIGHT SIX TWO SIX

AIG FOUR SIX SEVEN SIX

AIG FOUR SIX SEVEN EIGHT

AIG SIX EIGHT ONE NINE

AIG SEVEN THREE ZERO FIVE

AIG SEVEN FOUR SEVEN THREE

AIG SEVEN FIVE NINE EIGHT

AIG NINE FOUR ONE ONE//MSIPD/IMPD//

AIG ONE ONE THREE SIX EIGHT

HQ DFAS WASHINGTON DC//FM//

DFAS-CLEVELAND CENTER CLEVELAND OH//FFP//

DFAS-INDIANAPOLIS CENTER INDIANAPOLIS IN//FJA//

DFAS-KANSAS CITY CENTER KANSAS CITY MO//FSP//

INFO HQ USAF WASHINGTON DC//JACM//

OSAF WASHINGTON DC//FMBMB//FMPC

364 TRS SHEPPARD AFB TX//TTGBF//

USCINCCENT MACDILL AFB FL//CCCO//

PER DIEM TVL AND TR ALWS COMET ALEXANDRIA VA//JJJ//

SECDEF WASHINGTON DC//USD/P-R//

DIA WASHINGTON DC//OC-4//

UPERS WASHINGTON DC//PERS-20//

AVCOMPT WASHINGTON DC//NCF//

NAVCSRF HONOLULU HI//N33//

BT

UNCLAS //N00000//

SUBJ:INTERIM CHANGE (IC) 1-97 TO THE DODFMR, VOL 7, PART A (DOD

7000.14-R) (DFAS ITEM F-96) (PART 4 OF 5)

AIR FORCE: AIG'S 8621 AND 8624 FOR DEFENSE ACCOUNTING OFFICERS
AND FINANCIAL SERVICE OFFICERS

ARMY: AIG 8626 FOR FM AND DJMS-RC PAYROLL OFFICES
AIG'S 7473 AND 7598 FOR DEFENSE ACCOUNTING OFFICERS
AND FINANCE OFFICERS

NATIONAL GUARD

BUREAU: AIG 7305 FOR PROPERTY AND FISCAL OFFICERS.

NAVY: AIG'S 4676 AND 4678 FOR DEFENSE ACCOUNTING
OFFICERS AND DISBURSING OFFICERS.

MARINE CORPS: AIG'S 6819 AND 11368 FOR COMMANDERS, DEFENSE
ACCOUNTING OFFICERS, FINANCE OFFICERS, MISSE'S,
MCAAT'S, PERSADMINSCOL, AND DIRFINMGTSOL, AS
APPLICABLE.

1. DFAS-HQ HAS APPROVED THE RELEASE OF THIS MESSAGE TO TRANSMIT THE
FOLLOWING CHANGES TO THE DODFMR, VOL 7, PART A.

2. PLEASE POST THE FOLLOWING CHANGES TO DODFMR, VOL 7, PART A,
EFFECTIVE JANUARY 1, 1997.

3. PLEASE NOTE: THIS MESSAGE IS IN 5 PARTS. THIS IS PART 4 OF 5
PART 1 HAS A DATE TIME GROUP OF 062030Z JAN 97, PART 2 HAS A DATE
TIME GROUP OF 062100Z JAN 97, PART 3 HAS A DATE TIME GROUP OF 062130Z

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JAN 97 AND PART 5 WILL HAVE A DATE TIME GROUP OF 062230Z JAN 97. THE
 TEST IC ISSUED PRIOR TO THIS IC WAS PART 3, TO IC-1-97, 062130Z
 JAN 97. THE FOLLOWING BASE PAY RATES ARE EFFECTIVE JANUARY 1, 1997
 AND WERE APPROVED BY EXECUTIVE ORDER 13033 ON DECEMBER 27, 1996.
 PART A. REVISE TABLE 2-8 MONTHLY RATES OF BASIC PAY-ENLISTED
 MEMBERS-EFFECTIVE 1 JANUARY 1997, TO READ AS FOLLOWS:

		CUMULATIVE YEARS OF SERVICE				
RANK		2 OR LESS	OVER 2	OVER 3	OVER 4	OVER 6
E-9	BP					
	(NOTE 2)					
E-8	BP					
E-7	BP	1581.90	1707.90	1770.60	1833.00	1895.40
E-6	BP	1360.80	1483.50	1545.00	1610.70	1671.30
E-5	BP	1194.30	1299.90	1362.90	1422.30	1515.90
E-4	BP	1113.60	1176.30	1245.60	1341.60	1394.70 (MAX)
E-3	BP	1049.70	1107.00	1151.10	1196.70 (MAX)	
E-2	BP	1010.10 (MAX)				
E-1	BP	900.90 (MAX)				
	(4 MONTHS OR MORE ACTIVE DUTY)					
E-1	BP	833.40				
	(LESS THAN 4 MONTHS' ACTIVE DUTY)					

		CUMULATIVE YEARS OF SERVICE				
		OVER 8	OVER 10	OVER 12	OVER 14	OVER 16
E-9	BP		2701.80	2762.40	2824.80	2889.90
	(NOTE 2)					
E-8	BP	2265.60	2330.70	2391.90	2454.00	2519.10
E-7	BP	1955.70	2018.40	2081.40	2175.30	2237.10
E-6	BP	1731.30	1794.90	1887.30	1946.70	2009.40
E-5	BP	1577.70	1639.80	1700.40	1731.30 (MAX)	

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		CUMULATIVE YEARS OF SERVICE				
		OVER 18	OVER 20	OVER 22	OVER 24	OVER 26
E-9	BP	2954.70	3011.70	3169.80	3293.40	3478.50
	(NOTE 2)					
E-8	BP	2576.40	2639.70	2794.80	2919.30	3106.50
E-7	BP	2298.90	2329.20	2485.50	2609.10	2794.80
E-6	BP	2040.00				
	(MAX)					

NOTES:

1. FOR RANK TITLES, SEE ATTACHMENT 2 COMPARABLE TERMS
2. BASIC PAY FOR GRADE E-9 IS \$4227.90 REGARDLESS OF YEARS OF SERVICE WHILE SERVING AS:
 - A. SERGEANT MAJOR OF THE ARMY
 - B. MASTER CHIEF PETTY OFFICER OF THE NAVY
 - C. CHIEF MASTER SERGEANT OF THE AIR FORCE
 - D. SERGEANT MAJOR OF THE MARINE CORPS

IF A MEMBER IS PLACED ON TERMINAL LEAVE PENDING RETIREMENT IMMEDIATELY FOLLOWING THE COMPLETION OF SERVICE AS THE SENIOR ENLISTED MEMBER OF A MILITARY DEPARTMENT, THE MEMBER IS ENTITLED TO THE HIGHER PAY RATE (\$4227.90) UP TO A MAXIMUM OF 60 DAYS. QUESTIONS ON THIS CHANGE SHOULD BE REFERRED TO ONE OF THE FOLLOWING POINTS OF CONTACT, AS APPROPRIATE: DFAS-CL, DSN 580-5886; DFAS-CE, DSN 926-7981; DFAS-IN, DSN 699-3242; FOR DFAS-KC, DSN 465-5278.

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Court held that π was never validly separated from the Navy (he was misinformed and pressured into accepting a dishonorable discharge rather than face a court-martial for alleged homosexual conduct), therefore entitled to back pay for the unexpired term of his enlistment.

170 Ct. Cl. 36 printed in FULL format.

WILLIAM J. MIDDLETON v. THE UNITED STATES

No. 436-61

UNITED STATES COURT OF CLAIMS

170 Ct. Cl. 36; 1965 U.S. Ct. Cl. LEXIS 227

April 16, 1965, Decided

SYLLABUS: [**1]

ON THE PROOFS

Military pay; discharge; validity of. -- Plaintiff, a former enlisted man in the Navy, sues to recover active duty pay and allowances from November 12, 1955 when he was separated from the Navy with an undesirable discharge which he agreed to accept rather than face a threatened court-martial on charges of having committed a homosexual act. Plaintiff claims that his discharge was invalid since it violated a regulation of the Navy Department prohibiting the trial by court-martial of a person who had been tried in a civil court, as had plaintiff, for the same act or offense as that on which the court-martial is based. It is held that under the Navy regulation in question, plaintiff had the right to be free of the wrongful pressure exerted on him when he was misinformed concerning the threat of court-martial unless he agreed to accept an undesirable discharge; that his agreement to accept the undesirable discharge rather than face court-martial was obtained by improper means and in disregard of plaintiff's rights and of controlling Navy policy and the resulting discharge was accordingly void. Plaintiff is entitled to recover his active duty pay and allowances [**2] for the remainder of his term of enlistment.

Military pay; discharge; validity of discharge; regulation of executive department, violation of; effect of. -- A military discharge issued in violation of a regulation of the executive department is a nullity, and the character and fact of the discharge are both voided by the failure to accord the serviceman his material rights or to follow the required procedures.

Military pay; discharge; administrative discharge; validity of discharge; regulation of executive department, violation of; what constitutes. -- Where a Navy Department regulation prohibits the trial by court-martial of a person who has been tried in a civilian court for the same offense (except in unusual cases), the special regulation of the Navy relating to homosexuality and providing for the court-martialing of men who refuse to take an undesirable discharge, must be read as applying only to men who had not been tried by a civil court for the same homosexual act. Accordingly, where a Navy enlisted man who has been tried by a civilian court for a homosexual act, is thereafter induced by the Navy to accept an undesirable discharge as an alternative to facing [**3] court-martial on charges of sodomy, the resulting discharge is void for having been obtained by improper means in disregard of the man's right to due process and fair treatment, and also for being in violation of the Navy's own controlling policy in such matters as evidenced by the regulation.

COUNSEL: Fred W. Shields for the plaintiff. Fred W. Shields, Jr. of counsel.

Charles M. Munnecke, with whom was Assistant Attorney General John W. Douglas, for the defendant.

JUDGES: Cowen, Chief Judge, Laramore, Durfee, Davis and Collins, Judges. Davis, Judge, delivered the opinion of the court.

OPINIONBY: DAVIS

OPINION: [*37] After fifteen years as an enlisted man in the Navy, nine of them as a chief boatswain's mate, n1 plaintiff was given an undesirable discharge in November 1955. This came about because of an incident which is said to have occurred in a parked automobile in Norfolk, Virginia, on September 18, 1955. Plaintiff was arrested by the civil authorities on a charge of "visiting a place for immoral purposes" with another man. The detail of the accusation was that plaintiff committed, or attempted to commit, an act of perversion. He was convicted, the next [**4] day, in the Norfolk City Police Court but, on a de novo trial before the Corporation Court on October 14th, was acquitted.

- - - - -Footnotes- - - - -

n1 He was a prisoner of war from May 6, 1942, to September 12, 1945, after the sinking of his vessel at Corregidor.

- - - - -End Footnotes- - - - -

Between the two civil trials, naval investigators inquired into the incident, and in the course of that investigation plaintiff signed (on September 28th) a statement admitting [*38] passive participation in an incompleated homosexual act with a civilian. Two days later, plaintiff, while being examined by a naval psychiatrist, repudiated this statement and explained the incident of September 18th as having no homosexual or immoral coloration. The psychiatrist's report found that:

* * * Middleton has the kind of personality pattern consistent with either (a) impulsively indulging in socially unacceptable behavior, especially if instigated by someone else, and later feeling appropriate remorse or shame (which would explain his denial of his offense when talking [**5] to the psychiatrist); or, (b) having been falsely accused of an offense, impulsively confessing out of bitterness and resentment for authority -- in this case the authority being the U.S. Navy.

The doctor also concluded that his psychiatric evaluation could not definitely determine whether or not the alleged offense actually took place, but that "in view of Middleton's signed statement of 28 September 1955, he must be considered as a class Two homosexual and, therefore, unfit for retention in the service of the U.S. Navy." n2

- - - - -Footnotes- - - - -

n2 In Navy parlance, "Class II is defined as those cases wherein personnel, while in the naval service, have engaged in one or more homosexual acts or where evidence supports proposal or attempt to perform an act of homosexuality, and which do not fall in the category of Class I [aggressive or dangerous homosexuality] * * *." Sec. NAV Inst. 1620.1(5).

- - - - -End Footnotes- - - - -

After this medical report, plaintiff was shown a sample court-martial specification and charge of sodomy, and was told that he would [**6] be tried by general court-martial if he did not accept an undesirable discharge. n3 On October 17th -- after his acquittal by the Virginia Corporation Court -- plaintiff signed a formal statement requesting and agreeing to accept an undesirable discharge "for the good of the service [*39] and to escape trial by general court-martial." His commanding officer forwarded this statement, together with other papers (including plaintiff's initial "confession" and the psychiatrist's report) to the Bureau of Naval Personnel which, shortly, directed that plaintiff be given an undesirable discharge "by reason of unfitness." This action was taken under Sec. NAV Inst. 1620.1, "Procedure for the disposition of cases of homosexuality involving naval personnel" (see finding 6). The discharge was executed on November 12, 1955.

- - - - -Footnotes- - - - -

n3 We base this finding on (a) plaintiff's sworn testimony, in 1957, before the Board for Correction of Naval Records that he was threatened with a court-martial if he did not confess, (b) plaintiff's signed statement of October 17, 1955, that he accepted an undesirable discharge "for the good of the service and to escape trial by general court-martial" (emphasis added), (c) the transmittal by plaintiff's commanding officer, to the Bureau of Naval Personnel, of a "sample" general court-martial charge and specification accusing plaintiff of sodomy with a named civilian on September 18, 1955; and (d) the provision in Sec. NAV Inst. 1620.1 (finding 6), that "sample charges and specifications for trial by general court-martial shall be drawn and the accused shall be confronted with them," and offered the alternate of accepting an undesirable discharge or of undergoing court-martial.

- - - - -End Footnotes- - - - -

[**7]

Two years later, in November 1957, plaintiff had a hearing before the Board for Correction of Naval Records, at which he testified and submitted the results of a lie-detector test. The Board concluded, in January 1958, that the issuance of the undesirable discharge was improper and unwarranted, especially "in view of the psychiatrist's findings coupled with the acquittal in the civil court on appeal." Its decision and recommendation was that the undesirable discharge be changed to an honorable discharge as of the date it was issued. n4 However, the Secretary, through an Assistant Secretary, approved only so much of this decision and recommendation as changed Middleton's undesirable discharge to a general discharge for unsuitability. n5

- - - - -Footnotes- - - - -

n4 The Board rejected plaintiff's request for reinstatement or for an opportunity to re-enlist, holding that the request should be submitted to the Chief of Naval Personnel. Plaintiff does not challenge that ruling.

n5 Plaintiff was thereupon given the pay and allowances, up to November 12, 1955, he had lost by reason of the original character of his discharge.

- - - - -End Footnotes- - - - -

[**8]

The gravamen of this timely suit is that plaintiff's undesirable discharge from the Navy on November 12, 1955, was wholly invalid, and he therefore continued in his right to the active duty pay and allowances of a chief boatswain's mate until the end of his enlistment. If the premise is correct, the remedy he seeks follows as of course. *Sofranoff v. United States*, 165 Ct. Cl. 470 (1964); *Clackum v. United States*, 148 Ct. Cl. 404, 410, 296 F. 2d 226, 229 (1960); same case, 161 Ct. Cl. 34 (1963); *Smith v. United States*, 155 Ct. Cl. 682 (1961); *Murray v. United States*, 154 Ct. Cl. 185 (1961).

In testing the validity of a discharge given by an armed service, one of the prime questions is whether the department [*40] complied with its own regulations. Cf. *Service v. Dulles*, 354 U.S. 363 (1957). We have several times held that a discharge issued in violation of regulations is a nullity. *Sofranoff v. United States*, supra; *Smith v. United States*, supra; *Murray v. United States*, supra; *Rowe v. United States*, 167 Ct. Cl. 468, 470 (1964) cert. denied, 380 U.S. 961 (1965); Cf. *Grant v. United States*, 162 Ct. Cl. [*9] 600, 612 (1963). Not merely the character of the discharge but the fact of discharge is voided by the failure to accord the serviceman his material rights or to follow the required procedures. See *Clackum v. United States*, supra, 148 Ct. Cl. at 410; *Murray v. United States*, supra, 154 Ct. Cl. at 188, 191; *Sofranoff v. United States*, supra, at p. 478.

When the Navy was considering plaintiff's case, a directive of the Secretary (Sec. NAV Inst. 5810.1 JAG: 1:2CT: au, 5 March 1953, "Policy regarding trial by courts-martial of persons previously tried by civil courts for the same act or acts") provided:

A person in the naval service who has been tried in a State court, whether convicted or acquitted, shall not be tried by court-martial for the same act or acts except in those unusual cases where trial by court-martial is considered essential in the interests of justice, discipline, and proper administration within the naval service. Such unusual cases, however, shall not be referred to trial without first obtaining permission from the Secretary of the Navy. * * * [emphasis added].

This general instruction, governing all kinds of charges, [*10] set forth no exception for accusations of homosexual conduct, and we read it as fully applicable to plaintiff. n6

- - - - -Footnotes- - - - -

n6 The command in the special instruction on homosexuality (Sec. NAV Inst. 1620.1, supra) to court-martial men who refused to take an undesirable discharge must be interpreted, in the light of Sec. NAV Inst. 5810.1, supra, as applicable in full force only to those who had not been tried by a civil court for the homosexual act.

- - - - -End Footnotes- - - - -

At the time the naval investigators first spoke to plaintiff about the incident, he had already been tried by the Norfolk Police Court and therefore came within the ambit of the Secretary's directive. When on October 17, 1955,

he agreed in writing to an undesirable discharge "to escape trial by general court-martial," he had been acquitted, on his de novo [*41] appeal, by the Corporation Court. Nevertheless, the Navy investigators and officials affirmatively led him to believe that he would be court-martialed if he did not acquiesce in the undesirable discharge. [**11] He was not told that, under the Secretary's instructions, he could be tried by a military tribunal only if his case was an "unusual" one in which the Secretary determined that a military trial was "essential in the interests of justice, discipline, and proper administration." On the contrary, he was actively misinformed that he would be court-martialed unless he accepted the less-than-honorable certificate, and was apparently even shown a specification and charge accusing him of the offense of sodomy. He was presented with the stark choice of a court-martial or of being dismissed with the stigma of an undesirable discharge.

To induce the plaintiff by these misleading declarations to agree to an undesirable discharge violated the Navy's policy directive "regarding trial by courts-martial of persons previously tried by civil courts for the same act or acts" (Sec. NAV Inst. 5810.1, supra). Under that regulation he had the clear right to be free from the wrongful pressure which such misinformation exerted. Another way of putting it is that he was denied due process and fair treatment by being faced with a harsh and disagreeable option which simply did not exist under Navy law. [**12] Cf. Clackum v. United States, supra, 148 Ct. Cl. at 406-08, 296 F. 2d at 227-28. In either formulation, the necessary consequence of the wrongful predicament into which the Navy thrust him was to vitiate his acceptance of the lower-grade discharge. His agreement was obtained by improper means and in disregard of his rights, as well as of controlling Navy policy. Since plaintiff's invalid acceptance of the discharge, in turn, was the necessary basis for his early administrative release from the Navy under Sec. NAV Inst. 1620.1, supra, n7 we must hold the entire discharge to have been void. He was never validly separated from the Navy during his last enlistment.

- - - - -Footnotes- - - - -

n7 Under Sec. NAV Inst. 1620.1, an administrative discharge could be accomplished only if the individual agreed to a separation under conditions other than honorable. The Bureau of Naval Personnel specifically acted under that instruction in ordering plaintiff's discharge.

- - - - -End Footnotes- - - - -

The plaintiff is entitled to recover his pay and allowances [*42] [**13] for the unexpired portion of his term of enlistment, and judgment is entered to that effect. Recovery will be determined pursuant to Rule 47(c).

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Franklin M. Stone, and the briefs and arguments of counsel, makes findings of fact as follows:

1. Plaintiff enlisted in the United States Navy on August 30, 1940, and served continuously on active duty through successive terms of enlistment until November 10, 1955, when he was given an undesirable discharge. Plaintiff was rated as a Chief Boatswain's Mate (permanent appointment), effective January 1, 1946, and he held this rate at the time of his discharge.

2. On September 18, 1955, plaintiff was arrested by civil authorities in Norfolk, Virginia, on a charge of violating Section 29-50 of the Norfolk City Code "Visiting a place for immoral purposes" (involving a person of the same sex). He appeared in the Norfolk City Police Court, and was found guilty of that charge on September 19, 1955. Plaintiff appealed his conviction, appeared before the Corporation Court on October 14, 1955, and after trial on the same above-mentioned charge, [**14] he was found not guilty.

3. Upon receipt of information concerning the proceedings involving plaintiff in the Norfolk City Court on September 18-19, 1955, plaintiff's commanding officer, on September 21, 1955, requested the Fifth Naval District Intelligence Officer to conduct an investigation of the incident and to report any findings to him. Thereafter, on September 28, 1955, plaintiff furnished agents of the Office of Naval Intelligence a signed statement in which he admitted that on September 18, 1955, he passively participated in a homosexual act with a civilian who began, but did not complete, oral coition on him; that he was arrested by the Norfolk police and charged as set forth in finding 2, supra. n8

- - - - -Footnotes- - - - -

n8 Plaintiff's signed statement was received in evidence as Joint Exhibit 1(g), and by this reference is incorporated herein.

- - - - -End Footnotes- - - - -

[*43] 4. On September 30, 1955, plaintiff was examined by the Base Psychiatrist at the U.S. Naval Amphibious Base, Little Creek, Norfolk, Virginia, who submitted [**15] a memorandum dated October 4, 1955, which reads in relevant part:

* * * *

4. Middleton's account of the events of 18 September 1955 as related to the examining psychiatrist is as follows: After taking two friends to a bus station, Middleton met a stranger, a civilian who in the course of their conversation offered Middleton a drink from the bottle of liquor in his car. After having entered the civilian's car, and having drunk some of the liquor, Middleton stepped out to urinate. At that time he noted the police nearby, told the other man, who then stepped out of the car to place the bottle of liquor under the car seat. It was at this time, according to Middleton that the police noticed him and his companion and assumed they were engaged in a homosexual act. Middleton states that he signed the statement admitting the offense rather than go through an investigation and court martial.

5. Middleton denies having engaged in homosexual behavior on 18 September 1955, or at any other time in his life. He denies ever having had any homosexual desires.

* * * *

7. In summary, Middleton has the kind of personality pattern consistent with either (a) impulsively indulging in socially [**16] unacceptable behavior, especially if instigated by someone else, and later feeling appropriate remorse or shame (which would explain his denial of his offense when talking to the psychiatrist); or, (b) having been falsely accused of an offense, impulsively

confessing out of bitterness and resentment for authority -- in this case the authority being the U.S. Navy.

8. Psychiatric evaluation cannot definitely determine whether or not the alleged offense actually took place. However, in view of Middleton's signed statement of 28 September 1955, he must be considered a class Two homosexual and, therefore, unfit for retention in the service of the U.S. Navy.

5. In accordance with the provisions of C. 10312, Bureau of Naval Personnel Manual, and Secretary of the Navy Instruction 1620.1, plaintiff was given an opportunity to submit his acceptance of an undesirable discharge in lieu of [*44] general court-martial. He was shown a sample court-martial specification and charge (of sodomy) and was told that he would be court-martialed if he did not accept the undesirable discharge. On October 17, 1955, plaintiff, in writing, made a request for, and agreed to accept, an undesirable [**17] discharge "for the good of the service and to escape trial by general court-martial."

6. (a) On October 18, 1955, the Commanding Officer Naval Amphibious Training Unit, Atlantic Fleet (plaintiff's commanding officer), on the basis of plaintiff's signed statement dated September 28, 1955, n9 the memorandum, dated October 4, 1955, n10 submitted by the base psychiatrist, plaintiff's written acceptance of an undesirable discharge, dated October 17, 1955, n11 recommended to the Chief of Naval Personnel that "for the good of the naval service," plaintiff "be discharged under conditions other than honorable." The Chief of Naval Personnel was informed about plaintiff's trials in the Virginia civil courts. On October 28, 1955, the Chief of Naval Personnel issued a directive to the commanding officer of the plaintiff that he be discharged as "undesirable by reason of unfitness" in accordance with the provisions of "Sec. NAV Inst. 1620.1," which document, (dated 5 June 1953), reads in pertinent part:

Subj: Procedure for the disposition of cases of homosexuality involving naval personnel:

1. Purpose. To promulgate a uniform procedure relative to the disposition of personnel [**18] in cases involving homosexual tendencies or acts.

* * * *

4. Action

a. Known homosexual individuals are military liabilities and must be eliminated from the service. Commanding officers receiving information indicating that a person in the naval service possesses homosexual tendencies or has engaged in an act of homosexuality shall inquire thoroughly and comprehensively into the matter and ascertain all the facts and circumstances of the case, [*45] bearing in mind the peculiar susceptibility of such cases to possible malicious charges.

* * * *

5. Classification and Procedures. Personnel coming within the purview of this directive fall into several categories which may or may not overlap and which will be more or less complicated by facts and circumstances peculiar to the individual case. These cases, however, are generally classified and the

normal disposition for each class will be as follows:

* * * *

b. (1) Class II is defined as those cases wherein personnel, while in the naval service, have engaged in one or more homosexual acts or where evidence supports proposal or attempt to perform an act of homosexuality, and which do not fall in the category of [**19] Class I above.

(2) Disposition. Disposition will be accomplished by administrative separation under conditions other than honorable unless the individual resists separation from the service under such conditions, in which case he will be recommended for trial by court-martial. Detailed procedure follows:

(3) Sample charges and specifications for trial by general court-martial shall be drawn and the accused shall be confronted with them. He shall be offered the following alternatives:

* * * *

(b) 1. Enlisted persons shall be informed that a signed statement in tenor as follows, will probably receive favorable action: "I hereby accept an undesirable discharge for the good of the service and to escape trial by general court-martial. I understand that my separation from the naval service effected by undesirable discharge will be under conditions other than honorable; that I may be deprived of virtually all rights as a veteran under both Federal and State legislation; and that I may expect to encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces or the character of discharge received therefrom [**20] may have a bearing."

2. If an accused enlisted person refused to sign a statement so worded, he shall be recommended for trial by general court-martial. Recommendations for trial shall [*46] be prepared and submitted to the officer exercising general court-martial jurisdiction.

* * * *

(5) The commanding officer shall submit to the Department a complete report of each class II offender who is afforded, and who elects, the alternative of resignation or undesirable discharge. In all cases the report should include: A full and complete statement from the officer or enlisted person concerned, or his statement to the effect that he does not desire to make a statement; statements of witnesses; copy of the sample general court-martial charge and specification(s); resignation of the officer or agreement by the enlisted person to accept an undesirable discharge as worded in paragraph 5b(3) above; and the commanding officer's detailed comments and recommendations. The commanding officer's report will include a psychiatric or medical evaluation of the person concerned.

* * * *

- - - - -Footnotes- - - - -

n9 See finding 3, supra. [**21]

n10 See finding 4, supra.

n11 See finding 5, supra.

- - - - -End Footnotes- - - - -

(b) Paragraph 3 of the above-mentioned directive, issued by the Chief of Naval Personnel on October 28, 1955, supra, reads:

* * * *

3. The command effecting discharge shall show on the reverse side of the discharge certificate abreast the entry "Authority for Discharge" -- this letter and Article C-10312, BuPers Manual.

Said article C-10312, provides in pertinent part:

(1) The Bureau may direct the discharge of an enlisted person for unfitness.

(2) Discharges by reason of unfitness for any cause, regardless of circumstances attending, will be effected only on instructions of the Chief of Naval Personnel. These instructions shall be requested without delay in order that undesirable enlisted personnel may not be retained in the service any longer than necessary. * * *

(3) An enlisted person will be recommended for discharge for reason of unfitness to free the service of persons who are useless, only after that person has already demonstrated total unfitness for further retention. In this category are:

(a) Persons [**22] who give evidence of habits or traits of character manifested in antisocial or antimoral trends, [*47] criminalism, chronic alcoholism, drug addiction, pathological lying, or sexual perversion or misconduct.

* * * *

(4) Before recommending such a discharge, a commanding officer shall investigate thoroughly each case. The circumstances, facts, and offenses shall be included in the recommendation. The person concerned shall be informed of the contemplated action, and the reasons therefor, and shall be given an opportunity to appear and present any facts or submit any signed statement in own behalf that he may desire.

* * * *

(7) The commanding officer shall not recommend discharge for unfitness in lieu of punishment for an offense committed. After disciplinary action has been taken for an offense the commanding officer may recommend discharge for unfitness as a separate and distinct action based on the evidence listed in paragraph (3) of this article.

(c) Pursuant to the above-mentioned directive, plaintiff, on November 12, 1955, was given an undesirable discharge.

(d) Judicial notice is taken of SECNAVINST 5810.1 JAG: 1:2CT: au, 5 March 1953, which provides in pertinent [**23] part:

Subj: Policy regarding trial by courts-martial of persons previously tried by civil courts for the same act or acts.

Ref: (a) CMO 5-1945, 203.

1. Purpose. The purpose of this Instruction is to modify the policy set forth in reference (a) regarding trial by courts-martial of persons in the naval service who have previously been tried in civil courts for the same act or acts, and to provide procedures to be followed in carrying out the modified policy.

2. Modified Policy. A person in the naval service who has been tried in a State court, whether convicted or acquitted, shall not be tried by court-martial for the same act or acts except in those unusual cases where trial by court-martial is considered essential in the interests of justice, discipline, and proper administration within the naval service. Such unusual cases, however, shall not be referred to trial without first obtaining permission from the Secretary of the Navy. Requests for [*48] permission to refer such unusual cases to trial shall include a full report of all the attendant circumstances and shall be forwarded to the Secretary via the officer having general court-martial authority over [**24] the command, and the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate.

* * * *

7. Subsequent to plaintiff's discharge from the Navy on November 10, 1955, he filed an application with the Board for Correction of Naval Records (hereinafter referred to as the "Board"), in which he requested a remission of his undesirable discharge, and either reinstatement in the United States Navy in his rating of chief boatswain's mate or an opportunity to re-enlist in that grade. A hearing on that application was held by the Board on November 18, 1957, at which time plaintiff appeared in person, testified, and he was represented by counsel. After hearing plaintiff's testimony and considering documentary evidence, consisting of plaintiff's application, naval records, related correspondence, and applicable regulations and policies, the Board concluded its deliberations on December 2, 1957. Thereafter, on January 16, 1958, the chairman of the Board, on behalf of the Board, submitted to the Secretary of the Navy, a report of the Board's findings, decision, and recommendation. In addition to containing a summary of the facts and circumstances surrounding plaintiff's [**25] discharge, including the substance of the statement signed by plaintiff on September 28, 1955, n12 and the report of the examination made of plaintiff by the base psychiatrist on September 30, 1955, n13 the Board's report reads in pertinent part:

* * * *

b. That a review of Petitioner's naval records discloses that he was born on 12 November 1918 and he enlisted in the U.S. Navy on 30 August 1940 for six years. He was a member of the crew of the U.S.S. Pigeon (ASF 6) when that vessel was sunk at Corregidor in the Philippines on or about 4 May 1942. He was taken as a prisoner of war on 6 May 1942 and was liberated on 12 September

1945. His service record shows that two [*49] Presidential citations were awarded by the Secretary of the Navy to the officers and crew of the U.S.S. Pigeon during the month of December 1941; also, Petitioner was considered eligible to wear the Army Distinguished Unit Badge, with Oak Leaf Cluster, the Asiatic-Pacific Area Ribbon with one star, the American Area Ribbon, the American Defense Service Ribbon with one star, and the Philippine Defense Ribbon with one star. He received an Honorable Discharge on 3 June 1946 in the rating of Chief Boatswain's Mate (**26) (Permanent Appointment.)

c. That he reenlisted for two years on 4 June 1946 and was issued an Honorable Discharge on 30 November 1947.

d. That he reenlisted for four years on 1 December 1947 and received an Honorable Discharge on 22 February 1952.

e. That he reenlisted in the rating of BMC on 23 February 1952 for a period of six years. On 8 May 1952 he was tried by Summary Court-Martial for a violation of Article 86, UCMJ: absence over leave for about 19 1/2 hours, from 0100 until 2025 on 3 May 1952. He pleaded guilty and was sentenced to forfeit \$ 11. On 8 June 1953 he was transferred from the U.S.S. Maury (AGS-16) to the Naval Amphibious Base, Little Creek, Norfolk, Virginia.

* * * *

j. That in connection with the petition for a correction of his record, Petitioner has submitted the results of a lie detector test. The letter from an examiner of the National Lie Detection Laboratories, dated 15 February 1956, is contained in enclosure (2). The summary of the examiner reads as follows:

It is the opinion of this examiner, that in all probability, this subject did not reach the stage where an actual act of perversion had been committed. It is probably true, according to his responses that he suspected that the [civilian] was a pervert. However, the subject had been drinking and in all probability had he been sober he would never have gone as far as he did in getting into the car with the suspect. It is particularly pointed out that this subject reacts only to the question of having been drinking, and at no time is there any specific reaction to the questions of his joining in a perverted act.

[*50] k. That after a careful review of the evidence of record, this Board now finds that the issuance of an Undesirable Discharge was not justified under the circumstances of this case, and that a correction of this discharge is warranted. In so finding, the Board is cognizant of the fact that Petitioner on 28 September 1955 admitted participating as a passive partner in an act of oral coition. Opposed to this fact is Petitioner's denial to a Navy psychiatrist just two days later that any such act took place. The psychiatrist found no evidence of the personality structure of a sexual invert, but considered Petitioner a Class Two offender only on the basis of his previous admission of guilt in his signed statement of 28 September 1955, which he subsequently denied. The Board also notes that Petitioner had been convicted in a civil court at the time of his signing the statement admitting his guilt and at the time he talked to the psychiatrist; yet his conviction had been reversed on appeal by the time his Commanding Officer recommended him for an Undesirable Discharge. The Board finds that such a discharge was improper in view of the psychiatrist's findings coupled with the acquittal in the civil court on appeal. In addition, the Board carefully noted Petitioner's demeanor in testifying

under oath to the effect that he had not participated in an unnatural act. Also, it was felt that some credence should be given to the results of the lie detector test which indicate that in all probability no actual act of perversion was ever committed. As a further basis for finding that the Undesirable Discharge was not appropriate under the circumstances, the Board notes that Petitioner had rendered over fifteen years of honorable service, including spending over three years as a prisoner of war during World War II. Proof of Petitioner's good character and reputation is contained in the several character references contained in [**29] enclosure (2).

After finding that a correction of the discharge is warranted, the Board finds as an additional matter that his final average marks were 3.785 in proficiency and in leadership, and 3.821 in conduct. Accordingly, the Board finds that an Honorable Discharge is now warranted.

With regard to Petitioner's request for reinstatement or an opportunity for reenlistment in his old rating, the Board finds no basis for recommending favorable action. The Board finds that Petitioner should submit his request for authorization to reenlist to the Chief of Naval Personnel.

[*51] Decision:

It is the decision of this Board that Petitioner's Undesirable Discharge be changed to an Honorable Discharge, and that the Chief of Naval Personnel be directed to make this change by issuing Petitioner a certificate of Honorable Discharge by reason of BuPers Manual, Article C-10306, in lieu of the certificate previously issued.

Recommendation:

It is recommended that the Department of the Navy pay to Petitioner or other proper party or parties as a result of the foregoing correction of naval record, all monies lawfully found to be due from the Department of the Navy.

- - - - -Footnotes- - - - -

n12 See finding 3, supra. [**30]

n13 See finding 4, supra.

- - - - -End Footnotes- - - - -

8. (a) On March 18, 1958, the Assistant Secretary of the Navy (Personnel and Reserve Forces) sent a communication to the chairman of the Board for the Correction of Naval Records which reads in pertinent part:

Subj: Middleton, William J., 346 84 35, ex-BMC, USN

1. In the case of subject-named man, only so much of the decision of the Board for Correction of Naval Records dated 16 January 1958, as would change Middleton's Undesirable Discharge to a General Discharge for unsuitability, is approved.

(b) On April 1, 1958, the plaintiff was notified, through his attorney, of the action of the Board for the Correction of Naval Records, as approved by the Assistant Secretary of the Navy.

9. As a result of the action of the Board for Correction of Naval Records, as approved by the Assistant Secretary of the Navy, plaintiff submitted a military pay and allowance claims voucher in the total sum of \$ 733.61. On September 5, 1958, a certification voucher was issued which reads in pertinent part:

Middleton, William J.

The following pay and [**31] allowances for the above-named individual have been found due and payable because of correction of naval records * * *. [**52]

Amount due:

Mileage allowance 11/10/55, Norfolk,

Virginia to Kansas City, Missouri,

1,307 miles at \$ 0.06 per mile \$ 78.42

Less Discharge Gratuity 23.41 \$ 55.01

LSL 11/10/55, (60 das) BPC \$ 280.80

per mo 561.60

LSL 11/10/55, (60 das) allow \$ 1.95

per da 117.00

733.61

Less: Withholding Tax (\$ 561.60 at 18%)

101.09 \$ 632.52

Appropriation Chargeable DOD

9790102 (45) \$ 733.61

Appropriation Creditable 17F0101

WFTN 101.09

Plaintiff was paid through the Navy Finance Center, the sum of \$ 632.52, by check, which was cashed by him.

10. Plaintiff in this cause of action claims the active duty pay and allowances of a chief boatswain's mate, credited with his length of service for the period from November 10, 1955, to the date when his then current term of enlistment would normally have expired, the amount of the claim being subject to computation by the General Accounting Office, and determination under Rule 47(c) of this court.

CONCLUSION OF LAW

Upon the foregoing findings [**32] of fact which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover and judgment is entered to that effect. The amount of recovery will be determined pursuant to Rule 47(c).

Court held that ex-Marine was illegally:
reduced-in-grade, ~~and that he was threatened~~ and discharged,
and held that it was entitled to difference in pay between
E-4 and E-3 for the period of time from his demotion to his
discharge, and then from his discharge to the date on which
his enlistment would normally have expired to pay at E-4 level.

- But it earned more in civilian pay since his discharge than this
judgment would have given him, so it is completely "set-off"

407 F.2d 879 printed in FULL format.

HAROLD R. CONN v. THE UNITED STATES

No. 157-63

UNITED STATES COURT OF CLAIMS

187 Ct. Cl. 319; 407 F.2d 879; 1969 U.S. Ct. Cl. LEXIS 137

March 14, 1969, Decided

SYLLABUS: [***1]

ON THE PROOFS

Military pay; discharge; mitigation of liability for back pay. -- Plaintiff, a former sergeant in the United States Marine Corps, sued to recover active duty pay and allowances on the ground that his reduction in rank from sergeant to lance corporal was invalid under certain regulations. In an opinion reported at 180 Ct. Cl. 120, 376 F. 2d 878 (1967), the court held plaintiff's reduction in rank was invalid and that he was entitled to recover, the amount of recovery to be determined in further proceedings, including, for mitigation purposes, a determination of the amount of plaintiff's civilian earnings since his illegal discharge. Plaintiff contends that his medical expenses incurred during the period of claim which would have otherwise been provided by the military, and also his college tuition payments which he asserts would have been paid by the United States, should be allowed as deductions from his civilian earnings (or alternatively as additions to his recovery of pay and allowances). Further plaintiff asserts that his civilian earnings should not be used in mitigation because enlisted personnel on active duty often engage in "moonlighting" or off-duty [***2] civilian employment to supplement their income. It is held that, aside from the fact that tuition payments constitute veterans' benefits not related to the pay and allowance awarded by this court, the total tuition payments and medical expenses when added to the back pay found due plaintiff are less than plaintiff's civilian earnings for the period of the claim, and that plaintiff has sustained no compensable damages. It is also held that since plaintiff was not actually "moonlighting" at the time of his discharge, the possibility that he would have been so engaged at some time had he remained on active duty does not vitiate the established rule of "setoff" or mitigation of civilian earnings against the amount otherwise due plaintiff. The petition is dismissed.

Military pay; active duty pay; discharge, wrongful or invalid; recovery, measure of; interim earnings, deductibility of. --

In a successful claim for active duty pay and allowances by reason of an invalid or wrongful discharge from the Service, the amount of back pay which plaintiff may recover is subject to the Government's right to have set off in mitigation the amount of his outside earnings during the [***3] period of wrongful discharge.

COUNSEL: Fred W. Shields, attorney of record, for plaintiff.

Arthur E. Fay, with whom was Assistant Attorney General William D. Ruckelshaus, for defendant.

JUDGES: Cowen, Chief Judge, Laramore, Durfee, Davis, Collins, Skelton and Nichols, Judges.

OPINIONBY: PER CURIAM

OPINION: [*320] [**879] This case was referred to Trial Commissioner Louis Spector pursuant to the provisions of Rule 47(c) (2) for determination of the amount of recovery to which plaintiff is entitled under the decision of the court entered on May 12, 1967, 180 Ct. Cl. 120, 376 F. 2d 878. The commissioner filed a report, including his findings of fact, opinion and recommended conclusion of law on September 25, 1968. Plaintiff filed exceptions to the commissioner's opinion, findings of fact and recommended conclusion of law. Defendant took no exceptions and urged [**880] the court to adopt the commissioner's opinion and recommended conclusion of law. The case has been submitted to the court on oral argument of counsel and the briefs of the parties. Since the court is in agreement with the opinion, findings and recommended conclusion of law of the trial commissioner, [***4] with a minor addition, it hereby adopts the same, as modified, as the basis for its judgment in this case as hereinafter set forth. Therefore, [*321] it is concluded that plaintiff has sustained no compensable damages and his petition is dismissed.

OPINION OF COMMISSIONER

Spector, Commissioner: Plaintiff, a former United States Marine, sued to recover active duty pay and allowances, alleging the illegality of (1) an administrative reduction-in-grade, and (2) an undesirable discharge effective November 2, 1961. In its decision dated May 12, 1967, this court granted plaintiff's motion for summary judgment, denied defendant's cross-motion and counterclaim, and held plaintiff was entitled to recover (1) the difference between the pay and allowances of a Sergeant (E-4) and a Lance Corporal (E-3) for the period from October 4, 1961 to November 2, 1961; and (2) the active duty pay and allowances of a Sergeant (E-4) from November 2, 1961 to August 14, 1966, the date on which his term of enlistment would normally have expired. The exact amount of recovery was reserved for further proceedings under Rule 47(c) (2), "including a determination of the amount of plaintiff's civilian [***5] earnings since his illegal discharge."

The United States General Accounting Office has furnished a report and supplemental report demonstrating that the total amount of pay and allowances due plaintiff in accordance with the judgment is \$ 19,683.84. However, a stipulation by the parties recites that during the period covered by plaintiff's claim, he earned \$ 24,353.99 from civilian employment.

It is well established that civilian earnings must be "set off" in mitigation of the amount otherwise due plaintiff. See *Motto v. United States*, 175 Ct. Cl. 862, 360 F.2d 643 (1966); *Middleton v. United States*, 175 Ct. Cl. 786 (1966); *Shaw v. United States*, 174 Ct. Cl. 899, 357 F.2d 949 (1966).

Here, since the civilian earnings exceed the amount of entitlement, the latter is, in effect, obliterated.

Plaintiff would avoid this result by citing medical expenses (which would have otherwise been provided by the military) incurred during the period of

claim, in the amount of \$ 1,246.80. He also cites college tuition payments during the same period in the amount of \$ 1,001.00, which he asserts [*322] would have been paid by the United States had he received a discharge [***6] under honorable conditions.

Aside from the fact that the tuition payments constitute veterans' benefits, not related to the pay and allowances awarded by this court and the further fact that they are not apparently barred by an undesirable discharge, these payments (\$ 1,001.00) together with the medical expenses (\$ 1,246.80), when added to the pay and allowances found due by the General Accounting Office (\$ 19,683.84), do not equal or exceed plaintiff's civilian earnings for the same period (\$ 24,353.99).

As a result, plaintiff further urges that this is a case in which civilian earnings should not be used in mitigation at all because it is a well known fact that enlisted personnel on active duty very often engage in the practice of "moonlighting" (off-duty civilian employment) to supplement their income. Even if it is assumed, however, that this plaintiff (who was not "moonlighting" at the time of discharge) would have been so engaged at some time thereafter had he remained on active duty, there is no precedent which suggests that the well established rule of "setoff," or mitigation above noted, is vitiated thereby. [**881] The court does not have before it, and does not pass [***7] upon, the case of a serviceman who was actually "moonlighting" at the time of his discharge (or shortly before). [This last sentence is inserted as the language of the court.]

It follows that plaintiff's entitlement is exceeded by his civilian earnings, and that he is not entitled to judgment. The petition should accordingly be dismissed.

Findings of Fact

1. On cross-motions for summary judgment, plaintiff, a former United States Marine, was held entitled to recover "(1) the difference between the pay and allowances of a Sergeant (E-4) and a Lance Corporal (E-3) for the period from October 4, 1961 to November 2, 1961; and (2) the active duty pay and allowances of a Sergeant (E-4) from November 2, 1961 to August 14, 1966, the date on which his term of enlistment would normally have expired."

2. Defendant's cross-motion for summary judgment and [*323] counterclaim were denied. The exact amount of plaintiff's recovery was "reserved for further proceedings under Rule 47(c) (2), including a determination of the amount of plaintiff's civilian earnings since his illegal discharge."

3. In response to plaintiff's motion for call on the United States General [***8] Accounting Office, that agency has furnished a report and a supplemental report, finding that the total amount of pay and allowances due plaintiff in accordance with the judgment is \$ 19,683.84.

4. This sum is comprised of pay, basic allowance for quarters, clothing allowance, and commuted rations. It does not reflect plaintiff's civilian earnings.

5. In a response filed October 11, 1967, "defendant states that the said Report is acceptable. However, further proceedings are required pursuant to Rule 47(c), for the determination of applicable deductions, e.g., outside civilian earnings."

6. Defendant's letter of December 5, 1967, states that "it would appear that your client is also entitled to recover medical expenses actually incurred in the amount of \$ 1,246.80. The total amount of recovery would appear to be \$ 20,930.64." This item of medical expense has since been embodied in a Stipulation of Counsel filed August 9, 1968.

7. Said stipulation further provides "that during the period covered by plaintiff's claim he earned from civilian employment the following amounts:

1961	No civilian earnings
1962	\$ 4,646.68
1963	4,933.66
1964	5,110.43
1965	5,493.91
1966 (8.5/12 X \$ 5,885.63)	4,168.99
Total civilian earnings	\$ 24,353.99

[***9]

During this period plaintiff was employed at the following hourly rates of pay:

January 1, 1962, to October 22, 1962, at \$ 2.20 per hour
 October 23, 1962, to October 22, 1963, at \$ 2.30 per hour
 October 23, 1963, to October 22, 1964, at \$ 2.37 per hour
 October 23, 1964, to November 24, 1965, at \$ 2.47 per hour

During the foregoing periods, the normal working week was forty (40) hours."

[*324] 8. Defendant's aforementioned letter of December 5, 1967, suggests "that a stipulation dismissing the petition be filed on the grounds that your client's civilian earnings are in excess of the amount he would be entitled to recover under the Court's opinion in the case."

9. Plaintiff's counsel has declined to concur in this suggestion nor to accept the General Accounting Office report, asserting in letter of September 12, 1967, that "I propose to object to the deduction of the civilian earnings of the plaintiff from the amount of his claim on the theory that under the regulations of the Marine Corps personnel are permitted to hold outside employment so long as such employment does not interfere with the performance of their military duties. It is a matter of [***10] common knowledge that a substantial portion of enlisted service personnel do hold outside employment and the services apparently recognize that it is necessary for most of their married enlisted personnel to hold such employment in order to properly support their families."

10. In letter of January 10, 1968, plaintiff's counsel elaborates on the foregoing, observing that "plaintiff, during the period covered by his claim, was employed in a clerical capacity in a chain store. As you undoubtedly know, individuals so employed are paid on an hourly basis and the hourly rate of pay is a comparatively low one. The only way in which the plaintiff obtained the

earnings in question during the period of his claim was by working many hours of overtime each year."

11. Plaintiff also asserts that the "illegal discharge of the plaintiff, of course, destroyed the equity which he had built up in [his] retired pay" and that some allowance should be made for this.

12. The aforementioned letter of January 10, 1968, also asserts that plaintiff "had he received a discharge under honorable conditions from the United States Marine Corps, would have been entitled to receive a tuition [***11] grant from the United States and perhaps a monetary allowance for his support while attending classes at the University of Louisville."

13. The stipulation of August 9, 1968, states "that the plaintiff, during the period of his claim, attended classes [*325] at the University of Louisville during 1962, 1963, 1964 and 1965, for a total of eleven (11) semesters and that he paid tuition while attending the University of Louisville at the rate of from approximately \$ 154 to \$ 170 per semester, amounting to a total of \$ 1,001.00."

14. Finally, the stipulation acknowledges that the following documents may be introduced into evidence for consideration of the commissioner and the court in determining the amount of the judgment to be entered by the court in this cause:

1. A memorandum dated 12 May 1965 from the Assistant Chief of Staff, G-1, to the Chief of Staff, at Headquarters, United States Marine Corps, relating to off-duty civilian employment of Marine Corps personnel.

2. A pamphlet issued by the Air Force Compensation Study Group, entitled "Adjustments to Military Pay and Allowances FY 66," with subheading "Deficiencies in Military Compensation."

15. [***12] The first document mentioned is entitled "Moonlighting," a term employed to describe off-duty employment. It is a comprehensive statistical study of the practice.

16. There is nothing in the record to indicate that this plaintiff was engaged in "moonlighting" at the time of his discharge, nor that opportunity existed for off-duty employment in Haiti, his duty station at the time of discharge.

17. The second document above mentioned illustrates that inadequate pay at the lower grades has contributed to the practice of "moonlighting."

18. The aforementioned stipulation followed a pretrial conference held July 26, 1968, to facilitate completion of the stipulation, and reservation of the issues which plaintiff wished to submit.

Conclusion of Law

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff has sustained no compensable damages, and the petition is hereby dismissed.

159 Ct. Cl. 1 printed in FULL format.

BETTY FRIEDMAN, EXECUTRIX OF THE ESTATE OF JOSEPH FRIEDMAN,
DECEASED v. THE UNITED STATES

No. 377-60

UNITED STATES COURT OF CLAIMS

159 Ct. Cl. 1; 310 F.2d 381; 1962 U.S. Ct. Cl. LEXIS 139

November 7, 1962, Decided

SUBSEQUENT HISTORY: [***1]

Plaintiff's Motion for Rehearing Denied January 11, 1963. *

* Plaintiff's petition for writ of certiorari denied by the Supreme Court in this case and in Lipp v. United States, 373 U.S. 932.

SYLLABUS: ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Military pay; retired pay (disability); limitation of actions. -- Plaintiff, the widow of a former Army officer, sues to recover disability retired pay from the time of his release in 1947 not by reason of physical disability to the date of his death in 1958, on the ground that the denial of disability retirement with pay by the Army and the refusal of the Correction Board to change decedent's records to show him retired for disability in 1947 were arbitrary and capricious. It is held that because the decedent did not seek reevaluation of his claim for disability retirement following the 1946 Retiring Board action and following his unconditional separation from service in January 1947 without disability retirement, his cause of action accrued more than six years prior to the date on which he filed his petition and not at the time the Correction Board acted adversely in 1960, and the claim set forth [***2] in the petition of 1960 is barred by the statute of limitations. 28 U.S.C. @ 2501. Petition dismissed.

Military pay; retired pay (disability); Court of Claims jurisdiction; claim founded upon Act of Congress; Correction Board arbitrary denial of claim. -- Where disability retired pay is sought by plaintiff in a suit in the Court of Claims, the Act of Congress upon which that claim is founded in the sense of the Tucker Act, 28 U.S.C. @ 1491, is the substantive retirement legislation, 10 U.S.C. @@ 1201, et seq. The Correction Board statute (Act of October 25, 1951, 65 Stat. 655, 10 U.S.C. @ 1552, formerly 5 U.S.C. @ 191a), is merely a statute designed to implement the substantive rights granted by the retirement laws, and the Correction Board acting under that 1951 law is either a reviewing agency to decide whether the prior administrative actions of retiring boards, etc., acting under the retirement legislations, have been unjust or erroneous, or is acting in the place of a Retiring Board where none had acted.

Military pay; retired pay (disability); administrative decision -- finality of; recommendation for reevaluation. -- Where a Retiring Board denies a member [***3] of the uniformed services disability retirement but recommends that his case be reevaluated in six months, the denial by the board may not constitute a final action for the purpose of limitations. But where the officer, after his release, makes no effort to obtain such reevaluation for many years, that

action will be considered final.

Military pay; retired pay (disability); limitation of actions; accrual of cause of action; Correction Board action. -- Where an officer accepts unconditional separation from service following a Retiring Board's decision that he is not disabled but recommending reevaluation in six months, and the officer does not seek reevaluation until some 11 years later when he applies to the Correction Board, his suit in the Court of Claims based on alleged arbitrary action of the Correction Board is barred by the statute of limitations. 25 U.S.C. @ 2501. Because plaintiff had a Retiring Board, his claim is based on the final action of that board and not on the later action of the Correction Board whether arbitrary or not.

Limitation of actions; pay claims; continuing claim theory -- when applicable. -- This theory is applied to claims for periodic [***4] installments of back pay, military or civilian, in those instances where Congress has not entrusted some administrative officer or tribunal with the duty of determining the claimant's eligibility for the particular pay sought; where the case turns on pure issues of law or on specific factual issues which the court must decide in the first inference rather than by reviewing the prior determination of some administrative tribunal, and where there is involved the resolution of sharp and narrow factual issues. Such a claim accrues as soon as the payor fails or refuses to pay what the law or contract requires, and there is no other condition precedent to the accrual of the cause of action. Each successive failure to pay what is due gives rise to a new cause of action and no installment due and unpaid within the six years prior to the date on which the petition in the Court of Claims is filed is barred by the statute of limitations applicable to claims in this court. 28 U.S.C. @ 2501.

Limitation of actions; pay claims; non-continuing claim theory -- when applicable. -- Where Congress has given to an administrative official or tribunal the function of deciding the issue of a claimant's [***5] entitlement to some sort of pay, military or civilian, a claim or cause of action for that pay does not accrue until the official or tribunal has acted (if seasonably asked to act) or has refused to act. In such a situation the mere separation of the claimant from military or civilian Government service does not, in and of itself, start the limitations period (28 U.S.C. @ 2501) running. Once a proper board or duly authorized official has acted finally, or has refused to act, the statute of limitations starts to run and is not thereafter tolled because of later consideration of the claim by other boards, officials or agencies such as the Disability Review Board or the Correction Board in the military pay field.

Limitation of actions; pay claims; disability retired pay; accrual of cause of action; final action of proper board. -- A claim for disability retired pay (military) accrues when the proper board with authority to make a final decision either decides or refuses to decide the claimant's entitlement to such pay. Usually the proper board is a Retiring Board, but the action of such a board may be deprived of finality under some circumstances such as a case where the claimant [***6] has been misled by Government officials, or where the board's decision is tentative and invites reopening. Once a final decision is reached, later adverse determinations by other boards do not give rise to a new cause of action.

159 Ct. Cl. 1, *, 310 F.2d 381, **;
1962 U.S. Ct. Cl. LEXIS 139, ***6

Military pay; retired pay (disability); Court of Claims -- jurisdiction; claim founded upon Act of Congress. -- A claim for disability retired pay is founded upon the substantive retirement statute and not on the statute under which the boards for the correction of military and naval records are established and authorized to act. A claim for disability retired pay accrues when the claim is first denied by a proper board authorized by law to take final action and this is usually a Retiring Board. If a claimant has not had or requested a Retiring Board and a Correction Board is the first board to pass on his claim, then his cause of action, if any, accrues at the time of the wrongful denial of his claim by the Correction Board but the claim itself is founded not upon the Correction Board legislation but upon the retirement statute.

Military pay; retired pay (disability); administrative remedies -- exhaustion of; Correction Board -- resort to. [***7] -- Where disability retired pay has been denied a claimant by a Retiring Board, resort to the Correction Board is permissive and not a prerequisite to suit in the Court of Claims. Ogden v. Zuckert, 298 F. 2d 312 (1961). If the claimant has not had or requested a Retiring Board, then he must seek relief from the Correction Board before filing suit in the Court of Claims. Under these circumstances the Correction Board proceeding becomes mandatory and without it the case in the Court of Claims will be dismissed as premature on the ground that the claimant did not seek or obtain a final decision within the administrative hierarchy.

COUNSEL: Guy Emery, for the plaintiff. Emery and Wood were on the briefs.

Charles M. Munnecke, with whom was Assistant Attorney General William H. Orrick, Jr., for the defendant.

JUDGES: Davis, Judge, delivered the opinion of the court. Durfee, Judge; Laramore, Judge; Whitaker, Judge; and Jones, Chief Judge, concur.

OPINIONBY: DAVIS

OPINION: [*4] [***383] The plaintiff is the widow and executrix of Dr. Joseph Friedman who served in the Army on active duty as a medical officer from January 9, 1941, to January 30, [***8] 1947. She sues for disability retirement pay alleged to have been arbitrarily denied her husband.

During his service Dr. Friedman suffered a number of periods of serious illness and underwent considerable hospitalization. In 1944-1946 he had a series of boards to canvass his capacity for continued service, the last of which was a Retiring Board at Walter Reed General Hospital which decided on October 25, 1946, that he was not permanently [*5] incapacitated for active service, but also recommended that he be placed on a period of temporary limited duty not in excess of six months, with re-examination and reevaluation at the end of that time. This was not done and he was released, at his own request, on January 30, 1947, not for physical disability. The plaintiff claims that in December 1946, before his release, Major Friedman wrote to Walter Reed, in response to an official request that he indicate whether he wished to remain on temporary limited service for six months or be separated at once, asking that he be recalled to active duty at the end of six months from his appearance before the Retiring Board (which had been in October 1946), for the purpose of re-examination and [***9] reevaluation at the hospital. What is said to be the decedent's office copies of such an exchange of letters is presented to

us. The defendant answers [**384] that the files at Walter Reed and in the Adjutant General's Office contain no such correspondence or indication of it. Whether or not Dr. Friedman did make such a request in December 1946, it is clear that after his separation in January 1947 he made no further request of the Army and did nothing further to obtain disability retirement pay at any time during the remainder of his life. He died on October 4, 1958. After his death, his widow applied to the Board for Correction of Military Records on March 18, 1960, for a determination that he had been entitled to disability retired pay when he was released from active duty in January 1947. This application was denied on August 17, 1960. The petition in this court was filed on September 30, 1960. The parties have both moved for summary judgment.

As our statement of the case implies, this is another suit for disability retirement pay in which the first issue is whether the claim is barred by the six-year statute of limitations, 28 U.S.C. 2501. There are a multitude of [***10] cases -- past, present, and potential -- involving this thorny question. The court's recent ruling in Lipp v. United States, 157 Ct. Cl. 197, has been the fulcrum for a broad range of claims and contentions put forth both by plaintiffs and the Government. Briefs in pending cases and motions for rehearing or reconsideration strongly suggest that there are large uncertainties [*6] and inconsistencies in our past decisions; they call upon us to reassess the court's general position on the bar of limitations in the field of pay cases. We therefore take the opportunity to spell out in detail, in this case and the related case of Harper v. United States, also decided this day, post, p. 135, the rules we shall now follow and which we believe the court has been following, in the main, in its prior holdings. In the present case, the result of our consideration is that the claim is barred by limitations. In the Harper case, we conclude that the suit is not time-barred.

We discuss first the course of this court's past decisions on the time-bar in pay cases, including the rulings in the disability retirement area. Next we consider afresh the primary contention [***11] pressed by the plaintiffs in this and related cases: Does the determination of the Board for Correction of Military Records denying a claim for disability retirement ground a new cause of action upon which the claimant has six years to sue in this court? Finally, we treat the limitations problem as it is presented in this particular case.

I. THE COURSE OF THIS COURT'S DECISIONS ON THE LIMITATIONS BAR IN PAY CASES

We emphasize at the outset that, in canvassing the court's prior decisions, we have been mainly guided by our holdings, as distinguished from dicta and observations not truly part of the rationale of the decisions. Also, because the place of limitations in disability retirement cases becomes clearer when seen as part of the general design of our rulings on that problem in pay cases of all types, we begin with a discussion of the different kinds of pay litigation from the standpoint of the time-bar.

A. The "continuing claim" cases. Over the years, the court's pay cases (military and civilian) concerned with the issue of limitations have often applied the so-called "continuing claim" theory, i.e., periodic pay claims arising more than six years prior to [***12] suit are barred, but not those arising within the six-year span even though the administrative refusal to pay the sum claimed may have occurred, or the statute on which the claim is grounded may have been enacted, [*7] prior to six years. These were suits for

additional pay at a higher grade, or claiming greater compensation (under a statute or regulation) than the claimant was receiving, or seeking special statutory increments or allowances, etc. The important characteristics of all these cases were: (a) Congress had not entrusted an administrative officer or tribunal with the determination of the claimant's eligibility for the particular pay he sought; (b) the cases turned on [**385] pure issues of law or on specific issues of fact which the court was to decide for itself (i.e., Congress had not established any administrative tribunal to decide either the factual or the legal questions); and (c) in general the cases called upon the court to resolve sharp and narrow factual issues not demanding judicial evaluation of broad concepts such as "disability" (concepts which involve the weighing of numerous factors and considerations as well as the exercise of expertise [***13] and discretion). n1 For such cases -- in which no administrative agency has been set up to decide the claim, and the court passes de novo on all issues of law and fact -- the "continuing claim" doctrine is wholly appropriate and in accord with the general jurisprudence in this country on the statute of limitations. Under those general principles the cause of action for pay or compensation accrues as soon as the payor fails or refuses to pay what the [*8] law (or the contract) requires; there is no other condition precedent to the accrual of the cause of action (such as a factual determination by an executive tribunal or the exhaustion of some special procedure or remedy). And where the payments are to be made periodically, each successive failure to make proper payment gives rise to a new claim upon which suit can be brought. See, generally, *Odell v. United States*, 134 Ct. Cl. 634; *Gordon v. United States*, 134 Ct. Cl. 840, 843-4; *Levadi v. United States*, 137 Ct. Cl. 97, 100, cert. denied, 353 U.S. 917. n2

- - - - -Footnotes- - - - -

n1 See *Bachelor v. United States*, 8 Ct. Cl. 235, 238-239; *Ellsworth v. United States*, 14 Ct. Cl. 382, 395, aff'd on other grounds, 101 U.S. 170; *Blake v. United States*, 103 U.S. 227, 237; *Watson v. United States*, 21 Ct. Cl. 511, aff'd 130 U.S. 80, 83; *Moser v. United States*, 42 Ct. Cl. 86, 49 Ct. Cl. 285, 58 Ct. Cl. 164, aff'd 266 U.S. 236; *Brown v. United States*, 68 Ct. Cl. 734, 739; *Caudle v. United States*, 72 Ct. Cl. 331, 333-334; *Page v. United States*, 73 Ct. Cl. 626, 631; *Moore v. United States*, 76 Ct. Cl. 753, 754; *Standerson v. United States*, 83 Ct. Cl. 633, 636; *Thomson v. United States*, 79 Ct. Cl. 224, 226; *Dene v. United States*, 89 Ct. Cl. 502, 506; *Commings v. United States*, 89 Ct. Cl. 498, 501-2; *Hornblass v. United States*, 93 Ct. Cl. 148, 151, 156; *Long v. United States*, 93 Ct. Cl. 544, 546, 550; *Reynolds v. United States*, 95 Ct. Cl. 160, 161; *Lake v. United States*, 97 Ct. Cl. 447, 450; *Smith v. United States*, 98 Ct. Cl. 392, 396-7; *Sayers v. United States*, 102 Ct. Cl. 791; *Hermann v. United States*, 113 Ct. Cl. 54, 59-61; *Neff v. United States*, 113 Ct. Cl. 1; *Pacific Maritime Assn. v. United States*, 123 Ct. Cl. 667, 678; *McCormick v. United States*, 124 Ct. Cl. 111, 113-114; *Hart v. United States*, 125 Ct. Cl. 294, 296; *Winfree v. United States*, 125 Ct. Cl. 853, 857; *Lowry v. United States*, 125 Ct. Cl. 598; *Mistretta v. United States*, 128 Ct. Cl. 41; *Villarta v. United States*, 129 Ct. Cl. 748, 751 (claim for "overseas allowances"); *O'Brien v. United States*, 130 Ct. Cl. 713; *Gordon v. United States*, 134 Ct. Cl. 840; *Jalbert v. United States*, 147 Ct. Cl. 439; *Roberts v. United States*, 151 Ct. Cl. 360, 363; *Haislip, et al. v. United States*, 152 Ct. Cl. 339. [***14]

n2 For recent examples of references to this doctrine, see *Broche v. United States*, 157 Ct. Cl. 784; *McGrath v. United States*, 157 Ct. Cl. 791.

- - - - -End Footnotes- - - - -

B. Cases (other than disability retirement cases) in which the cause of action does not accrue until after a determination entrusted by Congress to an administrative official.

1. Concomitantly with its use of the "continuing claim" theory, the court has applied another principle in a different type of case. That second principle governs situations where Congress has deliberately given an administrative body the function of deciding all or part of the claimant's entitlement, i.e., where Congress has interposed an administrative tribunal between the claimant and the court. In those instances the claim does not accrue until the executive body has acted (if seasonably asked to act) or declines to act. So also where Congress [**386] has insisted that a special demand be made or a special application filed. Generally (but not always) these cases involve evaluation of the facts by the agency, some degree of administrative [***15] discretion, and some measure of conclusiveness for the administrative determination. There may be acute differences of opinion whether the particular agency has such a special function or is simply akin to the General Accounting Office -- see, e.g., *Smithmeyer v. United States*, 147 U.S. 342, 357-358 n3 -- but once the court has decided that the case falls into the former class it has ruled that the claim accrues, not when the events [*9] occurred, but when the agency has rendered or refused its determination.

- - - - -Footnotes- - - - -

n3 See, also, *Withers v. United States*, 69 Ct. Cl. 584, 587, holding that in the normal case consideration by the General Accounting Office is unnecessary and the statute of limitations is not tolled during such consideration. The Accounting Office is not normally a deciding tribunal. But cf. *Thomson v. United States*, 79 Ct. Cl. 224, 226-7, for a special statute requiring resort to that agency.

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Like the "continuing claim" theory, this second principle fits with general limitations [***16] law which recognizes that in appropriate cases conditions precedent to the accrual of a cause of action can be established by statute, contract, or common law, and that where such a condition precedent has been created the claim does not ripen until the condition is fulfilled. See *Sese v. United States*, 125 Ct. Cl. 526, 528-530.

2. Earlier cases in this court of this general type are *Taylor v. United States*, 14 Ct. Cl. 339, 353, aff'd 104 U.S. 216, 221-222 (statute required demand upon the Secretary); *Lawton v. United States*, 18 Ct. Cl. 595, 601, aff'd 110 U.S. 146, 149 (same); *Harrison v. United States*, 20 Ct. Cl. 175 (same); *Louisiana v. United States*, 22 Ct. Cl. 284, 288, aff'd 123 U.S. 32, 37 (General Land Office required to consider State's proof); *Horton v. United States*, 31 Ct. Cl. 148, 150, 157 (administrative determination relating to informer's award). More recent cases are *Schaeffer v. United States*, 114 Ct. Cl. 568, 570 (on demurrer), decision on the merits, 121 Ct. Cl. 369, cert. denied, 344 U.S. 854 (determination by Maritime Commission of just compensation for requisitioned vessels); *Smith v. United States*, 67 Ct. Cl. 182 (same); cf. *Oro*

159 Ct. Cl. 1, *9; 310 F.2d 381, **386;
1962 U.S. Ct. Cl. LEXIS 139, ***17

Fino Consolidated Mines, Inc. v. United States, 118 Ct. Cl. 18, 21-22, cert.
denied, 341 U.S. 948. n4

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n4 See, also, Tserioni v. United States, 94 Ct. Cl. 142, 147, cert. denied,
314 U.S. 668; Utah Power & Light Co. v. United States, 67 Ct. Cl. 602, 606; King
v. United States, 48 Ct. Cl. 371, 375.

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3. In recent years the main field in which the court has applied this
principle -- aside from the disability retirement cases (to be considered infra)
-- is that of adverse personnel actions against federal employees (refusal of
appointment to the federal service; discharge, separation, dismissal, or
removal; refusal of reinstatement; reduction in grade; compulsory retirement).
In those cases the court has recognized that Congress has entrusted the
administrators with a large measure of discretion and has in effect established
an executive agency as the primary tribunal for determining [*10] whether
certain adverse action should [***18] be taken against the employee.
Accordingly, the court has not applied the "continuing claim" theory but,
instead, has viewed the entire cause of action as accruing once the appropriate
agency has finally acted.

The first such case was Middleman v. United States, 91 Ct. Cl. 306, decided
in 1940. A civil service employee was dismissed on October 14, 1931 -- he
claimed unlawfully -- and suit was not filed until January 2, 1940. The court
held the entire action barred by limitations. We read the summary opinion as
ruling that discharges are outside the reach of the "continuing claim" doctrine
because the administrative agency has been granted [**387] a large measure
of discretion with respect to such personnel determinations. The subsequent
opinions of the court in this field (discharge, appointment, reinstatement,
reduction in grade, compulsory retirement) accord with the Middleman holding.
The court as a court has not applied the "continuing claim" theory. n5 In the
recent case of Feldman v. United States, 149 Ct. Cl. 22, 30-32, the court
explicitly rejected the applicability of that doctrine to discharge cases.

- - - - -Footnotes- - - - -

n5 See Croghan v. United States, 116 Ct. Cl. 577, 587 (removal); Siskind v.
United States, 116 Ct. Cl. 809 (same); Gray v. United States, 124 Ct. Cl. 313,
(appointment); Harmon v. United States, 124 Ct. Cl. 751, 754-5 (discharge);
Thomas v. United States, 125 Ct. Cl. 76, 79-80 (reduction in grade); Group v.
United States, 125 Ct. Cl. 135, 136-137 (same); Goodwin v. United States, 127
Ct. Cl. 417 (reinstatement order by Civil Service Commission creates new cause
of action for back pay illegally withheld, even beyond six years); Palmer v.
United States, 129 Ct. Cl. 322, 325-326 (demotions-removal); Villarta v. United
States, 129 Ct. Cl. 748, 751 (claim for difference in pay -- an "appointment"
claim); O'Brien v. United States, 130 Ct. Cl. 713, 714 (reinstatement at lower
grade); Riley v. United States, 130 Ct. Cl. 113 (demotion); Goldstein v. United
States, 131 Ct. Cl. 228, 232-3 (military discharge); Upton v. United States, 132
Ct. Cl. 355, 358 (demotion); Feldman v. United States, 149 Ct. Cl. 22
(discharge); see also Dorer v. United States, 115 Ct. Cl. 83 (all sums sought
were for periods prior to six years); Love v. United States, 122 Ct. Cl. 144

(same). Cf. Cannon v. United States, 137 Ct. Cl. 104 (no opinion of the court) and McCormick v. United States, 124 Ct. Cl. 111 (special status of claims under the Selective Training and Service Act).

- - - - -End Footnotes- - - - -
[**19]

These decisions are not inconsistent with, or a departure from, the "continuing claim" series. The differing results flow from the existence of two separate categories of claims -- "continuing claims" which are independent of administrative determination and those other claims dependent on prior [*11] administrative evaluation. The discretionary personnel-action cases do not fall into the "continuing claim" group, but, rather, into the second class in which the cause of action accrues only after final administrative decision, and then accrues as a whole. There are good reasons of policy for refusing to apply the "continuing claim" principle to such cases. The Feldman opinion, supra, points out that discharged employees should not be permitted to wait years before suing. The same is true of employees aggrieved by other personnel actions, such as refusals to appoint or demotions. Judicial relief should be sought promptly so that the administrators can know whether the employee should be reinstated, restored to his former grade, etc. Even though this court grants only money relief, its rulings on the legal issues normally determine whether the employee will be restored [***20] to duty. There is also the dislocation and expense connected with the employee hired to replace the plaintiff. In sum, more than the plaintiff's own salary is at stake.

4. In deciding in these cases that limitations runs from the date of the administrative action, the court has sometimes had to choose which administrative action it will regard as operative. Where the statute requires that a particular administrative remedy must be exhausted (i.e., a mandatory remedy), there has ordinarily been no problem -- the statute of limitations does not run until the completion of that process and, by like token, the claimant cannot bring suit until he has reasonably exhausted that remedy. See, e.g., New River Collieries Co. v. United States, 65 Ct. Cl. 205, 232-235; Smith v. United States, 67 Ct. Cl. 182, 206-208; Dawnic Steamship Corp. v. United States, 90 Ct. Cl. 537, 578-579; Utah Power & Light Co. v. United States, 67 Ct. Cl. 602, 606; Mistretta v. United States, 128 Ct. Cl. 41, 45; Cuiffo v. United States, 131 Ct. Cl. 60, 63-64, 66-67.

[**388] Where, however, an administrative remedy is permissive (i.e., suit may be brought [***21] without exhausting the remedy). the court has usually held that the running of limitations is not deferred or tolled by such optional administrative consideration. n6 [*12] A series of recent cases, involving the right of veterans to appeal to the Civil Service Commission (under the Veterans' Preference Act) from adverse personnel actions, may possibly be thought to have introduced an exception. In Love v. United States, 122 Ct. Cl. 144, 146, and Thomas v. United States, 125 Ct. Cl. 76, 79-80, the court ruled -- on the assumption that the remedy was permissive only -- that an appeal to the Commission did not defer or toll the statute of limitations. See also Gray v. United States, 124 Ct. Cl. 313. In Martilla v. United States, 118 Ct. Cl. 177, 179-180 -- not a limitations case -- the holding was that the plaintiff should have pursued his appeal to the Commission (i.e., that the appeal was required or mandatory) and that no cause of action existed until he did so. In Cuiffo v. United States, 131 Ct. Cl. 60, 63, 68, however, the court held pursuit of the

Commission remedy unnecessary where the plaintiff had been in effect informed [***22] that he had either an appeal to the Commission or further review within his own agency (but probably not both); the opinion also stressed the reasons for considering the appellate remedy (i.e., appeal to the Commission) permissive rather than mandatory. In *Adler v. United States*, 134 Ct. Cl. 200, cert. denied, 352 U.S. 894, the court, although recognizing that appeal to the Commission was not mandatory, nevertheless refused in its discretion to consider a veterans-demotion case until appeal to the Commission had been completed. Finally, in *Keeney v. United States*, 150 Ct. Cl. 53, 55, the court ruled that, even though the claimant's "appeal to the Civil Service Commission is merely permissive rather than mandatory," limitations did not begin to run until after the Commission's [*13] decision, since that ruling would be binding on the employing agency and the administrative action would therefore not become final until the Commission had acted.

- - - - -Footnotes- - - - -

n6 See, e.g., *Battelle v. United States*, 7 Ct. Cl. 297; *Carlisle v. United States*, 29 Ct. Cl. 414; *Curtis v. United States*, 34 Ct. Cl. 1; *Cohen, Goldman & Co., Inc. v. United States*, 77 Ct. Cl. 713, 730, cert. denied, 290 U.S. 681; *Hendricks v. United States*, 81 Ct. Cl. 609; *Pink v. United States*, 85 Ct. Cl. 121, 124; *John P. Moriarty, Inc. v. United States*, 97 Ct. Cl. 338; *Ylagan v. United States*, 101 Ct. Cl. 294; *L. E. Myers Co., Inc. v. United States*, 105 Ct. Cl. 459; *Love v. United States*, 122 Ct. Cl. 144, 146; *Tan v. United States*, 122 Ct. Cl. 662, 664-5, cert. denied, 344 U.S. 895; *Gray v. United States*, 124 Ct. Cl. 313; *Sese v. United States*, 125 Ct. Cl. 526, 527-531; *Mistretta v. United States*, 128 Ct. Cl. 41. See also *McMahon v. United States*, 342 U.S. 25; *Soriano v. United States*, 352 U.S. 270; *Smithmeyer v. United States*, 147 U.S. 342, 357-358.

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[***23]

C. Disability retirement pay cases. n7 The court has dealt with the limitations problem, in the disability retirement field, in over 30 decisions since 1954. n8 Without attempting to harmonize [**389] everything said in each of those opinions, we believe that the holdings, in totality, do fall generally into a rational pattern.

- - - - -Footnotes- - - - -

n7 We include in this category only those disability retirement cases in which there was necessarily involved the issue of whether the claimant should have been retired for disability. Cases in which a claimant previously retired for physical disability demands pay at a higher rate -- e.g., because of a change in the statutory method of computation -- have been generally handled by the court under the "continuing claim" doctrine, *supra*.

n8 *Uhley v. United States*, 128 Ct. Cl. 608; *Rosnick v. United States*, 132 Ct. Cl. 1; *Girault v. United States*, 133 Ct. Cl. 135; *Duff v. United States*, 133 Ct. Cl. 161; *Capps v. United States*, 133 Ct. Cl. 811; *Loeb v. United States*, 133 Ct. Cl. 937; *Levine v. United States*, 133 Ct. Cl. 774; *Odell v. United States*, 134 Ct. Cl. 634; *MacFarlane v. United States*, 134 Ct. Cl. 755; *Seabrook v. United States*, 135 Ct. Cl. 190; *Soukaras v. United States*, 135 Ct. Cl. 88, cert.

denied, 352 U.S. 918; Barker v. United States, 135 Ct. Cl. 42, cert denied, 352 U.S. 935; Levadi v. United States, 137 Ct. Cl. 97, cert denied, 353 U.S. 917; Conlin v. United States, 137 Ct. Cl. 128, cert. denied, 353 U.S. 916; Price v. United States, 137 Ct. Cl. 685; Furlong v. United States, 138 Ct. Cl. 843; Hutchinson v. United States, 137 Ct. Cl. 889; San Millan v. United States, 139 Ct. Cl. 485; Suter v. United States, 139 Ct. Cl. 466, cert. denied, 355 U.S. 926; Proper v. United States, 139 Ct. Cl. 511; Friedman v. United States, 141 Ct. Cl. 239; Brown v. United States, 141 Ct. Cl. 557; Patterson v. United States, 141 Ct. Cl. 435; Eicks v. United States, 145 Ct. Cl. 522; Allin v. United States, 147 Ct. Cl. 459; Weiner v. United States, 148 Ct. Cl. 445; Knight v. United States, 152 Ct. Cl. 298; Frederick v. United States, 150 Ct. Cl. 769; Lipp v. United States, 157 Ct. Cl. 197; Hoen v. United States, 157 Ct. Cl. 235; Merson v. United States, No. 5-60, decided April 13, 1962 (order), 157 Ct. Cl. 941; McAulay v. United States, 158 Ct. Cl. 359, 361 [cert. denied, 373 U.S. 938].

- - - - -End Footnotes- - - - -
[***24]

1. The claim accrues on final action of a board, not on release from active service. -- The court has consistently held that Congress has entrusted the military boards with the task of determining whether a serviceman should be retired for disability and therefore that no cause of action arises (and the statute of limitations does not run) until a proper board has acted or declined to act. See, e.g., Furlong v. United States, 138 Ct. Cl. 843, 845-846; Uhley v. United States, 128 Ct. Cl. 608, 611-612; Girault v. United States, 133 Ct. Cl. 135, 143-144; Odell v. United States, 134 Ct. Cl. 634, 638; Lipp v. United States, 157 Ct. Cl. 197, 199. No final holding of the court is truly inconsistent with this position; [*14] and there is no final holding that mere separation from the service without disability retirement, in and of itself, starts the limitations period. On the contrary, San Millan v. United States, 139 Ct. Cl. 485, 487, 497, 499, in which the Retiring Board was not requested until 3 1/2 years after release, is a recent direct holding that limitations runs not from release but from the later refusal to grant a Retiring Board; see also Proper v. United States, 139 Ct. Cl. 511, Patterson v. United States, 141 Ct. Cl. 435, 438, and Frederick v. United States, 150 Ct. Cl. 769, for comparable direct holdings. The recent Lipp opinion also recognizes this basis of the cause of action. n9 Thus, the court has uniformly applied to this type of case [**390] the doctrine (discussed supra) that where an administrative decision is mandatory the claim is not ready for suit until such a decision is had or is excused. That is the condition precedent to the accrual of the cause of action. Mere release from active duty without a Retiring Board (or request for one) or without disability retirement pay is not enough to start limitations running.

- - - - -Footnotes- - - - -

n9 The opinions which can be thought to be contrary are:

(1) In Hoen v. United States, 157 Ct. Cl. 235, the court rejected the claim on the merits and then added summarily (prompted by the Lipp decision which came down the same day) that the claim was also barred by limitations. However, it does not appear that Hoen had or applied for a Retiring Board at the time of his separation in 1946 (he did not ask for a Retiring Board until 1958). On April

13, 1962, in *Merson v. United States*, No. 5-60, 157 Ct. Cl. 941, the court dismissed by order (on the authority of *Lipp*) a disability retirement claim by a veteran who apparently had no Retiring Board and took no action until he applied to the Correction Board in 1958. The *Merson* case is pending on a motion for reconsideration. [In light of *Harper v. United States*, decided November 7, 1962, post, p. 135, plaintiff's motion for reconsideration was granted on November 7, 1962, and the order of dismissal vacated.]

(2) The holding in *Price v. United States*, 137 Ct. Cl. 685, is indecisive. Judge Whitaker's opinion, in which Judge Laramore joined, treated the action of the Disposition Board as sufficient to start the statute running; no Retiring Board was requested at the time. Chief Judge Jones concurred in the result only. Littleton and Madden, JJ. would not have passed upon the limitations issue at all. Similarly, though there may have been no Retiring Board in *MacFarlane v. United States*, 134 Ct. Cl. 755, there was, prior to release, a Disposition Board and extensive medical examination to determine disability. In both *MacFarlane* and *Price*, the majority of the court appears to have treated the Disposition Board (and consequent proceedings) as the equivalent of a Retiring Board proceeding.

- - - - -End Footnotes- - - - -
[***26]

2. There is no tolling by further consideration after final board action. -- The court has also held, with one possible exception, that where a proper board has acted finally the running [*15] of the statute is not tolled by later consideration by other boards or agencies. In particular, where full action by a Retiring Board had been had (or refused), later review by the Disability Review Board or the Correction Board does not toll the statute. *Rosnick v. United States*, 132 Ct. Cl. 1; *Girault v. United States*, 133 Ct. Cl. 135, 143-145; *Duff v. United States*, 133 Ct. Cl. 161; *Levine v. United States*, 133 Ct. Cl. 774, 779-780; *Odell v. United States*, 134 Ct. Cl. 634; *MacFarlane v. United States*, 134 Ct. Cl. 755; *Soukaras v. United States*, 135 Ct. Cl. 88, cert. denied, 352 U.S. 918; *Barker v. United States*, 135 Ct. Cl. 42, cert. denied, 352 U.S. 935; *Levadi v. United States*, 137 Ct. Cl. 97, cert. denied, 353 U.S. 917; *Conlin v. United States*, 137 Ct. Cl. 128, cert. denied, 353 U.S. 916; *Hutchinson v. United States*, 137 Ct. Cl. 889; *Lipp v. United States*, 157 [***27] Ct. Cl. 197. These cases hold that the final action of the first proper board to act (finally) is decisive for limitations purposes.

The possible exception is *Frederick v. United States*, 150 Ct. Cl. 769 (the opinion in which contains no now-relevant discussion of limitations). The plaintiff was discharged in 1945 after a Retiring Board found him disabled but his disability not service-connected; in 1952 he applied to the Disability Review Board which affirmed the Retiring Board's findings; in March 1954 he applied to the Correction Board which (after proceedings the court held to be irregular) refused to grant him disability retirement; suit was begun in 1956. The court's opinion does not refer to the prior cases on limitations to which we have just referred, and discusses that subject only in the context of deciding whether the plaintiff should recover his pay back to the date of his separation or only for the six years prior to suit; of the majority, Judges Madden and Littleton thought the former and the Chief Judge the latter, and the judgment was limited to the six prior years. (Judges Whitaker and Laramore dissented.) Since there is no explanation in the majority [***28] opinion, one must

speculate as to basis for the silent holding that the entire claim was not time-barred. There are at least two possible rationales which would not conflict with the line of cases [*16] beginning with Rosnick. n10 In any event, the absence of discussion in the opinion precludes us from treating Frederick as a "hard" or full precedent.

- - - - -Footnotes- - - - -

n10 Since the Correction Board actually reopened the proceedings, and directed new examinations of Frederick and a new hearing before a Physical Evaluation Board (as successor to the former Retiring Boards), the court could have viewed the case as one in which the initial board's decision was tentative and therefore within the class of case, to be discussed immediately below, in which the claim does not accrue until final action. Or it may be that, since the court stressed the irregularities in the Correction Board's procedures, it thought that those irregularities in procedure (rather than the arbitrariness of the substantive determination) created a new cause of action on which the plaintiff could recover.

- - - - -End Footnotes- - - - -

[***29]

[**391] 3. In a number of situations the court has held that the final action of the first board to decide has been delayed or deferred by one or another circumstance and therefore that the cause of action has not accrued until the later time. In *Uhley v. United States*, 128 Ct. Cl. 608, the plaintiff was erroneously told by Air Force medical officers that his disabilities would not warrant retirement for disability and consequently he did not seek a Retiring Board when he was separated in December 1945; he asked for and was refused such a board in 1951 and applied to the Correction Board in 1952. Suit was brought in February 1953 (within six years of the latter two requests); the court held that limitations did not begin to run on his separation in December 1945 because his failure to ask for a Retiring Board was excused by the misleading information. *Furlong v. United States*, 138 Ct. Cl. 843, 844, 846, is another case in which the officer failed to ask for a Retiring Board because he was misled. In *Capps v. United States*, 133 Ct. Cl. 811, and *Loeb v. United States*, 133 Ct. Cl. 937, the original Board action was held deprived of finality because [***30] the Secretary of War ordered that the case be reopened and reconsidered under a new regulation, and it was so reconsidered within six years of the commencement of the suit. In *Suter v. United States*, 139 Ct. Cl. 466, 468, 469-470, 471, cert. denied, 355 U.S. 926, the officer had a Retiring Board (which did not act finally) and was released without retirement pay in 1946, but in 1949 and 1951 he was erroneously refused a new Retiring Board (to make a further evaluation); he applied to the Correction Board in 1953; suit was brought in 1954. The tentative action of the Retiring Board in 1946 was (in effect) held [*17] non-final, and the statute of limitations further deferred by the erroneous refusal to grant the plaintiff subsequent re-evaluation; therefore the 1954 suit was not barred by the six-year statute. A similar case was *Friedman v. United States*, 141 Ct. Cl. 239, 254-256, in which the original Retiring Board (in 1947) did not purport to act finally and the officer's claim was not finally denied until December 1952 (within the six-year period). See, also, to the same effect, *Allin v. United States*, 147 Ct. Cl. 459, 465, 471-2, 474-476 (initial [***31] board action not final); *Weiner v. United States*, 148 Ct. Cl. 445, 450, 455, 460-1, 463-4 (initial board action

159 Ct. Cl. 1, *17; 310 F.2d 381, **391;
1962 U.S. Ct. Cl. LEXIS 139, ***31

not final and Government erroneously refused later request for further consideration).

4. Where there is no Retiring Board, the claim accrues on action of the Correction Board. -- The court has also held that claims were not barred where the serviceman was released (prior to the six-year period) without having or requesting a Retiring Board (and without being misled into failing to ask for one) and where the first board to which request was made was the Correction Board (which acted adversely or declined to act within six years prior to suit). In *Proper v. United States*, 139 Ct. Cl. 511, 512, 515, the first board to which the plaintiff (who was released in April 1948) applied (in 1954) was the Correction Board; suit was brought in May 1954. The court held that "because of the peculiar facts and circumstances * * * Correction Board proceedings were the only ones open to this plaintiff, and the only administrative action ever taken on his claim for disability retirement with pay was in connection with his application to that Board." n11 In *Patterson* [***32] v. *United States*, 141 Ct. Cl. 435, 438, the plaintiff was released without a Retiring Board in March 1946 and did not seek relief until he applied to the Correction [**392] Board in January 1953; suit was begun in 1958. The court held broadly that the rule was [*18] "that where a plaintiff has received no determination of his eligibility for disability retirement pay by any board until the correction board has acted, his cause of action accrues not at the time of his separation from the service, but at the time of the alleged wrongful action of the correction board, approved by the Secretary, in wrongfully refusing to correct the records and grant the plaintiff disability retirement with pay." There was no suggestion that *Patterson* had good justification for failing to apply to the Retiring Board.

- - - - -Footnotes- - - - -

n11 The only "peculiar facts and circumstances" in the case were that, although it was plain that he was unwell while in service, the plaintiff's malady was not diagnosed before his release, and his symptoms were largely in remission during his service; his symptoms grew much worse afterwards and his illness more apparent.

- - - - -End Footnotes- - - - -
[***33]

Although they hold that limitations does not defeat the suit of an officer who first brings his claim for disability retirement to the Correction Board, the *Proper* and *Patterson* cases are not incompatible with the other decisions holding that the claim arises upon the final action of the Retiring Board. The rationale of all the cases, taken together, is that Congress has given the function of deciding entitlement to disability retirement to the Secretary, acting with or through a statutory board, and that the claim does not accrue until final action on the basis of the determination of the first competent board to decide. As this court has said, "All of these boards, the Retiring Board, the Disability Review Board, and the Board for Correction of Military Records act only in an advisory capacity to the Secretary of War. If his decision on the retirement rights of an officer is alleged to have been arbitrary, then the officer's right to come to the court for redress accrues as soon as the arbitrary decision is rendered." *Girault v. United States*, 133 Ct. Cl. 135, 144, quoted in *Lipp*, supra, 157 Ct. Cl. at 201, n. 2. Either the

Retiring Board or the Correction [***34] Board is a proper board to perform this function of advising the Secretary; n12 and where a Retiring Board has not been had or requested, the officer's application to the Correction Board together with the action of that Board take the place of the Retiring Board's function in triggering the statute of limitations. The Correction Board becomes the first proper board to act (or to be asked to act) on the matter, and the claim does not ripen until [*19] that Board's action is final. The single judicial claim -- not a new cause of action -- never accrues (under the general principles discussed supra) until the Correction Board's decision. In that sense the Correction Board proceeding becomes a mandatory remedy; without it, the case in this court would be dismissed as premature on the ground that the plaintiff did not seek or obtain a final decision within the administrative hierarchy. n13

- - - - -Footnotes- - - - -

n12 The Correction Board's statutory charter is broad enough to encompass the functions of the Retiring Board as well as of the Disability Review Board.

n13 In McAulay v. United States, 158 Ct. Cl. 359, 361 [cert. denied, 373 U.S. 938], the court recently said that: "This court has consistently held that before a person can bring suit in this court for disability retired pay, he must first exhaust his administrative remedy of applying to a Retiring Board, or Physical Evaluation Board for an administrative determination of his right to retirement for physical disability. This is not a permissive remedy; it is mandatory, in the absence of extenuating circumstances." But the same paragraph of the opinion points out that no application was made to the Correction Board and that no administrative steps at all were taken by McAulay. The McAulay opinion does not hold that the Correction Board cannot be substituted in place of a Retiring Board when the latter was not requested or convened -- as was held in Proper and Patterson.

By order of April 13, 1962, the court held the claim in Merson v. United States, No. 5-60, barred by limitations on the authority of Lipp. Merson, like Proper and Patterson, had been released from active service (in 1946) without a Retiring Board or a request for one. He took no action to obtain disability retirement pay until 1958 when he applied to the Correction Board. A motion for reconsideration is pending in Merson. [See this court's most recent action in Merson v. United States, No. 5-60, set forth in footnote 9, supra.]

- - - - -End Footnotes- - - - -

[***35]

5. The Lipp decision. -- Lipp v. United States, supra, was a case in which the plaintiff requested a Retiring Board in 1948, and again in 1949 and 1950 (id. at 201). The opinion followed and was in accord with the Rosnick line, governing instances in [**393] which there was final action of a Retiring Board more than six years before suit. Lipp was not a case (like Proper or Patterson) in which no Retiring Board was had or requested. Nothing in the opinion controls any other type of case than that before the court; the opinion does not govern a case in which no Retiring Board was requested or in which the Retiring Board's action was not final, etc. Footnote 1 of the Lipp opinion does say that "it is questionable that an officer could accrue a cause of action by a request for retirement board proceedings after his release to inactive duty,"

but the court also stresses that it was not necessary to decide that point. In prior cases the court has not indicated that a post-release request for a Retiring Board was [*20] too late, at least if entertained or considered timely by the armed service itself. See *Updike v. United States* [***36], 132 Ct. Cl. 627 (overturning ruling of the Comptroller General that reserve officers could not be determined to be eligible for disability retirement after their release from active duty); *Adams v. United States*, 127 Ct. Cl. 470, 475; *San Millan v. United States*, 139 Ct. Cl. 485, 487, 497, 499; *Uhley v. United States*, 128 Ct. Cl. 608; *Furlong v. United States*, 138 Ct. Cl. 843; *Suter v. United States*, 139 Ct. Cl. 466, cert. denied, 355 U.S. 926; *Friedman v. United States*, 141 Ct. Cl. 239; *Allin v. United States*, 147 Ct. Cl. 459; *Weiner v. United States*, 148 Ct. Cl. 445.

6. "New cause of action." -- The main burden of the present argument of the plaintiffs in this and related cases is that Correction Board action always gives rise to a new cause of action on which the statute will not run until six years after the Correction Board's final action -- regardless of prior determinations by the Retiring Board or the Disability Review Board. The only ruling of the court which gives real support to that contention is the interlocutory holding in *Knight v. United States*, 152 Ct. Cl. 298, which was expressly [***37] overturned in the Lipp opinion. n14 We do not find any other decision (as distinguished from general observation) of the court which rests on or invokes this theory.

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n14 In *Knight*, there had been prior final action by a Retiring Board and the Disability Review Board; the court held, on a motion to dismiss, that limitations ran, not from the final action of these boards, but from that of the Correction Board.

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(a) The *Knight* decision is contrary to the holdings in the cases, discussed supra, refusing to toll the statute where final action of a proper board has been had, and relief is then sought from other boards (including the Correction Board). n15 It is said by the present plaintiffs that in those cases no point was made that action by the Correction Board grounded a new cause of action; we are not certain that this is so but in any event it is implicit in those rulings that the only claim upon which suit could be brought necessarily accrued [*21] upon final action by the initial board. [***38] That is the foundation-stone of the rationale of those decisions. It would be wholly technical to distinguish them on the ground that the plaintiffs had not formulated their arguments in terms of the creation of a new, separate, cause of action as a result of the Correction Board's decision. If the present plaintiffs' theory is to be adopted, those cases would, in effect, have to be overruled, at least partially. n16 On the other hand, in overruling *Knight*, the Lipp decision did not overrule any other holding if Lipp is confined to the only class it purports to cover (i.e., prior final board action more than six years [***394] old and only Correction Board action, in a review capacity, within the limitations period). n17

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n15 Rosnick; Girault; Duff; Levine; Odell; MacFarlane; Soukaras; Barker; Levadi; Conlin; Hutchinson; and Price. But see Frederick v. United States, 150 Ct. Cl. 769, discussed supra and infra.

n16 Certain but not all of the cases can be distinguished as resting on alternative grounds.

n17 Frederick v. United States, 150 Ct. Cl. 769, decided July 15, 1960, is a disability retirement case in which the court accepted jurisdiction although there may have been prior final board action outside the six-year span. But, as pointed out supra, the Frederick opinion does not discuss this problem and may well be explainable on the ground that the initial board's action was not final or that the Correction Board's errors in procedure created a new claim.

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[***39]

(b) It is true that there are expressions in some of the other opinions of the court which can be read, if isolated from the facts and holding of the particular case, as giving support to the general theory that Correction Board action engenders a fresh cause of action. None of these expressions is clear, decisive, or truly relevant, or represents a holding.

First, there are general statements that arbitrary action by the Correction Board might ground a claim (Rosnick v. United States, 132 Ct. Cl. 1, 5, 6; Carlin v. United States, 121 Ct. Cl. 643; Betts v. United States, 145 Ct. Cl. 530). This is correct as a generalization, but it does not mean that where a claim is judicially barred by limitations an arbitrary refusal by the Correction Board to grant it will necessarily create a new judicial cause of action. n18 Second, there are cases in which the claim was held free of limitations -- for one or another of the reasons discussed above, which do not depend on the creation of a new claim through Correction Board action -- in which the opinion also uses language which [*22] is said to suggest that a new claim existed (Friedman v. United States, 141 Ct. Cl. 239, 254-256, explicitly leaving the issue open; Towell v. United States, 150 Ct. Cl. 422, 433, reference to everything prior to Correction Board action being barred by limitations; Proper v. United States, 139 Ct. Cl. 511, 512-13, possible implication that Secretary's action in 1955, after Correction Board proceedings, created the claim). But these passing, somewhat ambiguous, observations do not indicate that (except in Knight) the court as a whole has accepted, or decided on the basis of, the theory that Correction Board action normally creates a new claim.

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n18 Such statements are also consistent with the view that arbitrary Correction Board action can ground a new claim in some circumstances but not in others.

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Third, there are cases, not involving eligibility for disability retirement, in which the court has allowed a recovery which takes account of more than a six-year period, on the ground that the claim was timely because founded on the action of a board. [***41] In Seabrook v. United States, 135 Ct. Cl. 190,

159 Ct. Cl. 1, *22; 310 F.2d 381, **394;
1962 U.S. Ct. Cl. LEXIS 139, ***41

the initial Retiring Board held in 1946 that the plaintiff was not entitled to disability retirement, but two years later (in 1948) the Navy reopened his case (at his request) and a new Retiring Board held that he was disabled. He was not, however, paid retired pay for the period between his release from duty in 1946 and his placement on the retired list in 1948. Suit was brought in May 1954. The court held (following earlier decisions such as *Holt v. United States*, 134 Ct. Cl. 801, *Hamrick v. United States*, 120 Ct. Cl. 17, and *Ramsey v. United States*, 123 Ct. Cl. 504) that since the second board had held his disability incident to service it necessarily followed as a matter of law that the plaintiff was entitled to retirement pay from the date of his release (but recovery was limited to the six-year period prior to the bringing of suit). Similarly, in *Brown v. United States*, 141 Ct. Cl. 557, the serviceman was released in 1946 (after appearing before a Retiring Board) without disability retirement pay. On May 10, 1949, the Disability Review Board reversed this finding, but he was not given [***42] disability retired pay for the period from 1946 to 1949. In 1952, he applied to the Correction Board to modify the records so as to entitle him to this back pay, but the Board refused to do so. Suit was [**395] filed on May 9, 1955, within six years of the Disability [23] Review Board's decision. Judgment was given for the full amount requested (unlike *Seabrook* where it was limited to the six prior years). See also *Caddington v. United States*, 147 Ct. Cl. 629, 635 (full amount). In *Eicks v. United States*, 145 Ct. Cl. 522, 526-527, the plaintiff, who had been granted disability retirement in 1944, sought additional retired pay on the basis of accumulated leave which he said he should have been allowed before his separation in that year. In 1954 he applied to the Correction Board to change his records; the majority of the Board agreed with him but the Secretary agreed with the dissenter and denied relief. Suit was filed on December 2, 1955, for additional back pay from 1944 to September 1949 (at which time the Career Compensation Act changed the method of computation). The court held the plaintiff entitled to recover. There was no bar of limitations, [***43] the court said, because "this present cause of action arose on the refusal of the Board, after the Secretary's disapproval, to correct plaintiff's record" and "the right to recover depends on whether the refusal to correct the record was arbitrary." On the merits the court held the plaintiff entitled to recover as a matter of law because the statutes and regulations in effect in 1944 gave him accumulated leave as a matter of right.

These cases -- *Seabrook*, *Brown*, *Caddington*, and *Eicks* -- stand not for the general proposition that any action of the Correction Board creates a new cause of action (for limitation purposes), but for a considerably narrower rule. *Brown*, *Seabrook* and *Caddington* clearly dealt with implementation of a favorable board decision and in that sense the claim was, and had to be, founded on the board's own action. It was a necessary prerequisite. n19 *Eicks* can be viewed in the same light, as implementing the favorable decision in 1944 granting the plaintiff disability retirement. The court thought it necessary to correct the plaintiff's records to show [24] the accumulated leave (in order to compute the additional pay he sought) [***44] and only the Correction Board could make the required correction. n20

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n19 A similar case, not involving disability pay, is *Goodwin v. United States*, 127 Ct. Cl. 417, where a civil service employee reinstated in his job by order of the Civil Service Commission was held entitled to recover back pay,

even beyond six years, because the Commission's reinstatement order, mandatory on the employing agency, created new legal rights in the employee. See, to the same effect, *Feldman v. United States*, 149 Ct. Cl. 22; and *O'Brien v. United States*, 124 Ct. Cl. 655.

n20 If Eicks were taken as holding that Correction Board action on a legal pay claim, based directly on statutes or regulations and not requiring administrative determination, creates a new cause of action for sums otherwise time-barred, it would be contrary to prior and subsequent decisions. In *Goldstein v. United States*, 131 Ct. Cl. 228, 233, the court had barred a veteran's claim for back service pay at a higher grade (for a period prior to six years) even though the Correction Board had denied the same claim within six years. In *Haislip, et al. v. United States*, 152 Ct. Cl. 339, the court rejected, as barred, a claim for additional pay (due to "re-retirement") even though the Correction Board purported, within six years, to correct the records to show that plaintiffs were entitled to the extra money. The court held that the issue was one of law and the claim had accrued 13 years earlier. And in *White v. United States*, No. 477-59, decided by order of April 13, 1962, 157 Ct. Cl. 939, the court held barred a 1959 suit for captain's pay (from 1942 to 1947) by an enlisted man who was ordered to active duty as a captain in 1942 but who never served in that rank (because the orders were shortly cancelled). The plaintiff sought relief from the Correction Board on the ground that the termination of his appointment as captain was erroneous and unfair; relief was denied in October 1955; suit was brought in 1959. The court considered the claim to have accrued no later than 1947.

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[***45]

7. Summary: As our discussion has shown, the main course of the court's decisions on the time-bar in the disability retirement field reveals a well-structured design:

(a). The judicial claim for disability retirement pay does not accrue on release from active duty but rather on final action [**396] of a board competent to pass upon eligibility for disability retirement (or upon refusal of a request for such a board).

(b). Normally, the Retiring Board is the proper board, but where the claimant has not had or sought a Retiring Board, his claim does not accrue until final action by the Correction Board (which in that instance stands in the place of the Retiring Board as the proper tribunal to determine eligibility for disability retirement).

(c). A board's action (or failure to act) is not final if (i) the claimant has been misled, (ii) the board's decision is tentative and invites reopening, (iii) the armed service itself reopens the case, or (iv) there are other circumstances depriving the action or non-action of finality.

(d). Once a final decision is had, the claim accrues, the limitations period begins to run, and there is no tolling of the statute [***46] by reason of further applications to other boards or agencies (including the Correction Board).

[*25] (e). Once a final decision is had, adverse determinations by other boards, including the Correction Board, do not give rise to a new cause of action.

(f). A claim for entitlement to disability retirement status and pay -- of the type requiring discretionary action by a board and the Secretary -- is not a "continuing claim" but accrues as a whole (once it accrues). However, other types of pay claims not dependent on a board finding -- including claims for increased retirement pay because of new legislation, etc. -- are "continuing" claims.

II. DOES ACTION BY THE CORRECTION BOARD CREATE A NEW CLAIM?

The plaintiffs in this and other cases also urge that, regardless of the course of our prior decisions, we should now hold that action by the Correction Board gives rise to a new cause of action, despite a prior ruling by a Retiring Board or the Disability Review Board, on which the claimant has six years to sue. In deference to these requests, we have carefully considered the issue de novo and afresh. We have again concluded that where, as in the Lipp [***47] type of case, the Correction Board is in effect reviewing a prior adverse determination by a Retiring Board or the Disability Review Board (or a refusal to convene such a board), the Correction Board's adverse decision does not give rise to a new cause of action. We continue, however, to agree with our past rulings that, where the Correction Board is not a reviewing tribunal but is the first board to consider or determine finally the claimant's eligibility for disability retirement, the single cause of action accrues upon the Correction Board's final decision.

A. Judicial review. The normal rule, where a proper administrative tribunal has denied or refused to consider a claim and further administrative remedies are permissive not mandatory, is that the judicial cause of action arises immediately upon the initial tribunal's action and does not start again upon a subsequent administrative decision affirming that holding. It is said, however, that that rule should not apply to the Correction Board remedy because Congress [*26] intended that there be judicial review of all Correction Board decisions. We find this argument unpersuasive.

1. It should be noted, first, that [***48] it is far from plain to what extent any judicial review of Correction Board action was affirmatively intended by Congress. The statute and the legislative materials are not clear and arguments can be made both ways. n21 The Government has often argued that Congress did not intend any review of Correction Board decisions. But for us the answer has already been given by the court's decisions -- which have consistently held that in disability [**397] retirement cases arbitrary actions of the Correction Board, if challenged within the applicable limitations period, can be reviewed here. See, e.g., Lemly v. United States, 109 Ct. Cl. 760; Prince v. United States, 127 Ct. Cl. 612, 617; Gordon v. United States, 129 Ct. Cl. 270, 277; Hiatt v. United States, 131 Ct. Cl. 585; Wales v. United States, 132 Ct. Cl. 765, 771; Suter v. United States, 139 Ct. Cl. 466, cert. denied, 355 U.S. 926; Proper v. United States, 139 Ct. Cl. 511; Friedman v. United States, 141 Ct. Cl. 239; Patterson v. United States, 141 Ct. Cl. 435, 437-8; Eicks v. United States, 145 Ct. Cl. 522; Frederick v. United States [***49] , 150 Ct. Cl. 769; Allin v. United States, 147 Ct. Cl. 459; Weiner v. United States, 148 Ct. Cl. 445; Siegel v. United States, 148 Ct. Cl. 420. We

see no adequate reason why the rule laid down by these (and other) cases should now be overturned. The decisions of Retiring Boards and the Disability Review Board are not immune from scrutiny under the court's holdings, and there is insufficient indication in the statute creating the Correction Board -- or the statute's legislative history -- that an exception should now be made for the Correction Board (if suit is timely brought).

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n21 For a discussion of the legislative history, see the Appendix to this opinion.

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2. But it does not follow from the general existence of judicial review for Correction Board decisions that those decisions create a new substantive cause of action which has its own, new, limitations period. That a tribunal's rulings are subject to judicial review means that the administrative decision is open to scrutiny [***50] by a court, if a timely judicial proceeding is filed -- not that the administrative tribunal's [*27] decision, in itself, becomes the new measure and the new beginning of the plaintiff's judicial rights. There is a profound difference between a legislature's providing for further review of a ruling on a cause of action and its creating a new and independent cause of action. District Court decisions are reviewable in the Courts of Appeals, but the appellant's cause of action is grounded on the various substantive statutes or other substantive federal law (or state law in diversity cases), not on the provisions of the Judicial Code establishing review of District Court cases by the Courts of Appeals or giving the District Courts jurisdiction of that type of case. Similarly with the administrative agencies. In court cases coming from the National Labor Relations Board or the Securities and Exchange Commission, for example, the individual seeking judicial relief places his claim on the substantive provisions of the National Labor Relations Act or the Securities Act, not on the provisions in those statutes for judicial review of agency proceedings. Judicial review and substantive [***51] claim are entirely separate concepts. The former is usually provided to see whether the latter is valid or has been properly enforced, but the establishment of review does not ipso facto create a new substantive claim.

In short, as applied to our problem, the existence of judicial review does not, in itself, supply any basis for asserting that the limitations period runs from the time of the Correction Board's decision. All that the existence of judicial review means is that the Board's decision will be reviewed, in a proper case, if a timely suit is brought. That is what the House Committee meant, in part, when it said that the courts would not be precluded from reviewing Correction Board cases "under appropriate circumstances" (H. Rept. No. 449, 82d Cong., p. 3).

3. It may be said, however, that on this view it is quite possible that the six-year statute of limitations will have run before completion of the Correction Board proceeding, and therefore that there will be no judicial review of the Board's determination even if it is wholly arbitrary and review would be "appropriate" if suit were timely brought [*28] (cf. Knight v. United States, 152 Ct. Cl. 298, [***52] 300). This [**398] is a possibility, but there are, we think, three sufficient answers to the argument.

159 Ct. Cl. 1, *28; 310 F.2d 381, **398;
1962 U.S. Ct. Cl. LEXIS 139, ***52

The first is that it is inherent in all statutes of limitations that claims otherwise justifiable and justiciable will be denied because suit is not brought in time. n22 Nor is it unique in federal law to have an administrative remedy immune from judicial review if a timely proceeding is not commenced. For example, the ten-year limitations statute for the General Accounting Office (31 U.S.C. 71a) means that many improper denials of claims by that office cannot be redressed in this court which is limited by the six-year statute -- although those very claims could have been vindicated here if suit had been brought in time. Congress has certainly shown as much intention to have adverse rulings by the Accounting Office reviewed by this court as it has Correction Board decisions, but if suit is not brought within six years of the original claim such review cannot be had, no matter how erroneous the later Accounting Office ruling may be. See also *Cosmopolitan Manufacturing Co. v. United States*, No. 168-60, and *Arlene Coats v. United States*, No. 123-60, 156 Ct. [***53] Cl. 142, 297 F. 2d 546, cert. denied in No. 123-60, 371 U.S. 818.

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n22 In cases coming before this court in which it has been held that the limitations bar is not tolled or deferred by resort to permissive administrative remedies (see text supra, Part I, B, 4), it is likewise true that arbitrary administrative action cannot be redressed if a timely suit is not begun. Those cases illustrate the principle that the mere existence of judicial review does not, in itself, insure that a suit can always be maintained.

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The second answer is that the plaintiff can bring suit and obtain judicial review within six years of his Retiring Board proceeding; he can then ask the court to suspend the judicial proceedings to allow resort to (or completion of) Correction Board proceedings (if it is desirable to have Correction Board review). See this suggestion in *Odell v. United States*, 134 Ct. Cl. 634, 645-6 (original opinion) and *Ogden v. Zuckert*, 298 F. 2d 312, 317 (C.A.D.C.). In that way there can be [***54] full completion of the administrative remedy, if that is appropriate.

Third, a claimant who has had a Retiring Board proceeding -- or who is sufficiently aware of a possible disability [*29] that he requests a Retiring Board (and is turned down) -- ordinarily has adequate notice of his potential entitlement to disability retirement pay so that he can and should bring suit within six years; he is not caught unawares by the sudden development of a latent or progressive condition that he reasonably thought non-disabling at the time of his separation. Such a claimant should be fully able to protect himself by bringing suit in time. n23

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n23 As for those claimants who did not have (or request) a Retiring Board (probably because they had no adequate idea they were or could be disabled) and who thereafter apply to the Correction Board, their single judicial cause of action does not accrue, under the court's decisions, until completion of the Correction Board proceedings (see supra and infra); thus, this group, too, is adequately protected against having too short a time in which to commence an action.

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[***55]

B. Exhaustion of administrative remedies.

1. Another argument is that a Correction Board proceeding should be viewed as mandatory not permissive, and therefore as a necessary prerequisite to the accrual of a cause of action for disability retirement pay in this court. n24 The District of Columbia Circuit recently held in Ogden v. Zuckert, 298 F. 2d 312 (Dec. 1961), that exhaustion of Correction Board proceedings was not required -- agreeing with this court's Girault decision (and those following it). Again we see no adequate [**399] reason to upset the appletart, at this late stage, by now declaring that exhaustion is necessary, and thus barring all those who, following this court's prior decisions, failed to apply to the Correction Board. In Reed v. Franke, 297 F. 2d 17 (Nov. 1961), the Fourth Circuit did hold that exhaustion of administrative remedies was required before resort to the injunctive process, but that case involved a military discharge -- and the Court of Appeals interpreted 10 U.S.C. 1553 as providing a mandatory remedy before the Discharge Review Board for servicemen dissatisfied with their discharges. The Correction Board was only [***56] incidentally involved, and the court did not hold the Correction Board proceedings (as distinguished from a proceeding before the Discharge Review Board) to be a required prerequisite. There is no conflict with Ogden v. Zuckert, supra.

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n24 This would require the overruling of Girault v. United States, 133 Ct. Cl. 135, 144, and the many other opinions holding that the cause of action accrues upon the final action of the Retiring Board and is not tolled by proceedings before the Disability Review Board or Correction Board. See supra.

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[*30] 2. Another facet of the exhaustion argument is that, even though resort to the Correction Board is permissive not mandatory, the cause of action does not accrue, if an application is made to the Board, until its final decision. Reliance is placed on Keeney v. United States, 150 Ct. Cl. 53, decided June 8, 1960, discussed supra, in which the court declared that, although a veteran's appeal to the Civil Service Commission from adverse personnel [***57] action is permissive, still limitations does not run until the Commission's final decision. It is not at all clear, and we do not decide, that under Keeney the veteran's appellate remedy is truly permissive, but in any case we shall not apply the Keeney rule -- even if it be considered to be that a wholly permissive remedy tolls the statute -- to disability retirement cases. Appeals to the Civil Service Commission in veterans' personnel matters must normally be taken within a short time after the adverse action by the employing agency. A six-year period from the agency's decision would almost never run before appeal had to be taken, and normally the appeal would be concluded in a few months. Accordingly, the employee is not in a position, by appealing, to postpone the final administrative decision for any lengthy period. On the other hand, until recently, review by the Correction Board or the Disability Review Board could be sought well after the end of the six-year span and a claimant who had allowed the six-year limitations period to elapse could easily revive his

judicial claim by applying to one or both of these Boards. The claimant could, in effect, pick his own [***58] time for suit; he could delay it for many years if he wished to do so, or he could bring it on at once if that was his desire. The long period for applying to the Correction and Disability Review Boards makes it inadvisable and inappropriate to carry over the suggested rule to the disability retirement area. The potentialities of delay and manipulation are too great.

C. Tucker Act. Still another contention is based on the Tucker Act (now 28 U.S.C. 1491) which gives this court jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United [***31] States, or for liquidated or unliquidated damages in cases not sounding in tort." It is argued that, once the Correction Board has acted, the claim is founded upon the 1951 Act providing for Correction Boards to change military records to correct errors or remove injustices. But this is again to confound a procedural remedy with a substantive cause of action. In disability retirement cases the claimant's cause of action rests upon the retirement legislation [***59] (now 10 U.S.C. 1201, et seq.) which gives servicemen disabled in the course of active service the substantive right to disability retirement. The Correction Board statute merely provides one remedy for enforcing that right, just as the provisions for Retiring Boards and the Disability Review Board also provide administrative remedies. The Act of Congress upon which the claim is founded -- in the sense of the Tucker Act -- is the substantive retirement statute, not the provision for [***400] boards or other methods for implementing that right. As we have pointed out, in retirement cases the Correction Board is normally a reviewing agency to decide whether prior administrative action under the retirement legislation has been erroneous or unjust.

We have already noted the relevant analogies showing that the Correction Board statute is not the basis of the claim. The legislation upon which is founded a federal claim pursued in the District Courts is the substantive statute, not the provisions of Title 28 U.S.C. providing for jurisdiction in the District Courts; claims for relief before administrative agencies rest on various substantive provisions of law (such as the unfair [***60] labor practice section of the National Labor Relations Act), not on the provisions establishing the administrative tribunal or the procedure to pass upon the demands. If the Correction Board statute is the Act of Congress on which the claim is founded -- thus commencing a new cause of action -- there would be no reason why a refusal by the General Accounting Office, acting under its general power to pay and settle, to satisfy a claim between six and ten years after accrual (see 31 U.S.C. 71a) should not create a new judicial cause of action allowing six more years for suit in this court. That, of course, has never been the law (e.g., *Marr v. United States*, 123 Ct. Cl. 474, 479-480, cert. denied, [***32] 345 U.S. 956), but it would have to become the rule if the plaintiffs are right that the Correction Board statute of 1951 gives them a new cause of action because it provides that the Board shall review their claims and grant them if just. The 1951 Act is no different in kind from comparable federal statutes providing a remedy for rights founded on other legislation or other regulations. See, e.g., *Cosmopolitan Manufacturing Co. v. United States*, No. 168-60, [***61] and *Arlene Coats v. United States*, No. 123-60, 156 Ct. Cl. 142, 297 F. 2d 546, cert. denied in No. 123-60, 371 U.S. 818.

Moreover, if every Correction Board decision creates a new cause of action under the 1951 Act -- a cause of action which is judicially cognizable -- it would follow that every ruling of the Boards, not merely monetary cases (such as disability retirement claims) but all rulings on the manifold types of disciplinary and other questions coming before the Boards, would be reviewable in the courts of the District of Columbia by declaratory judgment action or suit for injunctive relief under 28 U.S.C. 1331 (federal question jurisdiction) and the pertinent provisions of the District of Columbia Code (Sections 11-305 and 11-306). We are not ready to accept the proposition that every non-monetary decision of the Board thus becomes reviewable even though the initial military action which is sought to be corrected before the Board would not be reviewable even if arbitrary n25 -- or that Congress so intended. The correct position, it seems to us, is that certain of the Board's decisions are judicially reviewable (if a timely suit is begun) and others may well [***62] not be reviewable. Where the underlying claim is of the reviewable type, review may be had, but the 1951 Act would not create reviewability where the nature of the claim precluded it.

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n25 E.g., performance grading of officers and enlisted men; minor disciplinary actions; recommendations for decorations, etc.; promotions; assignments, etc.; school grades.

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D. Other considerations. Two other potent considerations argue against accepting the thesis that Correction Board action creates a new, independent, cause of action, upon which suit may be brought within six years.

1. The first is that it is unusual to have two or more causes of action stemming from the same events or transactions, but [*33] arising at wholly different times. Theoretically, it would not be impossible for Congress to make such provision, but in the absence of some definite legislative indication to that effect it is preferable to follow the normal principle [**401] that out of one set of facts and circumstances involving the [***63] claimant's separation from service there arises but one claim for the same kind of relief (money, in the case of disability retirement pay claims). This is all the more true since our limitations statute is phrased in terms of the "first" accrual of the claim. 28 U.S.C. 2501. The legislative emphasis on first accrual cautions against multiplication of monetary claims successively arising out of essentially the same facts.

The plaintiffs' theory would mean that a claimant might have three separate causes of action on which suit could be brought successively. He could sue immediately after the Retiring Board decision and if he lost at that time could appeal (in many cases) to the Disability Review Board and then file another suit and if he lost again could then proceed before the Correction Board and, losing there, file still another suit. These successive suits would not be subject to a defense of res judicata (since the claims would be different, under the theory of a "new cause of action") and might even avoid collateral estoppel on the basis of some new aspect of disability, etc. The claimant could thus have three separate and successive causes of action in this [***64] court, each with its own six-year limitations period. n26

-Footnotes-

n26 The Disability Review Board cannot be distinguished from the Correction Board with respect to the creation of a new cause of action. What holds good for one holds good for the other.

-End Footnotes-

2. Another reason for declining to recognize the Correction Board decision as starting a new six-year period is that most of these disability retirement cases involve an appraisal of the facts of the claimant's health when he left the service a considerable time before suit (usually in 1946-1948). In World War II cases, review by the Correction Board could be sought until October 1961; review by the Disability Review Board could be sought until fifteen years after release or retirement. Added to these long periods must be the significant factor that this court has been allowing the creation of full de novo records in disability retirement cases. As the [*34] court has pointed out (Odell v. United States, 134 Ct. Cl. 634, 645; Gordon v. United States, 134 Ct. Cl. 840, 843), ancient controversies, requiring the court to evaluate facts of the distant past, would be presented if claims were regularly allowed to wait until after the Correction Board or Disability Review Board proceedings. One of the prime objectives of the statute of limitations is to prevent factual issues from being tried too long after the events occurred -- with witnesses dead or gone, records lost or destroyed, and memories confused or dimmed -- at a time when the past cannot be reconstructed with any pretense of accuracy.

It is true, of course, that the same lengthy time can elapse where the Correction Board is the first Board to act (see Proper v. United States, 139 Ct. Cl. 511, and Patterson v. United States, 141 Ct. Cl. 435, discussed supra) as where the Correction Board is reviewing a Retiring Board's earlier decision. The answer is that Congress has deliberately given servicemen this lengthy period in which to apply to the Correction Board although no Retiring Board has been called or asked; in effect, Congress has allowed many servicemen a very long time in which to seek retirement pay and has not insisted that application [***66] be made at or upon release from service. We do not depart from our prior decisions embodying the principle that the claim for disability retirement pay does not accrue until the final action of a proper board simply because we may possibly believe too long a time has elapsed or been allowed. But it is worth noting that in cases in which the lapse of time puts the Government at too great a disadvantage in its proof before the Correction Board (or in this court) a rejection of the claim by the Board may well not be arbitrary in view of the difficulties of proof due to the passage of the years.

[**402] The other side of the coin is that veterans who never applied for a Retiring Board because they did not know they were ill or did not appreciate the progressive or serious character of their disease or disability will not be cut off by limitations from pursuing their late-discovered claim before the Correction Board and this court. We cannot, of course, know the precise statistics but it seems probable that the class of those who never had or sought a Retiring Board and later [*35] applied to the Correction Board includes a large proportion of men whose disabilities were discovered [***67] or became aggravated after release. On the other hand, those servicemen who were sufficiently alerted to the possible existence of a disability to ask for or

appear before a Retiring Board will properly be cut off after six years from that time; their request for (or appearance before) a Retiring Board would normally put them on adequate notice of the existence of their claim.

In discussing this double need to have the judicial determination of the facts take place at a moment not too far removed from the actual events and also to allow claimants an adequate (but not overly long) period to bring suit, we emphasize that we do not propose to make our rulings on these limitations issues turn on whether, in the particular case then before us, it would be easy or hard to reconstruct the facts accurately. Of course, the formulation of the general rules can and should take account of different recurring categories of factual situations; one reason, for instance, why we believe that the statute does not commence to run until Correction Board action where it is the first board, is that many or most of those will be cases where the serviceman did not know or appreciate his disability at the [***68] time of his release. But the classification is general and does not depend on an appraisal of the individual facts or the appeal of the particular case.

E. Conclusions. Our conclusion on de novo consideration is that the court has been correct in its implicit holding, in disability retirement pay cases, that a decision by the Correction Board does not create a new claim founded on the 1951 Correction Board legislation. But we also adhere to the holdings that, where a Retiring Board has not been had or requested, the claim based on the retirement legislation does not accrue until final denial by the Correction Board; in that event, the Correction Board action does not create a new claim but simply ripens or accrues the plaintiff's single claim.

We believe that the general rules set forth at the end of Part I, supra, which we now reaffirm, (a) accord with the trend of our time-bar rulings in disability retirement pay cases; (b) are in harmony with the main line of this court's [*36] prior limitations decisions in the pay field generally; (c) are in harmony with the general principles governing the statute of limitations; (d) are fair to the plaintiff in giving [***69] him adequate time to bring suit and to protect his rights in court; (e) are fair to the Government in that they follow established general principles and Congressional legislation, and would not normally allow too great a time to elapse between suit and the facts on which the claim is predicated; (f) do not depend upon an ad hoc evaluation whether the particular claimant deserves a chance to recover or not; and (g) are sufficiently well-defined for both court and counsel to follow. Moreover, we believe that neither plaintiffs nor the Government can properly complain that the court has unfairly hurt them by refusing to follow past rulings; the state of the prior decisions is such that neither side can correctly argue that it has been lulled into action or inaction by a series of prior decisions which we would now be refusing to follow. n27 On the contrary, as we have said, in our view the rules we affirm today conform [**403] well with the pattern fairly marked by our prior cases.

- - - - -Footnotes- - - - -

n27 The Knight opinion denying a motion to dismiss, the only opinion to articulate the theory that a new cause of action arises from a Correction Board proceeding, was rendered on January 18, 1961, only a year-and-a-third before the Lipp decision.

- - - - -End Footnotes- - - - -
[***70]

III. THE PRESENT CASE

The present case is almost identical with the Lipp case which we today reapprove. The decedent was accorded a Retiring Board before his release from active service in January 1947. He died in 1958. Relief was not sought from the Correction Board (by his wife) until 1960, and this suit was begun in that year. The only problem is whether the 1946 Retiring Board's recommendation that the officer be reevaluated at the end of six months deprived its action (and his release from service) of the necessary finality so that no cause of action accrued until the denial by the Correction Board in 1960. Cf. Suter v. United States, 139 Ct. Cl. 466, 468, 469-70, 471; Friedman v. United States, 141 Ct. Cl. 239, 254-56; Allin v. United States, 147 Ct. Cl. 459-65, 471-72, 474-76; Weiner v. United States, 148 Ct. Cl. 445-50, 455, 460-61, 463-64. [*37] We do not think that is so in this case since the officer, after his release and prior to his death in 1958 (11 years after his release), did not make any effort to obtain the contemplated reevaluation. Whether or not Dr. Friedman made a request for reevaluation in December 1946, before [***71] his final release from active duty on January 30, 1947, n28 it is undisputed that he did nothing further and there is no adequate excuse given for his doing nothing from 1947 to 1958. See War Department Circular No. 303, 9 Oct. 1946, par. 18b (requiring written application for reevaluation). In these circumstances, the cause of action accrued before 1954 (six years prior to suit) since he did nothing about his claim during the entire period from 1947 through 1953. In comparable cases in which the Retiring Board suggested later reevaluation and the court held that the Board's action was not final because of that recommendation, the officer made efforts within one, two, or three years to obtain the promised reevaluation; none delayed anywhere near as long as the officer in this case. See Friedman v. United States, 141 Ct. Cl. 239; Allin v. United States, 147 Ct. Cl. 459-65; Weiner v. United States, 148 Ct. Cl. 445.

- - - - -Footnotes- - - - -
n28 If he did make such a request in December, it was followed by his acceptance of unconditional separation in January.
- - - - -End Footnotes- - - - -
[***72]

Accordingly, we hold that this suit is wholly barred by limitations. Plaintiff's motion for summary judgment is denied and the defendant's motion for summary judgment is granted. The petition will be dismissed.

APPENDIX

The legislative history is quite inconclusive with respect to preclusion of judicial review of Correction Board determinations.

1. The position that Congress affirmatively intended judicial review of Correction Board actions is founded upon (a) the deletion from the finality provision of the Correction Board statute (now 10 U.S.C. 1552, formerly 5 U.S.C. 191a; Act of October 25, 1951, 65 Stat. 655) of any reference to the [*38]

159 Ct. Cl. 1, *38; 310 F.2d 381, **403;
1962 U.S. Ct. Cl. LEXIS 139, ***72

courts; (b) some colloquies at the House hearings at which certain Congressmen indicated their expectation that judicial review would be accorded; (c) the absence of any finality provision explicitly applying to the courts, and (d) the statement in the committee report that "the courts of the United States should not be precluded from reviewing such cases under appropriate circumstances." See Jones, Jurisdiction of the Federal Courts to Review the Character of Military Administrative Discharges, 57 Col. L. Rev. 917, 967-971 (Nov. [***73] 1957); Friedman v. United States, 141 Ct. Cl. 239; Madden, J., dissenting in Haislip v. United States, 152 Ct. Cl. 339, 344; Brief of Reserve Officer Association, amicus curiae, in Lipp case, pp. 39-40. Taken together with [**404] the general principle normally favoring limited judicial scrutiny of administrative action, n29 these materials in the legislative history do furnish support for the view that all judicial review was not precluded. However, these materials go no further than to sustain the proposition that the types of Correction Boards rulings which are reviewable are those which would also be reviewable if made by other entities within the Defense Department. Correction Board proceedings would not render reviewable those substantive rulings which would otherwise be immune from review.

- - - - -Footnotes- - - - -

n29 E.g., Harmon v. Brucker, 355 U.S. 579; Leedom v. Kyne, 358 U.S. 184; Stark v. Wickard, 321 U.S. 288.

- - - - -End Footnotes- - - - -

2. On the other hand, there are also indications in the [***74] legislative history pointing toward the conclusion that Correction Board decisions are not reviewable at all. First, it is clear that the Correction Boards were initially authorized in 1946 to provide an administrative substitute for the enactment of private bills for the correction of military or naval records; and such private laws were, of course, not reviewable by the courts (except for constitutionality); since the Correction Board stands in the place of such private legislation it can be argued that Board action should be equally immune from judicial review. Second, the original finality clause proposed for the 1951 amendment (the clause which initially provided that Board decisions "shall be final and conclusive * * * including review by the courts * * *", which was later modified to omit the reference to the courts) [*39] was introduced with reference only to subsection (b), the money settlement section, n30 and not with reference to subsection (a), which was the general provision granting power to the Secretaries to make corrections to remedy injustice or error. From the House hearings there is ground for the view that the reason this finality provision was [***75] modified to delete all reference to the courts, and transferred from subsection (b) to subsection (a), was to make sure that the General Accounting Office (and this court) would not be precluded from passing on the monetary correctness of sums owing to a claimant as a result of a favorable decision by the Board, i.e., a Board decision correcting a military record in such a way that money would be owing the claimant. The General Accounting Office stressed its concern with compensation and not with the substantive aspects of a Board decision (see the dissent in Haislip, supra), and the changes in the finality clause appear to have been made (at least in part) to meet these objections. After these changes were made, there were statements in the course of a colloquy between Representative Vinson, the chairman of the full committee, and Representative Smart, the spokesman for the subcommittee,

159 Ct. Cl. 1, *39; 310 F.2d 381, **404;
1962 U.S. Ct. Cl. LEXIS 139, ***75

which seem to say (without being explicit as to judicial review) that Congress intended the Secretary's authority to be final and conclusive except for computation of amounts (See I Hearings before the House Committee on Armed Services [No. 27], Full Committee Hearings on * * * H.R. 1181 [***76] * * *, 82d Cong., 1st Sess., pp. 600-601 (June 5, 1951)).

- - - - -Footnotes- - - - -

n30 I.e., the provision authorizing the services to make payments to servicemen whose records had been corrected in their favor.

- - - - -End Footnotes- - - - -

This legislative history can be argued to define the "appropriate circumstances" (the term the Committee Report used, H. Rept. No. 449, 82d Cong., p. 3) which Congress envisaged for judicial review as being solely the question of the determination and computation of the amounts due as a result of a correction made by the Secretary. Once the Secretary has effected a correction which would entitle the applicant to recover money from the United States, under the Correction Board statute he cannot properly deny the applicant all the monies to which his [**405] entitlement has been [*40] established by or as the result of a Correction Board proceeding. These, it can be said, are the only "appropriate circumstances" for judicial review to which the legislative history had reference. The earlier colloquy at the hearings [***77] involving Congressmen Doyle and Clements -- on which reliance has been placed (see Friedman v. United States, 141 Ct. Cl. 239, 257) n31 -- can be said to represent only their own views and not the position of the subcommittee, or the full committee, let alone of the House or the Senate as a whole.

- - - - -Footnotes- - - - -

n31 In this colloquy, the Congressmen seemed to indicate that they contemplated general court review of decisions of the Correction Board.

- - - - -End Footnotes- - - - -

204 Ct. Cl. 188 printed in FULL format.

MARION G. DENTON v. THE UNITED STATES

No. 319-72

UNITED STATES COURT OF CLAIMS

204 Ct. Cl. 188; 1974 U.S. Ct. Cl. LEXIS 122

April 17, 1974, Decided

SYLLABUS: [**1]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Military pay; correction of military records; wrongful discharge; limitation of actions; backdated discharge; discretion of Correction Board. -- On August 19, 1944 plaintiff, an Army Air Corps Reserve officer, was released from active duty and discharged pursuant to a general court-martial. In September 1953 he applied to the Board for Correction of Military Records for vacation of findings and sentence of the court-martial, the application being denied. On March 19, 1964 the Assistant Secretary of the Air Force pursuant to a recommendation of the Correction Board and in response to plaintiff's second application made in 1963 for the same relief, directed that the findings and sentence of the court-martial be set aside with restoration of all rights, privileges and property, and also directed that plaintiff's record be corrected to show that he was released from extended active duty due to demobilization effective September 2, 1945. In November 1965 plaintiff again applied for correction of his records requesting new and different relief (which could have been requested earlier), namely active duty pay from August [**2] 19, 1944 to separation date, drill pay, accrued leave and earned points. On October 4, 1966 plaintiff's records were corrected and he received and has been receiving all of the relief he requested in his 1965 application. Plaintiff seeks in this court relief which he never claimed before the Boards, namely a discharge as of March 19, 1964, active duty pay from September 4, 1945 to March 19, 1964, claiming that the Correction Board lacked the power to backdate his discharge. It is held (1) that the alleged cause of action plaintiff is asserting in this court accrued in 1964 or earlier, and his petition filed in 1972 is now time-barred; the 1966 favorable decision which has been fully paid did not affect the running of the limitations period on his present claim in this court; (2) that since all events on which plaintiff could possibly base his cause of action occurred more than 6 years before the filing of his petition and since he claims relief here never claimed before the Boards, he has no basis for a cause of action in this court; and (3) that the Correction Board did not act arbitrarily in backdating plaintiff's release which was at a time reasonably related to the events [**3] surrounding that date, i.e. World War II demobilization, but acted within its discretionary power under 10 U.S.C. @ 1552. Defendant's motion for summary judgment is granted, plaintiff's cross-motion is denied, and the petition is dismissed.

Military pay; limitation of actions; tolling of statute of limitations; Correction Board proceedings.

28 U.S.C. @ 2501 bars any claim in this court unless the petition thereon is filed within 6 years after such claim first accrues. Where plaintiff's

military records were corrected in 1964 following Correction Board proceedings granting the full relief requested in plaintiff's 1963 application a subsequent Correction Board decision in 1966 on plaintiff's new application filed in 1965 granting additional relief requested, including appropriate monetary compensation which has been paid, does not affect the running of the limitations period which began with the first favorable determination in 1964 on claims now being asserted in this court which he could have, but did not, request in his 1963 application. Thus, the later record-correction is a nullity so far as concerns the accrual of a cause of action, and plaintiff's suit filed more than [**4] 6 years after the first decision and claiming entitlement to certain active duty back pay, retirement pay, etc. is barred by 28 U.S.C. @ 2501.

Military pay; limitation of actions; accrual of cause of action; reconsideration or reopening of claim; what constitutes.

Where the military Correction Board granted plaintiff all the relief requested, a new application by plaintiff to the Correction Board for additional relief which could have been requested in the earlier proceedings does not constitute a "reopening" of the earlier decision so as to deprive the latter of finality and thus to toll the running of the limitations period, particularly where there were no changes in the facts, the regulations or interpretation of the law between the earlier decision and the later request for new proceedings relevant to plaintiff's right to recover.

Military pay; limitation of actions; notice to Board of claim asserted before court.

A favorable determination of a Board for Correction of Military Records may not be used as a springboard to obtain relief (within the Board's jurisdiction) which a claimant never sought from it, explicitly or implicitly, and which he now asserts in this [**5] court; nor can claimant, under the circumstances, avoid the usual limitations bar by contending that the Board acted arbitrarily or illegally by failing to approve such a claim.

Military pay; correction of military or naval records; discretion of Correction Board or Secretary; backdating discharge.

The discretionary power granted the Secretaries acting through the Correction Boards by 10 U.S.C. @ 1552 includes the power to backdate discharges of a reserve officer where such backdating places claimant where he likely would have been absent the improper discharge. Since reserve officers do not possess indefinite commissions and are subject to release from active duty at any time under 10 U.S.C. @ 681(a) and since the present claimant's backdated release coincided with the end of World War II and demobilization, the Correction Board's backdating action cannot be considered arbitrary.

COUNSEL: Alan Woods, attorney of record for plaintiff. William R. Baesman and Rodden and Woods, of counsel.

Rose E. Adewale-Mendes with whom was Acting Assistant Attorney General Irving Jaffee, for defendant.

JUDGES: Davis, Skelton, and Nichols, Judges. Skelton, Judge [**6] , delivered the opinion of the court.

OPINIONBY: SKELTON

OPINION: [*190] On August 19, 1944, the plaintiff, Marion G. Denton, while [*191] holding the rank of major, was released from active duty and dismissed as an officer in the United States Army Air Corps Reserve, pursuant to a general court-martial. Nine years later, on September 24, 1953, he applied to the Board for Correction of Military Records for a correction of his military record. Item seven of the plaintiff's application contained his complete request for relief, and read in full as follows:

7. I request the following correction of record (State the exact record for which a correction is requested and in what particular)

Vacation of findings and sentence of general court martial convened at Mitchell Field, New York, 27 September 1943, pursuant to Special Orders 234, 24 August 1943, and 266, 25 September 1943, Headquarters First Air Force.

The Correction Board denied the application.

In 1963, the plaintiff again requested the Air Force Board for the Correction of Military Records to correct his military records. The application before the Correction Board in 1963, including the request for relief, [**7] was exactly the same as the application filed by the plaintiff in 1953, which is quoted above. The Board conducted a hearing on May 1, 1963. Thereafter, pursuant to recommendations by the Chairman of the Air Force Board for the Correction of Military Records, the Assistant Secretary of the Air Force, on March 19, 1964, directed that the findings and sentence of plaintiff's court-martial be "set aside so that all rights, privileges, and property of which said member [plaintiff] may have been deprived by virtue of the findings, sentence and execution thereof, be restored." He also directed that plaintiff's military records be corrected to show that the plaintiff was released from extended active duty due to demobilization effective September 2, 1945; and he ordered that all necessary and appropriate action be taken in consonance with his directive.

On November 30, 1965, the plaintiff again applied for correction of his military records. As may be seen below, this application requested relief that was new and different [*192] from that requested in 1953 and 1963. His 1965 application requested relief as follows:

The order of the Board of 19 March 1964 providing that [**8] " * * * all rights, privileges, and property of which said member may have been deprived * * * be restored," be specifically amended to provide service beyond 2 Sept. 1945, and on determination of such date terminal promotion to Lieut. Colonel be provided, and to Colonel on 1 April 1953, and to Brigadier General on 30 November 1956.

Pay

1. Active duty pay from 19 Aug 1944 to separation date.
2. Drill pay as Lieut. Colonel from separation date to 1 April 1953.
3. Drill pay of Colonel from 1 April 1953 (date all reserve officers were tendered new commissions) to 29 November 1956.

4. Accrued leave of 90 days on determined separation date.

Points

All points earnable for retirement from separation date to 29 November 1956.

* * *

It is important to note that the relief requested in this 1965 application was not requested in plaintiff's 1953 or 1963 applications as it could have been.

After a hearing, the Board recommended that corrections be made to the plaintiff's military records. On October 4, 1966, the Undersecretary of the Air Force directed that plaintiff's records be corrected as follows:

MEMORANDUM FOR THE CHIEF OF STAFF

Having received [**9] and approved the recommendations of the Air Force Board for the Correction of Military Records and under authority of Section 1552, Title 10, United States Code (70A Stat. 116), it is directed that:

1. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0-150 432, be corrected to show that he was not released from extended active duty on 2 September 1945.
- [*193] 2. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0-150 432, be corrected to show that he was tendered and placed on 90 days terminal leave effective 2 September 1945.
3. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0-150 432, be corrected to show that he was eligible for promotion under the terminal leave promotion policies in effect and promoted to grade of Lt. Colonel, Air Reserve, Officer Reserve Corps, effective 1 November 1945.
4. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0-150 432, be corrected to show that he was relieved from extended active duty due to demobilization, effective 2 September 1945 [**10] and reverted to inactive status on 2 December 1945.
5. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0-150 432, be corrected to show that he was promoted to grade of Colonel, Reserve of the Air Force, effective 31 March 1953.
6. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0-150 432, be corrected to show that he was tendered an indefinite term appointment as Colonel, Reserve of the Air Force on 1 April 1953, and that he accepted the appointment on the same date.
7. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0-150 432, be corrected to show that he accrued 35 Inactive duty points and 15 Gratuitous points for a total of 50 points during each of the following periods; and that each period is a satisfactory year of Federal service for retirement purposes:

1 July 1949 to 30 June 1950

1 July 1950 to 30 June 1951

1 July 1951 to 30 June 1952

1 July 1952 to 30 June 1953

1 July 1953 to 30 June 1954

1 July 1954 to 30 June 1955

1 July 1955 to 30 June 1956

8. Upon submission of an appropriate application, the [**11] pertinent military records of the Department of the Air Force relating to MARION G. DENTON, O-150 [*194] 432, be corrected to show that he retired in grade of Colonel, Reserve of the Air Force, under the provisions of Section 1331, Title 10, USC, on 30 November 1956, with entitlement to retired pay effective 1 December 1956.

9. All necessary and appropriate action be taken in consonance with this Directive.

On April 25, 1967, the plaintiff received \$ 42,511.57 as payment for sums due him as a result of the corrections to his records. Since October 1966, he has been receiving monthly retirement checks.

On August 17, 1972, the plaintiff filed a petition in this court seeking a judgment against the United States for the following: (1) back pay, allowances, and all other emoluments of a major in the United States Air Force Reserve on active duty from September 2, 1945, to March 19, 1964; (2) back retirement pay and all other emoluments due a retired colonel in the United States Air Force Reserve from March 19, 1964, to the date of judgment; and (3) an order to the defendant to pay plaintiff as a retired colonel in the United States Air Force Reserve. The case comes to [**12] us on cross motions for summary judgment, and is ready for disposition on those facts which are undisputed.

The plaintiff contends that the October 4, 1966, decision by the Undersecretary of the Air Force was arbitrary and contrary to law. He argues that neither the Correction Board nor the Secretary of the Air Force has the power to backdate a reserve officer's release from active duty. Therefore, he asserts that as a matter of law he remained on active duty from the date of his wrongful discharge until March 19, 1964, when he was discharged by corrective action. Alternatively, the plaintiff contends that even if power exists to take corrective action by backdating a release, the use of such power in this case constitutes an arbitrary and capricious abuse of discretion.

The defendant asserts that the plaintiff's cause of action is barred by the statute of limitations. It also contends that the plaintiff's failure to present his claim before the Correction Board bars his action in this court. Alternatively, [*195] the defendant maintains that the Air Force Board acted within its power and discretion in backdating the plaintiff's release from active duty.

The statute of [*13] limitations, 28 U.S.C. @ 2501 (1970), bars any claim "unless the petition thereon is filed within six years after such claim first accrues." In *DeBow v. United States*, 193 Ct. Cl. 499, 503, 434 F. 2d 1333, 1335 (1970), cert. denied, 404 U.S. 846 (1971), we reaffirmed our earlier holdings "that a claimant can often found a new cause of action, or a 'continuing' claim, upon a [first] favorable determination by the Correction Board (or comparable military tribunal) where that determination stops short of giving the full relief it was compelled in law to grant on the presentation then made." [Emphasis supplied.] The instant case involves two Correction Board determinations which were favorable, in the sense that some relief was granted to the plaintiff in both Board decisions. The Assistant Secretary of the Air Force acted on the first favorable determination on March 19, 1964, more than six years before August 17, 1972, the date on which the plaintiff filed a petition in this court. So, the first issue in this case is whether or not the plaintiff can successfully claim that his cause of action arose on October 4, 1966, the date on which the Undersecretary of the [*14] Air Force acted on the second favorable determination. If not, his claim is barred by limitations.

We held in *DeBow* that a major reason for allowing a cause of action to be based on an initial favorable administrative determination, that would otherwise be barred by limitations, is that once an administrative body decides relief is proper on the claim and presentation then made, it should not be free to illegally or arbitrarily award less relief than that requested by the claimant in that proceeding. In the context of the correction of a military record, this means that once a discretionary decision is made to correct a record, the grant of appropriate money relief is not discretionary but automatic. *Ray v. United States*, 197 Ct. Cl. 1, 453 F. 2d 754 (1972). If appropriate payment is not then made, a cause of action accrues in this court at that time. *Ray*, supra. In this case, however, the appropriate payment has been [*16] made and plaintiff seeks only a new discretionary correction of his record. In these circumstances, the 1966 record correction is a nullity so far as concerns the accrual of a cause of action and whatever cause plaintiff has accrued [*15] in 1964 or earlier, and is now time barred.

The plaintiff contends that we should not consider the 1964 decision by the Correction Board final for the purposes of the statute of limitations because the 1965-1966 proceedings involved a reopening of the 1964 decision. This court has held that an administrative body's reopening of an earlier decision may, under certain circumstances, deprive that decision of finality for limitations purposes until a subsequent decision is reached. *Schiffman v. United States*, 162 Ct. Cl. 646, 319 F. 2d 886 (1963); *Friedman v. United States*, 159 Ct. Cl. 1, 310 F. 2d 381 (1962) cert denied, 373 U.S. 932 (1963); *Capps v. United States*, 133 Ct. Cl. 811, 137 F. Supp. 721 (1956). However, in *Robinson v. United States*, 163 Ct. Cl. 235, 237 (1963), we further explained those cases by saying "[t]he 'reopening' to which Friedman refers (see p. 16, 310 F. 2d at 391) is of the kind which was present in *Capps v. United States*, * * * and *Schiffman v. United States*, * * * -- where the service itself moved to accord the plaintiff a new hearing on the basis of a new regulation or interpretation of the law." Under [*16] this approach, the fact that the parties and Correction Board call the new proceedings a "reopening," as they did in the instant case, has no effect on whether or not the proceedings are the type of reopening which tolls the running of limitations. In the case at bar, rather than the Air Force moving to accord the plaintiff a new hearing, the plaintiff himself requested new proceedings. Additionally, there was no change in regulations or interpretation of the law between the 1964 decision and the request for new proceedings in 1965.

Therefore, the 1964 decision was not "reopened" by the later proceedings in any manner that affects the running of the limitations period.

We know of no reason why the 1965-1966 proceedings involved in the instant case should be held to bar the 1964 decision of finality. In 1964, the plaintiff received all the relief he had requested in his application to the Correction [*197] Board. He requested no more than a vacation of the findings and sentence of his general court-martial of 1943, and that is exactly what he received. None of the relief requested by the plaintiff's 1965 application to the Correction Board was requested, as it could have [*17] been, in his 1963 application. We see no reason why proceedings initiated by an application for entirely new relief, which could have been requested prior to an earlier favorable decision, should deprive the earlier decision, which granted all the relief requested, of finality. Therefore, the 1964 decision was final for the purpose of beginning the limitations period.

The plaintiff's 1965 claim before the Correction Board grew out of the same transaction or occurrence, the findings and sentence of the general court-martial of 1943, as his 1963 claim. Additionally, all the relief requested by the plaintiff in 1965 could have been requested in 1963. In other words, during the time between the two applications, no change occurred in the facts, or law, which was relevant to the plaintiff's right to recover. Therefore, as the discussion above indicates, the 1966 favorable decision by the Correction Board and the Undersecretary did not affect the running of the limitations period which began with the 1964 favorable determination. Since the plaintiff filed his petition in this court more than six years after the 1964 decision, his claim is barred by our statute of limitations.

Even [*18] if the plaintiff could base his cause of action on the 1966 decision by convincingly arguing that the 1964 decision was not final, which he cannot, he still could not prevail. When the plaintiff filed his application with the Correction Board in 1965, he did not request either a discharge as of March 19, 1964, or active duty pay for the period from September 2, 1945, until March 19, 1964, both of which he is claiming in the instant suit. His active duty pay claim before the Board in 1965 covered only the period from August 19, 1944, until his separation date. Since he requested drill pay from his separation date until April 1, 1953, his application indicates that at most he claimed that his separation date should be after September 2, 1945, and sometime before [*198] April 1, 1953; and that he should receive active duty pay for the period ending on such separation date. The plaintiff does not contend that at any time during the 1965-1966 proceedings he attempted to extend his claim beyond what he indicated in his application. As can be seen, the claim he asserted during the 1965-1966 proceedings was very different from his claim here that the Correction Board's lack of power [*19] to backdate his discharge entitles him to active duty pay for the period from September 2, 1945, until March 19, 1964.

Although a claimant may be able to base a cause of action upon a Correction Board's favorable determination, this court plainly held in DeBow that a plaintiff may not use a "beneficial administrative determination as a springboard to obtain relief (within the Board's jurisdiction) which he disowned before the Board itself, or never sought from it, explicitly or implicitly." [193 Ct. Cl. at 503, 434 F. 2d at 1335.] In DeBow, we dismissed the plaintiff's petition because he asked for relief which he had not sought before the Correction Board. The only events, other than the Correction Board action, on

which he could base his claim were barred by the statute of limitations.

We believe the DeBow holding applies to the instant case. As we indicated in DeBow, a favorable Board determination can be used as the basis for a cause of action only when the claimant's contentions before the Correction Board should have put the Board on notice as to the nature of the claim later asserted in this court. A claimant should not be allowed to avoid the usual limitations [**20] bar by contending that a Correction Board acted arbitrarily or illegally by failing to approve a claim of which the Correction Board never had notice. In the case at bar, the plaintiff failed to put the Correction Board on notice as to the nature of the claim he now asserts in this court. This failure is shown above by the considerable difference between the relief sought in the plaintiff's 1965 application to the Correction Board and the relief sought in the plaintiff's petition in this court. Therefore, the plaintiff may not base his cause of action on the 1966 decision by the Correction Board and the Undersecretary of the Air Force. Since all events on which the plaintiff could [**199] possibly base his cause of action occurred more than six years before he filed his suit in this court, and since he claims relief here he never claimed before the Board, he has no basis for a cause of action in this court.

Even if we assume arguendo that the plaintiff put the Correction Board on notice as to the nature of his claim in this court, and that he can escape the limitations bar, he still cannot prevail. 10 U.S.C. @ 1552(1970) n1 grants to the Secretary, acting through the Correction [**21] Board, the power to correct records when a correction is necessary to rectify an error or remove an injustice. In Kimmel v. United States, 196 Ct. Cl. 579 (1971), this court held that section 1552 entitles a complainant to nothing more than placement in the same position he would have been had no error been made. The plaintiff in the instant case has indicated no purpose of the statute, and we know of no purpose, that would be better served if the Correction Boards were required to grant more relief than that stated in Kimmel.

- - - - -Footnotes- - - - -

n1 10 U.S.C. @ 1552 (1970) reads in pertinent part as follows:

"@ 1552. Correction of military records: claims incident thereto.

"(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. * * *

- - - - -End Footnotes- - - - -

[**22]

The task of removing the injustice of an improper discharge or release can best be accomplished, and the purpose of the statute best effectuated, if the Correction Boards (more correctly, the Secretaries acting through the Correction Boards) have considerable discretion to apply their expertise to the varying situations they confront. Many factors, such as the needs of the armed services and the characteristics of the particular individual involved, can affect the date on which a serviceman would have been discharged had an improper discharge never occurred. In a case such as the one at bar where the original discharge

is not invalidated until many years after it occurred, such factors certainly might indicate that the complainant would have been discharged prior to the invalidation date. Therefore, [*200] we think the discretionary power granted to the Correction Boards by section 1552 includes the power to backdate discharges where such backdating places the claimant where he likely would have been absent the improper discharge. In fact, this court has previously approved the backdating of discharges and releases by Correction Boards. O'Callahan v. United States [*23], 196 Ct. Cl. 556, 451 F. 2d 1390 (1971); Mercereau v. United States, 155 Ct. Cl. 157 (1961).

In several previous cases involving officers in the armed forces, this court held that Correction Boards acted improperly by backdating discharges. Hamlin v. United States, 183 Ct. Cl. 137, 391 F. 2d 941 (1968); Motto v. United States, 172 Ct. Cl. 192, 348 F. 2d 523 (1965); Egan v. United States, 141 Ct. Cl. 1, 158 F. Supp. 377 (1958). The plaintiff contends that these cases support his position in the instant case. However, all of these cases are decisively distinguishable from the case at bar.

All of these cases except Egan involved regular officers in the armed forces. Regular officers possess indefinite commissions, and, therefore, their status in the armed forces is different from the status of other personnel. O'Callahan v. United States, 196 Ct. Cl. at 560, 451 F. 2d at 1392, and cases cited therein. Reserve officers do not possess indefinite commissions. With exceptions not relevant to the instant case, reserve officers, such as the plaintiff, can be released from active duty at any time under 10 U.S.C. @ 681(a) (1970). n2 We know [*24] of nothing which indicates that the status of reserve officers was any different on the date to which the plaintiff's release was backdated. So, while regular officers may be able to successfully attack the backdating of a discharge as contrary to law, section 681(a) prevents reserve officers from succeeding in such a broad attack.

- - - - -Footnotes- - - - -

n2 10 U.S.C. @ 681(a) (1970) provides in pertinent part as follows:

"@ 681. Reserves: release from active duty.

"(a) Except as otherwise provided in this title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty."

- - - - -End Footnotes- - - - -

Even though Egan involved a reserve officer, this court has previously distinguished that case from cases such as the one at bar. In Merriott v. United States, 163 Ct. Cl. 261, 265 [*201] (1963), cert. denied, 379 U.S. 838 (1964), we stated as follows:

* * * In Egan, the officer was illegally and erroneously released to inactive duty in October 1943, and then illegally discharged from [*25] the Marine Corps Reserve in April 1944, on the ground that he was insane (which he was not); if the true facts had been known it would have been highly unlikely that a healthy Marine Corps combat officer would have been released in the very midst of World War II; in fact, no reason for such a release at that time appeared in the record * * *.

Because the record in Egan indicated no reason or basis for backdating the release to the selected date, the Correction Board's action was found to be arbitrary and was not allowed to stand.

In the instant case, the Correction Board did not act arbitrarily in backdating plaintiff's release. The release was backdated to a date near the end of World War II, a time when many reserve officers were released from active duty because they were no longer needed. This court approved a similar release in Merriott where an Army Disability Review Board found that the plaintiff in that case had been improperly released from active duty on January 1, 1945, by reason of physical disability. Even though the Review Board reversed the earlier finding that the plaintiff in Merriott was incapacitated for active duty, it refused to grant [**26] any relief, and, therefore, left the plaintiff's release date at January 1, 1945. In refusing to find that the Review Board acted arbitrarily, we said that the plaintiff obtained a release which "came too close to the end of World War II for the court to speculate that, unlike millions of other reservists, he would have been kept on active duty." [163 Ct. Cl. at 264.] As with the plaintiff in Merriott, the plaintiff in the instant case received a release as of a date reasonably related to the events surrounding that date. Therefore, he cannot successfully claim that the Correction Board acted arbitrarily by backdating his claim.

For the reasons stated above, the defendant's motion for summary judgment is granted, the plaintiff's motion for summary judgment is denied, and plaintiff's petition is dismissed.