

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS**

September 18, 2023

Docket No. VS-21-0028

ROGER A. MELLO, Petitioner

v.

**EXECUTIVE OFFICE OF VETERAN'S SERVICES (f/k/a/ DEPARTMENT OF
VETERANS' SERVICES), Respondent**

DECISION

Appearance for the Petitioner:

Roger A. Mello, *pro se*
9 Candle Paper Lane
West Wareham, MA 02576-1512

Appearance for the Implied Intervenor:

Gregory Quilty
Director, Barnstable District
Cape Cod Veterans' Services
66 Falmouth Road
Hyannis, MA 02632

Appearance for the Respondent:

Matthew Deacon, Esq., General Counsel
Executive Office of Veterans' Services
Legal Office
600 Washington St., 2nd floor
Boston, MA 02111

Administrative Magistrate:

Mark L. Silverstein, Esq.

Summary of Decision

Veterans' Benefits Appeals - Massachusetts Veterans Annuity Benefit (M.G.L. c. 115, § 6B) - Former Massachusetts Army National Guard member - Benefit denial affirmed based upon ineligibility under Massachusetts definition of "veteran" for state veterans' benefits purposes (see M.G.L. c. 4, § 7, cl. 43rd) -- United States Army active duty mostly for training purposes - State Guard service upon order of Governor to maintain readiness for deployment to maintain order in Massachusetts municipalities not readily classified as active service not for training purposes - Statutory ambiguity requiring legislative clarification.

The denial by the Massachusetts Department of Veterans' Services (DVS, now the Executive Office of Veterans' Services, EOVS) of a former Massachusetts Army National Guard member and Army Reservist's application for an M.G.L. c. 115, § 6B state veteran annuity benefit is affirmed. The member's United States Army active duty in 1964, and state Guard active service in 1968, did not satisfy the active duty or service requirements of M.G.L. c. 4, § 7, cl. 43rd needed to qualify for Chapter 115 state veterans benefits.

(1) The petitioner was ordered to active duty in the United States Army in 1964 by the President of the United States pursuant to U.S.C. Title 10. After performing mostly active duty for training purposes, he received an honorable discharge and was reverted to duty in the Massachusetts National Guard. He also sustained an injury during his Army training for which he later received a 100 percent service-related disability rating by the United States Department of Veterans' Affairs (VA). However, because the Massachusetts statutory definition of "veteran," see M.G.L. c. 4, § 7, cl. 43rd, specifically excludes active duty for training purposes from its definition of active duty, the petitioner's Army duty mostly for training purposes did not qualify him for M.G.L. c. 115 state veterans benefits.

(2) The circumstantial evidence present here allows a reasonable inference that the petitioner was ordered to perform state Guard active service starting April 5, 1968—maintaining order on the streets of Massachusetts municipalities during a time of civil unrest. The Guard was never deployed to perform this state service, but it maintained readiness to perform it as a priority function throughout 1968. M.G.L. c. 33 does not characterize maintaining Guard readiness to perform state Guard service ordered by the Governor as "active service" or "active service for training purposes." M.G.L. c. 4, § 7, cl. 43rd does not state how state Guard service may be characterized as having been active service for training purposes or not. Resolving this ambiguity requires legislative clarification via statutory amendment or new legislation, if the legislature chooses to do so. Absent such legislative clarification, the petitioner's 1968 state Guard service cannot be determined to be state Guard active service not for training purposes that qualifies him, pursuant to M.G.L. c. 4, § 7, cl. 43rd, for the M.G.L. c. 115, § 6B annuity benefit.

Background

Petitioner Roger A. Mello served as a member of the Massachusetts Army National Guard

between 1963 and 1969. In 1964, while a Guard member and Army reservist, Mr. Mello performed mostly “active duty for training” in the Army upon activation by the President of the United States. During his Army service, Mr. Mello suffered an injury for which he received, later, a service-related 100 percent disability rating by the United States Department of Veterans Affairs for federal veterans’ benefits eligibility purposes.¹ Upon the completion of his Army service in September 1964, Mr. Mello was “reverted” to the Massachusetts Army National Guard to complete his Guard service. He claims to have been called into active service by the Governor of the Commonwealth in early April 1968 to prepare for deployment to maintain order in Massachusetts cities and towns. Although maintaining readiness to perform this state Guard service remained a priority Guard function throughout the remainder of 1968, the Guard was not deployed to the Commonwealth’s streets to perform it.

Based mostly upon his Army service in 1964 and his related service-connected disability rating, Mr. Mello applied in 2020 to the Massachusetts Department of Veterans’ Services² for the

¹/ The “Veterans’ Administration” to which M.G.L. c. 115, § 6B refers is now the United States Department of Veterans’ Affairs. The name change preserved the agency acronym “VA.” The name change occurred on October 25, 1988, when President Reagan signed P.L. 100-527, the “Department of Veterans Affairs Act.” This legislation elevated the Veterans Administration to Cabinet-level department status in the federal government. The status elevation went into effect on March 29, 1989, so that the new president could appoint the new (and first) Department Secretary. The VA “recognizes both dates—when the law was signed/enacted and when it became fully effective— as significant to its history.” *See* VA News (Oct. 25, 2015), “Department of Veterans Affairs Act signed 27 years ago,” available at: <https://news.va.gov/23584/departments-veterans-affairs-act-signed-27-years-ago/>. *See also* U.S. Dep’t of Veterans’ Affairs, “History Overview,” <https://department.va.gov/history/history-overview/>.

²/ DVS; now the Executive Office of Veterans’ Services, EOVS.

“continued annuity” state veterans’ benefit made available by M.G.L. c. 115, § 6B. This statute directs the payment of an annuity (currently, \$2,000 annually) to a “veteran,” as defined by M.G.L. c. 4, § 7, cl. 43rd. Clause 43rd defines “veteran” according to the circumstances of active service. These include “active service” under “honorable conditions” in the Armed Forces of the United States, or service “on full time duty under Titles 10 or 32 of the United States Code or under sections 38, 40 and 41 of [M.G.L.] chapter 33 for not less than 90 days *active service*, of which at least 1 day of which was for wartime service,” unless the Guard member was awarded a VA service-connected disability or Purple Heart, in which case the member is “deemed to be a veteran notwithstanding his failure to complete 90 days of *active service*.” (Emphases added.)

DVS denied Mr. Mello’s annuity application because his Army duty was mostly for training purposes, and he requested that the agency hold a hearing on the denial. Following a hearing, DVS Hearing Officer Vallerie Stein affirmed the annuity benefit denial in a decision dated November 25, 2020 (the *DVS Decision*). The DVS Hearing Officer found that Mr. Mello had been ordered to active duty in the Army for 26 weeks in 1964, while he was a Massachusetts Army National Guard member; and although he was discharged honorably, his service and discharge record (Form DD-214) showed that his Army service was mostly for training purposes and, as a result, was not “active service” in the Armed Forces of the United States and did not qualify Mr. Mello for an annuity benefit under M.G.L. c. 115, § 6B, *citing* M.G.L. c. 115, § 6A, M.G.L. c. 4, § 7, cl. 43rd, and 108 C.M.R. § 3.02 (DVS state veterans’ benefits regulation providing, in pertinent part, that “ active service . . . does not include active duty for training purposes in the Army or Air National Guard; or active duty for training as a reservist in any branch of the Armed Forces.”).

Mr. Mello timely appealed the *DVS Decision* to the Massachusetts Division of Administrative Law Appeals. He claimed that (1) he performed some active duty not for training during his 1964 Army service; and (2) in 1968, he and his Guard unit were ordered by the Governor of the Commonwealth to prepare for urban deployment to maintain order, which he claimed was active service that qualified him for the M.G.L. c. 115, § 6B annuity.

I held two prehearing conference sessions by telephone with the parties on March 25, 2021 and April 22, 2021. I discussed with them whether there was sufficient evidence of Mr. Mello's active service not for training purposes as a Guard member after 1964 and, if not, whether he would need to seek a legislative remedy to qualify for the section 6B annuity. Mr. Mello related his effort to obtain documentation of his state Guard service from the Massachusetts National Guard's records office in Milford, Massachusetts. He also related the Guard's response—there was a Guard “recordkeeping gap” for the time period in question, as a result of which it had no records showing that the Governor ordered Mr. Mello's Guard unit to perform state Guard service in 1968, or that Mr. Mello performed such service by order of the Governor.

After each of these conference sessions, I issued an Order summarizing my discussions with the parties, particularly the state of the evidence regarding Mr. Mello's Army service in 1964 and state Guard service in 1968. I requested that the parties attempt to draft a stipulation of uncontested material facts to assist with adjudication—at least to the extent of determining whether any material facts were genuinely disputed and required adjudication via an evidentiary hearing. (*See Orders Following Prehearing Conference Session*, Mar. 29, 2021 and Apr. 23, 2023). The parties were not able to agree upon such a stipulation.

On May 9, 2023, Mr. Mello filed a public records request seeking all of the documents in DALA's possession regarding his appeal. His request also stated that "I would hope that you would agree that this claim should be adjudicated, one way or the other, and not leave a veteran that is in declining health with additional stress." On May 18, 2023, I issued an Order responding to Mr. Mello's record request to DALA, and also to his apparent request that his appeal be decided upon the parties' written submissions rather than via an evidentiary hearing. The Order stated that unless any of the parties filed, by June 9, 2023, an objection for good cause, I would decide Mr. Mello's appeal upon the parties' written submissions, pursuant to 801 C.M.R. § 1.01(8)(c). (*See Order re Response to Petitioner's Records Request, and Request to Decide Appeal*, May 18, 2023.)

Mr. Mello filed a response to the Order on May 18, 2023. Mostly, this filing reiterated Mr. Mello's argument that he should be treated as a veteran eligible for the Section 6B annuity based upon the United States VA's determination that he was a disabled veteran, whether or not his 1964 Army service, or his subsequent state Guard service, was active duty or service not for training. He did not object to the decision of his appeal upon the parties' written submissions. Neither EOVS (DVS) nor the local Veterans' Service Officer objected to deciding the appeal in this manner.

Undisputed Facts

I find that the following facts, and reasonable inferences drawn from them, are not genuinely or materially disputed, based upon the parties' filings and the Orders I issued previously in this

appeal,³ and, as well, the nature of Massachusetts National Guard service depending upon whether it is ordered by the President for national defense purposes under U.S.C. Titles 10 or 32, or by the Governor of the Commonwealth for state Guard purposes (such as maintaining order in the Commonwealth's municipalities) pursuant to M.G.L. c. 33.

a. Mr. Mello's 1964 United States Army Active Duty While a National Guard Member

1. Mr. Mello joined the Massachusetts National Guard in late 1963 or early 1964.⁴ The Guard division in which he served was the Massachusetts Army Reserve National Guard.

2. The Massachusetts National Guard, comprising Army and Air Force National Guard units, is headquartered at Hanscom Air Force Base, located mostly in Bedford, Massachusetts, with portions of the base extending into adjoining towns. It is:

an operational reserve of the United States Army and Air Force that provides ready, relevant and reliable troops and equipment to respond to natural disasters or other civil emergencies when activated by the Governor. The Guard also supports the federal military mission when activated to duty by the President of the United States.

Commonwealth of Massachusetts, *Massachusetts National Guard Website*, <https://www.mass.gov/orgs/massachusetts-national-guard>.

3. Shortly after joining the Guard, Mr. Mello was ordered to active duty for training (ACDUTRA) in the United States Army on March 13, 1964 by the Secretary of the Army with "his

^{3/} See the Appendix to this Decision.

^{4/} None of the parties' filings shows the actual starting date of Mr. Mello's Massachusetts National Guard service. His Form DD-214 for his United States Army service shows "NA" (not applicable) at Box 16, which is for recording the "Date Inducted" into the U.S. Armed Forces.

consent and the consent of the Governor of the Commonwealth of Massachusetts.” (*DVS Decision*, Exh. 4: Massachusetts Military Division, The Adjutant General’s Office, *Special Order No. 54: Order to active duty for training* (with recipients including Mr. Mello), dated Mar. 13, 1964.)

4. This Order to active duty for training stated that it was issued pursuant to 10 U.S.C. § 672(d), (*id.*), meaning that Mr. Mello’s activation into the United States Army was, for its duration, a U.S.C. Title 10 activation ordered by the President of the United States; and that upon its completion, this service would be documented in a Form DD-214 issued to Mr. Mello by the Army.

5. Mr. Mello performed a total of nine months and 25 days of active duty in the United States Army between March 13, 1964 and September 26, 1964, of which (a) five months and 25 days was active duty for training; and (b) four months was for “other service creditable for basic pay purposes.” (*DVS Decision*, Exh. 2: Mr. Mello’s Form DD-214 at Blocks 24 and 32.)

6. Mr. Mello received an honorable discharge from the Army on September 26, 1964. (*Id.* at Block 13A.)

7. Upon being discharged from the Army, Mr. Mello was “reverted” to service in the Massachusetts Army National Guard until December 1, 1969, for the purpose of completing his Army Reserve obligation. (*Id.* at Blocks 11a and 17.)

8. On March 31, 2020, the United States Department of Veterans’ Affairs (VA) granted Mr. Mello a 100 percent service-connected disability that Mr. Mello sustained during his Army service, effective retroactive to August 2, 2018. (*See DVS Decision*, Exh. 2: U.S. Dep’t of Veterans

Affairs, *Decision Review Officer's Decision* dated Mar. 3, 2020.)⁵

b. Mr. Mello's Subsequent Massachusetts National Guard State Service

9. Following his return to the Massachusetts Army National Guard on September 26, 1964, Mr. Mello served as a Guard member and an Army reservist, until his Army Reserve obligation ended on or about December 1, 1969. (DVS Decision. (*DVS Decision*, Exh. 2: Mr. Mello's Form DD-214 at Block 18.)

10. This period of Mr. Mello's Massachusetts Army National Guard service was within

⁵/ The VA has issued an "individual unemployability fact sheet" explaining what this type of disability is and how a veteran may apply for it. It states in pertinent part that:

Individual Unemployability (IU) is a unique part of VA's disability compensation program. It allows VA to pay certain Veterans compensation at the 100 percent rate, even though VA has not rated their service-connected disabilities at that level.

The fact sheet also states that an applicant for this type of disability must be a veteran unable to hold a job as a result of service-connected disabilities. This means being "unable to "maintain substantially gainful employment" (defined as "unemployment that is not marginal, such as performing "odd jobs") and must have "[o]ne disability that is rated at 60 percent or more; or "[m]ultiple disabilities, with one disability rated at 40 percent or higher, and a total rating of 70 percent or more." It also states that an applicant claiming disability based on individual unemployability must present "evidence of at least one service-connected disability . . ." and must "prove the service-connected disability or disabilities alone prevent getting or keeping substantially gainful employment," which " can be due to inability to perform either mental or physical tasks." This fact sheet is available online either by searching "VA Individual Unemployability," which should bring up a pdf version; or at <https://www.benefits.va.gov/BENEFITS/factsheets/serviceconnected/IU.pdf>.

Although the nature of Mr. Mello's injury is not determinative here, I note that the VA's 2020 Decision does not identify the injury that Mr. Mello sustained, and neither does Mr. Mello's Form DD-214.

the era of wartime service classified as “Vietnam II,” which lasted from August 5, 1964 until May 7, 1975. (*DVS Decision*, Exh. 5: Chart entitled “Definition of Massachusetts Veteran, M.G.L. c. 4, § 7, cl. 43rd as amended by the Acts of 2005, c. 130.”)⁶

11. Upon separating from the Massachusetts National Guard, Mr. Mello should have received a Massachusetts National Guard Report of Separation and Record of Service known as “Form NGB 22,” or equivalent document used in 1969.⁷ The record does not include a copy of Mr. Mello’s Form NGB 22, the Massachusetts National Guard Report of Separation and Record of Service. The DVS Decision appealed here does not mention this document. However, it is undisputed that Mr. Mello completed the Massachusetts National Guard service to which he was reverted by the Army in September 1964.

⁶/ This chart, apparently prepared by DVS, correlates each “era” of military service (starting with the World War I era and continuing to and including the “Persian Gulf” era) with the applicable requirements for veteran status under M.G.L. c. 7, § 4, cl. 43rd. The same information regarding Massachusetts veteran status may be found online at the Executive Office of Veterans’ Services website. *See Definition of a Veteran: Eligibility and Service Requirements*, <https://www.mass.gov/service-details/definition-of-a-veteran>.

⁷/ Box 10 of the current Form NGB 22 used by the Massachusetts National Guard is used to record a discharged Guard member’s various types of service. Box 10(c) is used for entering “[p]rior active federal service.” (*See* Form NGB 22 linked from the National Guard Bureau Forms website, <https://www.ngbpmc.ng.mil/Forms/NGB-Forms/> ; scroll down the chart of available forms and click on “NGB Form 22.”) It is unclear whether a Guard member’s service upon activation into the United States Army or Air Force for active duty service not including training would be recorded at NGB Form 22, Box 10(c). The current Form NGB 22 does not include a separate box for entering service performed by a Massachusetts National Guard member in the Armed Forces of the United States following activation by the President under United States Code Titles 10 or 32. It is unclear whether the Form NGB 22 or equivalent form used in 1969 had a separate box for recording service upon activation by the President. As to that service, however, the member’s DD-214 Form would be determinative as to the type of active duty service performed in the Army or Air Force, and its duration.

12. Mr. Mello claimed in his November 28, 2020 appeal, and in his subsequent filings, that his Massachusetts National Guard unit was activated in 1968 by the Governor of the Commonwealth for the purpose of patrolling urban areas if they became sites of civil disorder and rioting, similar to Governor-activated service that was performed during the summer of 1967 by National Guard units in other states. (*See, e.g.*, Mr. Mello's document filing dated January 22, 2021; attached Cover letter from Mr. Mello dated Jan. 22, 2021; and Mr. Mello's filing dated May 1, 2021; attached letter from Mr. Mello dated May 1, 2021.)

13. At some point prior to January 25, 2021, Mr. Mello emailed to the Massachusetts National Guard an inquiry as to his active duty status as a Guard member under U.S.C. Title 32. (*See* discussion of Title 32 active duty below at 25-27.) Mr. Mello's inquiry was referred to Brigadier General (Ret.) Leonid Kondratiuk, the Director of Veterans Affairs in the Adjutant General's Office of the 747th Military Police. On January 25, 2021, Brigadier General Kondratiuk responded to Mr. Mello that his Guard file:

does not state if he ever served on state active duty. There are no orders for state active duty. The only data I have is a compilation of call-ups that is not official that sometimes lists the units. *You have identified a gap in the state system.*

(Mr. Mello's document filing dated January 22, 2021: attached email, Brig. Gen. Leonid E. Kondratiuk, Director, Veterans Affairs, The Adjutant General's Office, Massachusetts Army National Guard, to Roger Mello, dated Jan, 25, 2021, re: 747th Military Police Records)(emphasis added).

14. On April 22, 2021, Mr. Mello filed a public records request pursuant to M.G.L. c. 66, § 10 with Brigadier General Kondratiuk, in which he sought records maintained by the

Massachusetts Military Division related to the activation of the Massachusetts Army National Guard during the 1960s. (*See* Mr. Mello’s cover email addressed to the Magistrate dated May 8, 2021, with attached email, Timothy F. Cullen, Massachusetts Military Division, Legislative Liaison and Records Access Officer, Joint Force Headquarters, Hanscom Air Force Base (Massachusetts), to Roger A. Mello, dated May 6, 2021, regarding Mr. Mello’s April 22, 2021 records request.)⁸ Massachusetts Military Division Records Access Officer Cullen’s May 6, 2021 response to Mr. Mello’s public records request stated, in pertinent part, that “there does not appear to be a document that specifically” responded to Mr. Mello’s request for “[c]opies of all communications from the Assistant Deputy that addressed and implemented a policy/procedure to assure that the National Guard Personnel Records are inclusive of said activations under [U.S.C.] Title 32 or Title 10 if both types of activation are silent in the individual records.” (*Id.*)

15. As additional evidence that the Governor activated the Massachusetts National Guard in 1968 for the purpose of maintaining order on the streets of Commonwealth municipalities, Mr. Mello filed affidavits from three other former Massachusetts Army National Guard members with whom he served—David C. Pinto, John L. Whelan and Floyd J. Silvia. (*See* Appeal by Roger A. Mello from Nov. 25, 2020 *DVS Decision*, dated November 28, 2020: attached Affidavit of David Pinto, dated Nov. 30, 2020 and notarized Dec. 31, 2021; Affidavit of John L. Whelan dated Feb. 18, 2021, filed by Mr. Mello on February 19, 2021; and Mr. Mello’s filing dated January 22, 2021:

⁸/ Mr. Mello’s public records request to the Guard is not in the record. The responses by Massachusetts National Guard Access Records Officer Cullen, whose authority to issue them is not disputed here, show sufficiently that Ms. Mello filed the records request, and the types of records he sought.

attached Affidavit of Floyd J. Silvia, sworn-to Jan. 12, 2021.)

(a) David C. Pinto served with Mr. Mello in the Massachusetts National Guard in 1967 and 1968. He recalled that their Guard unit was ordered to service during these years by the Governor's office verbally, via Guard officers, and without written orders. On several occasions, identified only as having occurred during the two years he served with the Guard with Mr. Mello, Mr. Pinto recalled that the unit was ordered in this manner (meaning without written orders from the Governor) to "participate as support personnel for the city and towns; and that "[t]he local government would contact the Governor's office, and the Governor's office would contact the duty sergeant" for the Guard unit, who then called the Guard unit members and told them to report for duty. He also recalled that in 1967, during a period of urban rioting::

[a]lthough Boston was having problems, we were called in and placed on stand-by to go to Harlem, New York. We were not provided with written orders. Just a phone call that we were ordered to report. As a point of information, computers were not available to the military during those years, and, [at] best, we had a fax machine . . . Mr. Mello and I had both been activated to participate during emergencies that were not considered to be training exercises. We were both able to trade off the time that we participated for time that was required to meet our obligation to the National Guard.

(Affidavit of David C. Pinto dated Nov. 30, 2020 and notarized Dec. 31, 2021.)

(b) John L. Whelan served in the Massachusetts Army National Guard with Mr. Mello from 1964 through 1969, and then served an additional year in the Guard. He recalled "having to stand guard at the Hyannis Armory because work [sic; probably "word"] was out that Cape Cod Community College students were going to demonstrate in front of the

Armory,” but Mr. Whelan did not state the year in which this occurred. Mr. Whelan recalled receiving no written activation orders about a Guard response to civil disturbances. He recalled receiving a telephone call from the Guard Armory Sergeant stating that his Guard unit had been ordered to duty, although Mr. Whelan did not say when this occurred. He also recalled that Massachusetts Army National Guard members who received this type of notice “were allowed to trade off this time for future scheduled commitments or receive monetary compensation,” and that “[s]ince the money was so little, most of us opted for the time off.” (Affidavit of John L. Whelan dated Feb. 18, 2021.)

(c) Floyd J. Silvia served in the Massachusetts Army National Guard with Mr. Mello, and continued his Guard service into 1970, after Mr. Mello’s Guard service had ended. (*See* Mr. Mello’s letter dated Jan. 22, 2021 supplementing his appeal with additional documents.) Mr. Sylvia recalled being contacted in July 1970 by Guard Armory Sergeant Edward Burke “regarding a civil disturbance in New Bedford, Massachusetts;” having to “respond to the Armory for further orders;” and remaining “on standby for the day,” but “not being deployed to New Bedford.” He recalled never receiving written activation orders to respond to the New Bedford civil disturbance “or anytime that we were called in for storm duty,” and that the Guard members “[h]ad the option of trading the time spent for the call-out for a mandatory drill.” (Affidavit of Floyd J. Silvia dated Jan. 12, 2021.)

16. On April 5, 1968, Mr. Mello’s Massachusetts Army National Guard unit was ordered to perform state Guard service—maintaining order in Massachusetts cities and towns during a period of civil unrest, and maintaining readiness to do so. The Guard was not deployed to the streets of any

Massachusetts city or town, but it maintained readiness for this deployment throughout 1968 as a priority function.

(a) The Governor's order of activation was transmitted telephonically to Guard commanding officers, as had been the practice regarding similar orders by the Governor to prepare for deployment to maintain law and order during the late 1960s and in 1970. The Guard commanding officers immediately informed Mr. Mello and the other members of his Guard unit, by telephone, that they had been ordered to perform this state Guard service, and were to report immediately for unscheduled training preparatory to deployment for the purpose of maintaining order on the streets of Massachusetts municipalities. (*See* Finding 15.)

(b) Mr. Mello and his fellow Guard unit members were told at or about midnight on the same day, April 5, 1968, that they had been "released" from the order to report for the "unscheduled training" to maintain order on the streets of Massachusetts municipalities. (*Id.*)

(c) Mr. Mello and his fellow Guard unit members were not deployed to the streets of any Massachusetts municipality to maintain order in 1968. (*Id.*)

(d) There is no Guard record showing that the Governor's April 5, 1968 order to perform state Guard service was rescinded. (*See* Findings 13 and 14.)

(e) There is a public record showing that, throughout 1968, the Massachusetts National Guard maintained readiness for civil disorder control deployment as a priority function. (*See* State Library of Massachusetts, *Annual Report, Military Division, Commonwealth of Massachusetts* (1968) (addressed to Governor Francis W. Sargent,

Commander in Chief and dated Feb. 5, 1969); available at: <https://archives.lib.state.ma.us/handle//2452/756521>.

c. Section 6B Annuity Benefit Denial, and Appeal

17. DVS denied Mr. Mello's application for an annuity benefit pursuant to M.G.L. c. 115, § 6B on May 13, 2020. (*DVS Decision*, Exh. 1.) On May 22, 2020, Mr. Mello requested that DVS hold a hearing on the benefits denial. (*Id.*: Exh.3). DVS Hearing Officer Vallerie Stein held a hearing on the benefits denial on June 2, 2020, and issued a Decision sustaining the annuity benefit denial on November 25, 2020. As had been DVS's annuity benefits denial, the Hearing Officer's Decision sustaining the denial was based upon the nature of Mr. Mello's 1964 Army active duty shown by his form DD-214, which was mostly active duty for training purposes. (*DVS Decision* at 4-5.)

18. Mr. Mello filed a timely appeal of the *DVS Decision* with DALA on November 28, 2020.

Discussion

1. Issues to be Decided

Several issues must be decided to resolve whether Mr. Mello qualifies for the M.G.L. c. 115, § 6B annuity benefit based upon his 1964 Army active duty, his 1968 Massachusetts National Guard state service, or both. Several of these issues can be determined here, but determining the ultimate legal issue—whether his state Guard service in 1968 was active service not for training

purposes—requires legislative clarification before it can be decided in Mr. Mello’s favor.

The issues are:

(1) During his service as a Massachusetts National Guard member, did Mr. Mello perform active duty in the United States Army?

I conclude that he did, in 1964, but because it was mostly active duty for training purposes, Mr. Mello’s Army service in 1964 does not qualify him for the section 6B annuity.

(2) Did Mr. Mello perform state Guard active service pursuant to an order issued by the Governor in 1968?

I conclude that he did. The relevant circumstantial evidence presented here includes a Massachusetts National Guard “recordkeeping gap;” Mr. Mello’s recollection (and that of fellow Guard members) regarding their Guard unit’s call-up for state Guard service during the late 1960s and in 1970; and the Massachusetts National Guard’s 1968 Annual Report to the Governor, which noted that maintaining readiness for deployment to maintain order in the Commonwealth’s municipalities during a time of civil disorder was a priority Guard function that year. This circumstantial evidence supports a reasonable inference that Mr. Mello performed state Guard active service in 1968 beginning on April 5 of that year pursuant to an order the Governor issued on that date. This service included maintaining readiness, throughout the remainder of 1968, to deploy for maintaining order on the streets of Massachusetts municipalities even though the Guard was not deployed for this purpose.

(3) Does this state Guard service qualify Mr. Mello as a “veteran” under M.G.L. c. 4, § 7, cl. 43rd and therefore qualify him for the M.G.L. c. 115 § 6B annuity?

I conclude that it does not. Clause 43rd requires that state Guard service have been active service not for training purposes in order to qualify a Guard member as a “veteran” for Chapter 115 state veterans benefits eligibility purposes. It is unclear that the state Guard service Mr. Mello performed starting in April 5, 1968—maintaining readiness for deployment to Massachusetts municipalities to maintain order if that became necessary— was active service not for training purposes. Legislation would be needed to clarify that “maintaining readiness” for State Guard service ordered by the Governor of the Commonwealth is active service not for training purposes and therefore qualifies a Guard member for Chapter 115 state veterans’ benefits generally, and/ or for the M.G.L. c. 115, § 6B annuity specifically. Without this legislative clarification, I cannot determine, as a matter of law, that Mr. Mello’s state Guard service in 1968 was active service not for training purposes that qualifies him for the M.G.L. c. 115, § 6B state veterans’ annuity.

2. Applicable Law

I review next the applicable law regarding the National Guard, how Guard units and their members may be activated for federalized or state duty, and which type of service currently qualifies a former Massachusetts National Guard member for the M.G.L. c. 115, § 6B annuity benefit.

a. The National Guard’s Dual Federal-State Identity

What ultimately became the National Guard was organized originally in 1636, in Salem, Massachusetts, as a group of citizen militia regiments in the Massachusetts Bay Colony. Citizen militia regiments of both the Massachusetts Bay Colony and the Plymouth Colony, and then of Great

Britain's Massachusetts Province, were called to duty in all of the major conflicts fought during the North American colonial period between 1636 and the end of the French and Indian War in 1760. Massachusetts militia regiments have served in the major conflicts of the United States since (and including) the American Revolution. Other states have also maintained forces that have functioned as both state militias and as United States Army Reserve units. Today, the National Guard includes more than 100,000 U.S. Air Force and more than 300,000 U.S. Army members. *See Official Designation of Salem, Massachusetts, as Birthplace of the National Guard of the United States*, Pub. L. No. 112-241, § 1 (2013) (regarding the Guard's historical Massachusetts origins); *see also National Guard Fact Sheet, Army National Guard (FY2005)*; pdf version available online, linked from <https://www.nationalguard.mil> › About-the-Guard › Army-National-Guard › Resources › News › ARNG-Media › FileId › 137011; *see also 10 Need-To-Know Facts About the National Guard*, USO online, <https://www.uso.org/stories/2934-10-need-to-know-facts-about-the-national-guard>.

In 1916, Congress passed, and President Woodrow Wilson signed, legislation making the National Guard subject to federalization by the President—in other words, subject to being called to active duty service in the United States Armed Forces (initially, the United States Army, and later the United States Air Force) in times of declared national emergency, and with the federal government assuming responsibility for Guard unit funding, training and maintenance. *See National Defense Act of 1916*, Pub. L. 64-85, 39 Stat. 166 (1916). This federal legislation made the National Guard of each state, including the Massachusetts National Guard, a United States military reserve force, maintained by each state but subject to active duty call-up by the President of the United States, as well as by the Governor of the state where the Guard was based. It remains the case that

when units of a state's National Guard are activated by the President and federally funded, they function within the United States Army or the United States Air force; otherwise, these units are maintained and funded by the state, and can be called up to perform state emergency functions that they could not perform as activated members of the United States Army or Air Force. *See* National Guard Website, *About the Guard*, [https:// www.nationalguard.mil/About-the-Guard/.](https://www.nationalguard.mil/About-the-Guard/),

As a result, each state National Guard has a dual identity—as a state militia force that protects lives and property when it is not called up by the President for duty in the armed forces of the United States; and as a military reserve of the Armed Forces of the United States when it is activated by the President as a matter of national defense or national interest, which can include overseas deployment. (*Id.*)

National Guard members can be called into active duty service in any of three ways:

(a) By the President of the United State, pursuant to 10 U.S.C. § 12406, to repel foreign invasion or prepare to repel it, to suppress rebellion against the authority of the United States (or prepare to meet the danger of such rebellion), or when the President “is unable with the regular forces to execute the laws of the United States.” In the event of this “Title 10” Guard activation, the President serves as commander-in-chief of the Guard units activated for federal service; active duty officers command the guard units that are federalized; and the federal government pays the costs of federalized National Guard units.

(b) By the President of the United States, pursuant 32 U.S.C. § 502, with the Governor of each state whose Guard units are federalized serving as commander-in-chief of those units but answering to the Chief of the National Guard Bureau, and with the federal government paying the

costs of the federalized National Guard units. This type of “Title 32 activation” by the President directs or authorizes the Governor to order the state’s National Guard to active duty status to perform federal military service.

(c) By the Governor of a state, through an order activating the Guard units of his or her state, and with the state paying the costs of the activated Guard units. This is known as “Title 32 Active Duty.” *See* 32 U.S.C. § 328. This statutory section:

provides the Governor with the ability to place a soldier in a full-time duty status under the command and control of the State but directly funded with Federal dollars. Even though this duty status is authorized by Federal statute, this section is a statutory exception to the Posse Comitatus Act; the Governor may use the Guard in a law enforcement capacity; and the chain of command rests within the State.

See Army National Guard Fact Sheet, <https://www.nationalguard.mil/About-the-Guard/Army-National-Guard/Resources/News/ARNG-Media/FileId/137011/> (clicking on this web opens up a document in pdf format entitled “Basic-ARNG-Facts.pdf”).

U.S.C. Title 32 allows a state Governor to activate National Guard personnel “in response to natural or man-made disasters or Homeland Defense missions . . . based on State statute and policy.” *Id.* A state Governor may also activate the state’s National Guard to maintain order. *Id.* When a Governor does so, the state’s National Guard is state-funded, and Guard members serve under the Governor’s command and control. *Id.* In addition, when a Guard unit is activated by the Governor, it is not subject to limits upon using Armed Forces of the United States for civilian law

enforcement purposes that are imposed by the Posse Comitatus Act of 1878, 18 U.S.C. § 1385.⁹

An Army or Air Force National Guard member who performs “Title 32 Active Duty” service by order of a state Governor performs “primarily state active duty” that includes “State Active Duty” or “Title 32 Full Time National Guard Duty.” *Army National Guard Fact Sheet, supra.* 32 U.S.C. § 101(19) defines “Title 32 Full-Time National Guard Duty” (meaning state Guard service for which the state pays) to include “training or other duty, other than inactive duty.” Title 32 allows a state legislature to decide what types of state Guard service may be ordered by the Governor, including both deployment to perform state Guard service and maintaining readiness to do so. Title 32 also leaves it to a state legislature to decide which state Guard service ordered by the Governor will, or will not, qualify a Guard member for state veterans benefits.

M.G.L. c. 33 addresses what types of state Guard service the Governor of the Commonwealth may order the Massachusetts National Guard to perform, although in doing so it does not distinguish between active state Guard service and active Guard service for training purposes. M.G.L. c. 33, §

⁹/ The Posse Comitatus Act of 1878 was enacted following the withdrawal of federal troops from the South after the election of 1876, and President Hayes’s use of federal troops to end the Railroad Strike of 1877. It applied originally to the Army only; a 1956 amendment applied the Act to the United States Air Force, and a 2021 amendment applied the Act to the other branches of the Armed Forces of the United States. The Act does not apply to the use of Army or Air Force National Guard units for law enforcement purposes when Guard units are acting under state authority; in that case, the Guard units can be used for law enforcement purposes in that state, or in an adjacent state upon invitation to do so by the adjacent state’s Governor. If a Guard unit is federally activated by the President under U.S.C. Titles 10 and 32, however, it becomes subject to the use limitations imposed by the Posse Comitatus Act, and therefore cannot be used for law enforcement purposes; however, “law enforcement purposes” does not include use of the Guard in case of national emergencies declared by the President, such as invasion. *See* 10 U.S.C. § 12406.

38 states that the Governor may “order out a part of the organized militia,” meaning the Massachusetts National Guard. This includes “escort and other duties including special duty and emergency assistance to state and local civil authorities in the preservation of life and property.” *Id.* The Governor may also order that the Guard be used “to repel an invasion or to suppress an insurrection made or threatened.” M.G.L. c. 33, § 40. In addition, the Governor may order that the Massachusetts National Guard be used to aid a civil authority (such as a municipality) “in cases of riot, natural disaster or catastrophe or when necessary to preserve order and afford protection to persons and property” when the civil authority requests this assistance. M.G.L. c. 33, § 41.¹⁰ In providing this assistance, the Guard performs a civil law enforcement function, and the Guard’s military police unit members function as police officers. M.G.L. c. 33, § 41(b).

None of the Guard service that the Governor can order pursuant to M.G.L. c. 33 is confined,

¹⁰/ M.G.L. c. 33, § 41(a) provides that the Governor, acting as Commander-in-Chief of the Massachusetts National Guard:

may issue an order directed to the commander of any organization or unit of the armed forces of the commonwealth directing the command, or any part thereof, to appear at a time and place specified in the order to aid the civil authority in suppressing violations of law, preserving order, affording protection and supporting the laws if 1 of the following situations occurs: (i) in the case of a tumult, riot, mob or body of persons acting together by force to violate or resist the laws of the commonwealth or when such tumult, riot or mob is threatened; (ii) in the case of public catastrophe or natural disaster; (iii) if the usual police provisions are inadequate to preserve order and afford protection to persons and property; or (iv) if additional support to civilian law enforcement is necessary. The order may be issued upon the initiative of the commander-in-chief, or at the request of the sheriff of a county, the mayor or city manager of a city or the selectmen of a town.

by specific statutory language in Chapter 33, to active service that is not for training purposes, including maintaining readiness to perform state Guard service. As a result, M.G.L. c. 33, §§ 38, 40 and 41 leave it to the Governor, as the Guard Commander-in-Chief, to decide, as a matter of discretion, whether to order Guard deployment, maintaining readiness for such deployment, or both for the purposes that the General Laws allow. Absent any statutory language to the contrary, the Governor's discretion appears to include ordering Guard units and members to train and prepare for deployment to perform functions such as those specified at M.G.L. c. 33, §§ 38, 40 and 41, even if actual deployment never occurs.

Chapter 33 suggests that, for purposes of gubernatorial authority to activate the Guard, the distinction between state Guard active service and state Guard active service for training purposes is a distinction without a difference. However, the distinction is definitely one with legal significance under M.G.L. c. 4, § 7, cl. 43rd, in terms of whether a Guard member's performance of state Guard service qualifies the member for M.G.L. c. 115 state veterans' benefits, including the section 6B annuity. What proves problematic here for Mr. Mello is that neither Chapter 33 nor M.G.L. c. 4, § 7, cl. 43rd helps in distinguishing between these two types of state Guard service, particularly in determining whether maintaining Guard readiness to perform State Guard service ordered by the Governor under Chapter 33 is, or is not, active service for training purposes.

b. Guard Service Qualification for the M.G.L. c. 115, § 6B Annuity Benefit

To qualify for the state veterans' annuity made available by M.G.L. c. 115, § 6B, a person applying for this benefit must be a "veteran" as defined for state veterans benefits purposes by

M.G.L. c. 4, § 7, cl. 43rd. *See* M.G.L. c. 115, § 6A (adopting clause 43rd’s definition of “veteran” in determining section 6B annuity eligibility). Clause 43rd provides in pertinent part that:

“Veteran” shall mean (1) any person, (a) whose last discharge or release from his wartime service as defined herein, was under honorable conditions and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States, or on full time national guard duty under Titles 10 or 32 of the United States Code or under sections 38, 40 and 41 of chapter 33 for not less than 90 days active service, at least 1 day of which was for wartime service; provided, however, than any person who so served in wartime and was awarded a service-connected disability or a Purple Heart, or who died in such service under conditions other than dishonorable, shall be deemed to be a veteran notwithstanding his failure to complete 90 days of active service

M.G.L. c. 4, § 7, ck. 43rd, first para. The final paragraphs of clause 43rd state that:

"Armed forces" shall include army, navy, marine corps, air force and coast guard.

"Active service in the armed forces", as used in this clause shall *not* include active duty for training in the army national guard or air national guard or active duty for training as a reservist in the armed forces of the United States.

(Emphasis added.)

Clause 43rd’s definition of “veteran” is applied readily to service in the Armed Forces of the United States performed by Massachusetts National Guard members upon activation by the President of the United States pursuant to United States Code Titles 10 or 32. It also applies to state Guard service performed by Guard members.

Per this definition, and subject only to the exceptions that M.G.L. c. 4, § 7, cl. 43rd mentions, service in the United States Armed Forces upon activation by the President of the United States that qualifies for M.G.L. c. 115 state veterans benefits does not include “active duty for training purposes.” The distinction made by Clause 43rd between active service and active service

for training purposes is one that Title 32 allows a state to make in determining which type of federal or state Guard service qualifies for *state* veterans' benefits.

In the federalized context of a Guard member's duty, Title 32 defines "active duty" as :

full-time duty in the active military service of the United States. It includes such Federal duty as full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. It does not include full-time National Guard duty.

32 U.S.C. § 101(12). 32 U.S.C. § 101(19) defines "Full-Time National Guard duty" as:

training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia . . . for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.

The apparent purpose of these definitions is to clarify the type of Guard duty that would qualify as full-time duty comprising active duty service in the Armed Forces of the United States that was not for training purposes, and for which the federal government pays. The definitions are related to Title 32's purpose, which is to assure that the National Guard's strength and organization can function "as an integral part of the first line defense of the United States" in meeting national security needs "when Guard units are ordered to active Federal duty" by the President. *See* 32 U.S.C. § 102.¹¹ National Guard activation by the President implicates, in turn, national defense and related

¹¹/ 32 U.S.C. § 102, entitled "Statement of Policy," provides in full that:

In accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United

federal expenditures. In this respect, the definitions sections of Title 32 recognize that a state's National Guard performs both federalized service, for which the United States pays, and state Guard functions for which a state pays and that are not directly related to national security and defense needs.

32 U.S.C. §§ 101(12) and (19) do not address what Guard service, whether performed in the Armed Forces of the United States or not, would qualify for *state* veterans benefits. Whether state Guard service to perform state functions might qualify for state veterans benefits is a matter neither addressed nor preempted by Congress in defining "active duty" at 32 U.S.C. §§ 101(12) and (19). The matter is left, instead, for resolution by individual state legislatures.

To the extent it is possible to do so, Title 32 must be read "as a whole to produce an internal consistency," keeping in mind the statute's purpose. *See Com. v. Fall River Motor Sales*, 409 Mass. 302, 31, 565 N.E.2d 1205, 1214 (1991), *citing* 2A C. Sands, *Sutherland Statutory Construction* § 46.05 (4th ed. 1984). I do so here, bearing in mind the relationship between federalized Guard service and federal benefits based upon military service ordered by the President under Titles 10 and 32 of the United States Code. Congress has granted credit for federal retirement and federal benefits qualification purposes only for active duty in the United States Armed Forces order by the President,

States be maintained and assured at all times. Whenever Congress determines that more units and organizations are needed for the national security than are in the regular components of the ground and air forces, the Army National Guard of the United States and the Air National Guard of the United States, or such parts of them as are needed, together with such units of other reserve components as are necessary for a balanced force, shall be ordered to active Federal duty and retained as long as so needed.

but need not do so (and possibly cannot do so constitutionally) for active Guard service performing state functions such as maintaining order upon activation for this purpose by a state governor only. For the same reason, Congress may also define full-time Guard duty of any type as qualifying a former Guard member who performed service in the Armed Forces of the United States for *federal* veterans' benefits, or it may, as it has, delegated authority to do so to the United States VA.

Reading Title 32 in this manner is consistent with its national defense and related budgetary purposes. It also recognizes that Title 32 leaves it to a state to determine which type of National Guard service (including state service performed upon activation by the Governor) is active duty that the state will or will not credit for state veterans benefits purposes. Equally important is that this is an option for a state legislature, not a mandate. I examine next the extent to which the Massachusetts legislature has exercised this option.

M.G.L. c. 4, § 7, cl. 43rd recognizes a particular type of Massachusetts National Guard duty as qualifying a Guard member for “veteran” status for state veterans benefits purposes, based upon the performance of “active service”—“full time national guard duty under Titles 10 or 32 of the United States Code *or under sections 38, 40 and 41 of chapter 33* for not less than 90 days *active service, at least 1 day of which was for wartime service*; provided, however, than any person who so served in wartime and was awarded a service-connected disability or a Purple Heart, or who died in such service under conditions other than dishonorable, shall be deemed to be a veteran notwithstanding his failure to complete 90 days of *active service*;” (Emphases added.) Clause 43rd defines what active service is not, for state veterans benefits purposes; per its last paragraph, it does not include active service for training purposes, which is also true of active service in the

Armed Forces of the United States.

What Clause 43rd does not do is explain what differentiates state Guard active service from state Guard active service for training purposes. In the context of determining whether service in the Armed Forces of the United States qualifies a Massachusetts National Guard member for Chapter 115 state veterans' benefits, the ambiguity is resolved as a practical matter by relying upon the member's Form DD-214 issued by the Armed Forces service branch in which the Guard member served. As was the case here, Form DD-214 specifies which active duty in the Armed Forces of the United States was performed for training purposes. However, Form DD-214 does not characterize service not performed in the Armed Forces of the United States, such as state Guard service performed by members of a state's National Guard. The National Guard has its own discharge record, NGB Form 22 (discussed below at 34), and Mr. Mello should have been issued one, or whatever similar form was used in 1968. The Form might, or might not, have characterized which state Guard service was performed for training purposes. The point is academic here, since the Massachusetts National Guard identified a "recordkeeping gap" for the time period in question, and Mr. Mello was unable to locate records pertaining to his Guard service in 1968. (*See* Findings 13 and 14.)

Mr. Mello's Guard service in 1968 occurred during a period of wartime ("Vietnam II," which lasted from August 5, 1964 to May 7, 1975), and he was awarded a service-connected disability by the United States VA, which allowed his *active service* in the Guard to qualify for veteran status under M.G.L. c. 4, § 7, cl. 43rd even if it was for less than 90 days. However, it is not clear that any of Mr. Mello's state Guard service in 1968 was "active service" as clause 43rd employs this phrase,

as opposed to active service for training purposes. M.G.L. c. 4, § 7, cl. 43rd states (in its unnumbered last paragraph) that “[a]ctive service in the armed forces,” as used in this clause shall not include active duty for training in the army national guard or air national guard or active duty for training as a reservist in the armed forces of the United States.” M.G.L. c. 33 does not distinguish state Guard service based upon whether it was, or was not, active state Guard service for training purposes. However, M.G.L. c. 4, § 7, cl. 43rd unquestionably makes this distinction for M.G.L. c. 115 state veterans benefits eligibility purposes. M.G.L. c. 115, § 6B bases eligibility for the section 6B annuity benefit upon the definition of “veteran” recited at M.G.L. c. 4, § 7, cl. 43rd.

Thus, while Mr. Mello’s state Guard service in 1968 must have been active service not for training purposes in order to qualify him for the section 6B annuity, it is unclear that this was the case. While the Massachusetts Legislature could, for state veterans benefits qualification purposes, define state Guard active service (such as maintaining order) to include maintaining readiness to perform this function, neither M.G.L. c. 4, § 7, cl. 43rd nor M.G.L. c. 115, § 6B does so specifically.

2. Did Mr. Mello Perform Active Duty Service in the United States Army that Qualifies Him for M.G.L. c. 115 State Veterans’ Benefits?

Shortly after joining the Massachusetts National Guard, Mr. Mello was activated in early 1964, by order of the President, to perform active duty in the United States Army. (Finding 4.) However, per the Form DD-214 the Army issued to Mr. Mello, most of this service was active duty for training purposes (ACDUTRA). (Finding 5.)

Mr. Mello argued that he should be treated as a veteran under M.G.L. c. 4, § 7, cl. 43rd based

upon his 100 percent service-related disability rating by the United States VA. Without question, the VA disability rating qualifies Mr. Mello for federal veterans' benefits without regard to whether the injury he suffered was sustained while performing active duty for training or not. However, as noted above, 32 U.S.C. Title 32 recognizes that a state may define which type of Guard service qualifies a Guard member for state veterans' benefits, and in doing so need not credit state Guard active service for training purposes.

The performance of active duty not for training purposes in the Armed Forces, or of state Guard active service not for training purposes, is critical to meeting the M.G.L. c. 4, § 7, cl. 43rd definition of "veteran" for M.G.L. c. 115 state veterans' benefits qualification purposes. Clause 43rd makes no exception based upon a VA disability rating. In terms of qualifying as a veteran for Massachusetts state veterans' benefits under M.G.L. c. 115, the determinative criterion remains the performance of active duty *not* for training purposes in the Armed Forces of the United States or state active service in the Massachusetts National Guard. Mr. Mello's mostly active duty for training purposes during his 1964 Army service does not meet this criterion, and does not qualify him for the section 6B state veterans' annuity, therefore. *See Franco v. Dep't of Veterans' Services*, Docket No. VS-17-636, Decision (Mass. Div. of Admin. Law App., Apr. 20, 2018).

3. Did Mr. Mello Perform State Guard Active Service by Order of the Governor in 1968?

I turn next to whether Mr. Mello's Massachusetts National Guard service in 1968 was active service not for training purposes or, more accurately, whether it can be characterized as such under the applicable state statutes as they are now written.

a. Reviewability of Mr. Mello's State Guard Service

As noted above, a Guard unit and its members can perform service upon activation by the President of the United States pursuant to United States Code Titles 10 or 32 (in which case the Guard unit and member perform “federalized” active duty); or upon activation to perform state Guard service (essentially, state militia duty) by order of the Governor of the Commonwealth. Under M.G.L. c. 33, state Guard service includes law enforcement and maintaining order in Massachusetts municipalities—functions that, generally, United States Armed Forces personnel (including Guard members activated to Armed Forces service by Presidential order) cannot perform.

The *DVS Decision* did not discuss Mr. Mello's state Guard service. The DVS hearing exhibits do not include his NGB 22 service and discharge record, or equivalent Guard service and discharge record that may have been used in 1969. In view of the “recordkeeping gap” the Guard identified when Mr. Mello requested records, it is not possible to confirm directly Mr. Mello's state Guard service pursuant to order of the Governor in 1968 or its duration.

Nonetheless, the nature of Mr. Mello's state Guard service is material to whether he qualifies for Chapter 115 state veterans benefits and must be addressed here. The DVS regulations do not confine the scope of an appeal such as this one to the record that was before the DVS Hearing Officer, or, more specifically, to the nature of the veteran's military service as it was known during the DVS hearing. 108 C.M.R. § 8.07, which addresses both a hearing request to DVS and a subsequent appeal to DALA, does not necessarily confine the scope of DALA review to what the DVS Hearing Officer reviewed. In an appeal to DALA of a state veterans' benefit denial based upon

ineligible service, DALA's review includes determining the veteran's service and discharge record as accurately and completely as possible. In this respect, DALA's review in an appeal such as this one is *de novo*.

I consider all of the circumstantial evidence regarding Mr. Mello's performance of state Guard service in 1968 pursuant to an order of the Governor issued on April 5 of that year because there is no direct evidence on point. The Guard was unable to find official records of Ms. Mello's state Guard service in 1968, or the Governor's order that commenced it. Another reason for considering the circumstantial evidence of Mr. Mello's state Guard duty is that the consequences of missing official documentation the Guard was required to maintain should not fall exclusively upon the former Guard member. Visiting that consequence upon the Guard member would be contrary to the purpose of state veterans' benefits, which is to provide public assistance to qualified veterans and assist them in determining the benefits for which they qualify. *See*, as to the purpose and structure of M.G.L. c. 115 benefits generally, *McConnell v. Dep't of Veterans' Services*, Docket No. VS-16-275, Decision (Mass. Div. of Admin. Law App., Aug. 11, 2017).

b. Circumstantial Evidence of Mr. Mello's State Guard Active Service

i. Massachusetts National Guard Recordkeeping Obligations

When units and/or members of the Massachusetts Army or Air Force National Guard are activated by the President of the United States, whether for training purposes or for active service not for training, a record of each Guard member's service is maintained by the Armed Forces service in question, meaning the United States Army or the United States Air Force.

Upon separation from Army or Air Force service, a Guard member is issued (as is any member of the United States Armed Forces upon his or her separation from service) a United States Department of Defense Report of Separation known as “Form DD-214.” Form DD-214 shows (among other things) the periods of a United States Armed Forces member’s service for training and/or active duty, and the characterization of the discharge as honorable or other than honorable.

Generally, a former member of the United States Army or other Armed Forces service branches can obtain copies of his or her Form DD-214 from the United States Armed Forces Official Military Personnel File. A veteran of the U.S. Armed Forces on active duty service, or serving in the Reserve or in the National Guard, can obtain his or her Form DD-214 from an electronic database of military service records maintained by the United States Defense Personnel Records Information Retrieval System page (on the “milConnect” website), if the DD-214 has been scanned into this data system. An alternative source for an Armed Forces member’s Form DD-214 may be the National Archives, which maintains at least two websites from which a Form DD-214 might be retrieved, if it has been scanned into the National Archives data system.¹² See U.S. Dept. of Defense, “Requesting Military Records Including DD Form-214” (updated Aug. 23, 2021), <https://www.defense.gov/Contact/Help-Center/Article/Article/2742452/requesting-military-records-including-dd-form-214/>.

A different form is used to record the duty and discharge record of a National Guard member who performed service other than upon activation into the Armed Forces by the President. Upon

¹²/ These are: <https://www.archives.gov/personnel-records-center/military-personnel>; and <https://www.archives.gov/personnel-records-center/other-medical-records>.

being separated from service in the Massachusetts National Guard, a Guard member is issued a National Guard Report of Separation and Record of Service, known as “NGB Form 22.” *See* United States Nat’l Guard Bureau, Publications and Forms Library online, <https://www.ngbpmc.ng.mil/Forms/NGB-Forms/>.

A Massachusetts Army or Air Force National Guard member’s NGB Form 22 is one of the records maintained by the Massachusetts National Guard, currently by its Military Records Branch (located in Milford, Massachusetts), known previously as the War Records Section. *Id.* The Military Records Branch also maintains copies of Massachusetts National Guard members’ DD-214 Forms for Armed Forces service between 1958 and 1973. *See* Mass. Nat’l Guard, Military Records Branch website, <https://www.massnationalguard.org/index.php/resources/military-records-branch.html>. Mr. Mello performed and completed his National Guard service during this time period.

A member of any state’s Army or Air Force National Guard must request his or her NGB Form 22 from the Guard’s state headquarters. *See* Nat’l Guard Bureau, Publications and Forms Library online, *Prior Service–Retirement Service Records*, <https://www.ngbpmc.ng.mil/Service-Records/>.¹³ Presumably, then, the records of Mr. Mello’s state Guard service, if kept and maintained, should have been in the archives of the Massachusetts National Guard’s Military Records Branch

^{13/} Overall, Guard service records are state records, not United States Armed Forces records. At its online website, the National Guard Bureau directs persons discharged from the National Guard to request copies of their Guard service records (including NGB Form 22) from “the state headquarters and respective branch” from which they were discharged from the National Guard or in which they served, and that “States are required by law, to maintain these records for 99 years.” National Guard Bureau, *Publications and Forms Library: Prior Service–Retirement Service Records*, <https://www.ngbpmc.ng.mil/Service-Records/>.

in Milford. Although the Massachusetts National Guard's Military Records Branch may be an alternative source for a Guard member's Form DD-214 showing service in the Armed Forces of the United States when activated for such service by the President, the Guard's Military Records Branch is the only designated source of a Guard member's NGB Form 22. (*Id.*) However, the Massachusetts National Guard produced no NGB Form 22 in response to Mr. Mello's records requests. (*See Findings 13, 14.*)

(ii) Guard Member Recollections of State Guard Active Service

Mr. Mello has claimed throughout this appeal that, as a Massachusetts National Guard member, he performed state Guard active service in 1968 (which he described as "riot duty") and was activated (or as he described it, "mobilized") by the Governor of the Commonwealth for this purpose during that year. His evidence of such activation was circumstantial, as he offered no direct evidence of an activation order issued by the Governor in 1968 (or during any other year of his Guard service) to him or to his Guard unit. His Army DD-214 form addressed only his 1964 Army service, which was mostly active duty for training. He did not offer an NGB-22 form showing the types of Guard service he performed. However, it is not clear he was issued one, or, if one was issued to him, that the Massachusetts National Guard ever kept a copy of it in its archive.

A copy of this form (or equivalent) should have been among the records maintained by the Massachusetts National Guard's Military Records Branch. However, the Guard produced no records in response to Mr. Mello's public records request in 2021 and identified, instead, a "recordkeeping gap" regarding state active service performed by Guard members in the late 1960s. (*See Finding 13.*)

The Massachusetts National Guard confirmed that it had no record of Mr. Mello's state Guard service upon activation to perform it (*see* Finding 14), although neither the Guard, nor DVS, denied that he performed and completed his Guard service through early 1969.

Mr. Mello offered statements by other Guard members who recalled that Guard activation orders by the Governor during the period 1967-70 were not in writing and were, instead, transmitted via telephone to Guard members from the officers who had received them. (*See* Finding 15.) These statements suggest an informal, although rapid and effective, means of ordering the Guard to active service as a state militia pursuant to M.G.L. c. 33. They do not show directly that the service Mr. Mello performed in the Guard in 1968 was indeed state Guard active service ordered by the Governor. They are, however, circumstantial evidence by fellow Guard members who served with Mr. Mello in the Guard in 1968 that the non-written activation of their Guard unit to perform state Guard service (whether it is characterized as active state service, or as active state service for training purposes) occurred as Mr. Mello alleged.

(iii) 1968 Annual Report to the Governor of Guard Activity

There is other circumstantial evidence, in the form of a public record, that tends to make Mr. Mello's performance of state Guard active service in 1968 more likely than not—an annual report for 1968 by the Massachusetts Military Division Adjutant General to the Governor.

By 1923, the Massachusetts Militia (and later the Massachusetts Military Division) was filing annual reports to the Governor of the Commonwealth, pursuant to M.G.L. c. 33, § 27. The reports described the activities of Massachusetts National Guard units within the Armed Forces of

the United States pursuant to Presidential activation related to World War I and its aftermath, and as state militia units when activated by the Governor in response to requests by Massachusetts municipalities for Guard assistance. In 1923, that state Guard service included a response to an explosion of a gas purifying tank at the Springfield Gas Works, and civil disorders during the same year. *See* State Library of Massachusetts, *Annual Report of the Adjutant General for the Year Ending December 31, 1923* (addressed to the Governor of the Commonwealth and dated Dec. 31, 1923); available at: <https://archives.lib.state.ma.us/handle/2452/756510>.

Among the annual reports to the Governor included in the State Library's digital archives is a pdf copy of a typewritten annual report for 1968 by the Massachusetts Military Division's Adjutant General. *The 1968 Annual Report* includes the following information, under the subheading "Emergency Preparation and Activities:"

Since Boston, and other cities of the Commonwealth, experienced only minor difficulties (rioting, looting and arson) as a result of the assassination of Dr. Martin Luther King, Jr. on 5 April 1968, National Guard units were not requested or directed to provide assistance to any municipality. However, upon request of Mayor Kevin H. White and at the direction of Acting Governor Francis W. Sargent, certain Massachusetts Army and Air National Guard Units totaling 10,000 men were alerted at 1700 hours, 5 April 1968, and directed to report to their armories to participate in an unscheduled training assembly. This unscheduled training assembly was used to increase the readiness of the units concerned in the event their assistance in Boston became necessary. Increased readiness during this time was accomplished by fully manning the Emergency Operating Center at the Military Division; increased liaison with State and City agencies; preparation of vehicles and radios for possible development; refresher training and orientations of troops for possible commitment. At 2400 hours, 5 April 1968, the tension and incident rate in Boston having subsided, all Massachusetts Army and Air National Guard units were released from their training status.

Massachusetts Executive Office of Public Safety, Military Div., Adjutant General's Office, *Annual*

Report, Military Division, Commonwealth of Massachusetts (1968 (addressed to Governor Francis W. Sargent, Commander in Chief, dated Feb. 5, 1969) at 6-7, para. 12(b); available at the Massachusetts State House Library Archives website, <https://archives.lib.state.ma.us/handle/2452/756521>).

Although the *1968 Annual Report* states that the Guard members were “released” from their “training status” the same day they were told to report for the unscheduled training (at 2400 hours (midnight) on April 5, 1968; *id.* at 7), the *Report* is also notable for what it does *not* state. It does not state that the Guard members were not activated by the Governor in 1968 for the purpose of preparing for and remaining in a state of readiness for civil disorder control deployment in the Commonwealth’s cities. It also does not state that the activation ended on the same day, April 5, 1968, or on any subsequent date in 1968.

What the *1968 Annual Report* does show is that maintaining Guard preparedness for civil disorder control deployment was a Massachusetts National Guard priority function in 1968.

The heightened need in 1968 for the Guard to remain prepared for maintaining order furnished the Governor with at least one ground for activating the Massachusetts National Guard under state statute—“order[ing] out any part of the organized militia for escort and other duties including special duty and emergency assistance to state and local civil authorities in the preservation of life and property,” pursuant to M.G.L. c. 33, § 38. U.S.C. Title 32 defines remaining trained and prepared to perform state Guard duty as “active service.” *See* 32 U.S.C. § 101(19). (*See* above at 26-28.) Although the *1968 Annual Report* does not state whether or not the Governor formally activated the Massachusetts National Guard, it shows that remaining ready to maintain order in the

Commonwealth was a top Guard priority in 1968. Bearing in mind that this was a Report to the Governor on (among other things) the duties the Guard performed during the year in question, it is reasonable to infer that the Guard mentioned its prioritized maintenance of readiness to maintain order in 1968 because the Governor had ordered the Guard to do so, although it does not explain whether maintaining this readiness was active service for training purposes, or not.

Among other things:

(a) The *1968 Annual Report* noted that the two top priority objectives for that year were, first, maintaining combat readiness as reserve components of the United States Army and Air Force, and to serve as combat or combat-support units of the Army and Air Force when called or ordered into active service by the President, *1968 Annual Report* at 2, para. 3(a); and second, “[t]o serve the Commonwealth on active duty, on order of the Governor or of certain county and municipal officers, in case of internal disorder, natural disaster, or other emergency situations.” *Id.* at 3, para. 3(b).

(b) The *1968 Annual Report* lists civil disturbance control planning and training as a key component of Massachusetts Army National Guard training in 1968. *Id.* at 5, para. 8. The Report’s Emergency Preparations and Activities section listed, as key activities in 1968 for the Massachusetts Army National Guard, “planning, publishing and reviewing State plans for providing Military Support of Civil Authorities in the event of a nuclear attack, civil disturbance or natural disaster,” *id.* at 6, para. 12(a); and rewriting the Massachusetts Army National Guard’s “Civil Disturbance Plan” in November 1968 “[a]s a result of civil disturbances in various parts of the country in April 1968 and lessons learned by other States.” *Id.* at 6, para. 12(a)(2).

(c) Under the section heading “The Outlook for 1969,” the *1968 Annual Report* stated that

“[a]ll personnel of the Massachusetts Army National Guard *will continue* to participate in refresher training for the control of civil disturbances.” *Id.* at 10, para. 26. (Emphasis added.)

It is not clear that the *1968 Annual Report* was intended to serve as a record of Guard activation by the Governor, or of activation of Guard members for “Title 32 active service.” Its contents and tone suggest that the *Report* was intended to inform the Governor of the Guard’s activities and state of readiness in 1968, and to continue to keep the Governor informed and updated on an annual basis, as required by a directive issued by the Commonwealth’s Commissioner of Administration (*Administrative Bulletin 57*, dated 4 December 1967; *1968 Annual Report* at 1, para. 1.) The *1968 Annual Report* is unquestionably an official document maintained as a public record in electronic format as part of the Commonwealth’s Archives. Although not evidence of actual Guard activation by the Governor for Title 32 active service, the Report sets out priorities, actions, circumstances and objectives that are consistent with gubernatorial activation to perform state Guard duties allowed by Chapter 33 (*see above* at 22-24), and therefore would have supported such activation if it were ordered.

The *1968 Annual Report* is, therefore, among the factors showing it to have been more likely than not that, on April 5, 1968, the Governor ordered the Massachusetts National Guard, including Mr. Mello’s Guard unit, to maintain order in Massachusetts municipalities, including remaining ready to do so throughout that year.

(iv) *Massachusetts National Guard “Recordkeeping Gap”*

To confirm the nature of his Guard service in 1968 and assist in determining whether it

qualified him for the section 6B annuity benefit, Mr. Mello requested, in January 2021, relevant records from the Massachusetts National Guard. (*See* Findings 13, 14.) The responses of Brigadier General Kondratiuk and Records Access Officer Cullen show reliably that the Massachusetts Army National Guard was without records showing Mr. Mello’s state Guard service or whether or not his Guard unit was ordered to perform this state service by order of the Governor in 1968. Instead, as Brigadier General Kondratiuk put it, Mr. Mello’s request for these records had resulted in the identification of a “gap” in state service-related recordkeeping by the Massachusetts National Guard during a time period that included 1968 (*Id.*)

Because this recordkeeping was the Massachusetts National Guard’s obligation unless its members were activated by Presidential Order under Titles 10 or 32 of the United States Code, a “gap” in this recordkeeping is not a trivial omission. There is no evidence, or even a claim, before me that the maintenance of records showing state Guard active service pursuant to gubernatorial order in 1968 (or any other year) was discretionary on the Guard’s part.

The “recordkeeping gap” does not negate Mr. Mello’s Massachusetts Army National Guard service. The *DVS Decision* that Mr. Mello appealed here recognized that he served as a Guard member during the years that followed his 1964 Army service. None of the parties has argued that the consequences of the recordkeeping “gap” regarding Guard activation by the Governor in 1968, including ineligibility for M.G.L. c. 115 veterans’ benefits, should fall upon Mr. Mello. He attempted to obtain his state Guard service records for a service time period including 1968, and the Guard responded that none could be found. The Guard’s obligation to keep and maintain such records is undisputed.

c. Reasonably Inferring Mr. Mello's 1968 State Guard Active Service by Order of the Governor of the Commonwealth

As noted above, whether Mr. Mello performed state National Guard active service by order of the Governor of the Commonwealth in 1968 depends upon an evaluation of circumstantial evidence, since the Massachusetts National Guard records that would presumably show his state Guard service do not, or no longer, exist. This circumstantial evidence supports an inference that Mr. Mello was ordered to perform state Guard active service in 1968 by order of the Governor.

Circumstantial evidence is indirect evidence that does not, on its face, prove a fact in issue but gives rise to a logical inference that the fact exists. *See, e.g.,* Cornell Law School, Legal Information Institute, *Circumstantial Evidence* (rev. Jan. 2022), https://www.law.cornell.edu/wex/circumstantial_evidence. In evaluating circumstantial evidence, it is not essential that the inferences drawn from the circumstances presented be “necessary;” instead, it is enough if the inferences are “reasonable and possible.” *Commonwealth v. Montecalvo*, 367 Mass. 46, 54-55, 323 N.E.2d 888, 893 (1975). In both civil and criminal cases, the probative value of circumstantial evidence “has never been seriously questioned.” *Abraham v. City of Woburn*, 383 Mass. 724, 729, 421 N.E.2d 1206, 1210 (1981), *quoting Montecalvo*, 367 Mass. at 54, 323 N.E.2d at 893. Indeed, proof of crucial facts can depend on the reasonable inferences that can be drawn from the circumstances presented, and it is for the factfinder to determine “what inferences are established,” and that the facts inferred “are as properly proved as if directly testified to.” *Abraham*; 383 Mass. at 730, 421 N.E.2d at 1211, *quoting Commonwealth v. Bonomi*, 335 Mass. 327, 355-356, 140 N.E.2d 140, 160-61 (1957).

The circumstantial evidence of Mr. Mello's state Guard service upon activation by the Governor in 1968 includes Mr. Mello's recollections about being ordered to state Guard active service by the Governor in early 1968 to prepare for deployment in Massachusetts cities to maintain order. It also includes the recollection of Massachusetts Army Guard members who served with Mr. Mello and recall having being called to state Guard active service by the Governor during the period 1967-70, via telephone rather than by written order. Former Guard member David C. Pinto recalled such a call-up in 1968 and that it was conveyed verbally from the Governor to Guard unit officers and then by telephone to the unit members (*See Finding 15(a).*) Former Guard member John J. Whelan, who served in the Guard through 1969, recalled being called to state Guard active service with Mr. Mello for possible riot duty, although not by written order. (*See Finding 15(b).*) Former Guard member Floyd J. Silvia, who served with Mr. Mello and then served an additional year in the Massachusetts Army National Guard through 1970, recalled that this type of call-up by the Governor for possible riot duty without a written order continued after 1968. (*See Finding 15(c).*)

The *1968 Annual Report* filed by the Adjutant General's Office of the Massachusetts Military Division is additional circumstantial evidence of state Guard active service by order of the Governor in 1968. This public record shows that the Guard was called up by the Governor on April 5, 1968, upon request by Commonwealth municipalities, to prepare for deployment to maintain order in the Commonwealth, although the Report does not mention a written order. While it states that the Guard members called up were not deployed, and that Guard members were relieved, at midnight on April 5, 1968, of the special training to which they were ordered earlier that day, the Report does not state that their active state service upon order by the Governor ended on that date. Instead, the *1968*

Annual Report identifies maintaining Guard readiness to preserve order in the Commonwealth as a Massachusetts National Guard priority during that year.

The *1968 Annual Report* suggests strongly, therefore, that on April 5, 1968, then Acting Governor Sargent ordered the Massachusetts National Guard to perform a state Guard duty specified by M.G.L. c. 33—maintaining order in the Commonwealth’s municipalities, *see* above at 22-24—and maintaining readiness to do so if the Guard was deployed to the streets of the Commonwealth to maintain order, and that the Guard maintained readiness to do so at least for the remainder of 1968.

Whether Mr. Mello has proven by a preponderance of the evidence that his state Guard active service occurred, and qualified him for the M.G.L. c. 115, § 6B annuity benefit, depends factually upon this body of circumstantial evidence. The probative value of this circumstantial evidence in meeting Mr. Mello’s evidentiary burden, considered as a whole, is high. It suffices to prove his claim, allowing, as it does, an inference that he was indeed ordered to perform state Guard service in 1968 upon activation by the Governor. Because the Guard was not deployed to the streets of the Commonwealth’s municipalities to maintain order in 1968, it is likely that the state Guard service Mr. Mello performed was entirely for the purpose of maintaining preparedness for this deployment at least after midnight on April 5, 1968.

Whether this suffices as a matter of law to characterize Mr. Mello’s 1968 state Guard active service as not having been for training purposes is a different matter. 32 U.S.C. § 101(19) recognizes training to perform state Guard duty as one that the federal government might recognize for federal veterans’ benefits purposes, and that a state legislature *may* recognize as active duty service

qualifying a Guard member for state veterans benefits purposes. *See* above at 25-28. The Massachusetts definition of “veteran” recited at M.G.L. c. 4, § 7, cl. 43rd recognizes active state Guard service as active duty, but distinguishes, for state veterans benefits eligibility purposes, between active duty and active duty for training purposes. The ambiguity this creates here is whether the Governor’s early April 1968 order to the Massachusetts National Guard to maintain order in the Commonwealth’s municipalities, including maintaining readiness to do so, is or is not active state Guard service not for training purposes, which is the only type of service that may qualify a Guard member for Chapter 115 state veterans benefits, including the M.G.L. c. 115, § 6B annuity benefit.

The first step in addressing this ambiguity and identifying it as a legal problem in terms of the relief Mr. Mello seeks is to establish that the Governor issued the alleged order in the first place.

Governor Sargent’s’s apparently verbal April 5, 1968 order directing the Massachusetts National Guard to prepare for maintaining order in the municipalities of the Commonwealth is inferred reasonably from the circumstantial evidence here. More specifically, I infer that if Guard records of activation to state service by order of the Governor in 1968 had been maintained and produced when Mr. Mello requested them, they would have supported his claim that his Guard unit was called up by the Governor, beginning on April 5, 1968, to maintain order in urban areas during Vietnam-era civil disorders, as M.G.L. c. 33 allowed the Governor to do, and that this call-up included maintaining the Guard’s readiness to perform this type of state Guard duty for the remainder of 1968.

4. Was Mr. Mello's State Guard Service in 1968 Active Service Not for Training Purposes that Qualified him for the Section 6B Annuity?

M.G.L. c. 4, § 7, cl. 43rd requires that state Guard service have been active duty service not for training purposes in order to qualify a Guard member for Chapter 115 state veterans' benefits. However, M.G.L. c. 33 recites no distinction between active state Guard duty and active state Guard duty for training purposes. Therefore, in terms of what state duty the Governor may order the Guard to perform under M.G.L. c. 33, §§ 38, 40 and 41, such as maintaining order and remaining ready to do so, the distinction between active state Guard active duty, and active state Guard duty for training purposes, is without a significant legal difference. Nonetheless, it is a distinction that matters in terms of determining whether state Guard duty qualifies a Guard member for M.G.L. c. 115 state veterans benefits. However, the General Laws do not now instruct whether maintaining readiness for deployment to perform state Guard duty such as maintaining order is, or is not, state Guard service for training purposes, or upon what grounds this distinction may be based.

The state Guard active service Mr. Mello performed starting on April 5, 1968, when the Governor's activation order was conveyed to him (and to his fellow Guard unit members) verbally, turned out to be mostly maintaining readiness to deploy to the streets of Massachusetts municipalities to maintain order, as the deployment did not actually occur. That does not necessarily mean that maintaining readiness to deploy for this particular type of state service in 1968 was active service "for training purposes." Nor, however, was it necessarily not for training purposes. Neither M.G.L. c. 4, § 7, cl. 43rd, nor M.G.L. c. 33, instructs how this classification should be made, an ambiguity

magnified by the fact that Chapter 33 does not distinguish between state Guard active service as having been for training purposes or not. Nonetheless, M.G.L. c. 4, § 7, cl. 43rd requires that state Guard active service have been not for training purposes in order for this service to qualify the member who performed it for M.G.L. c. 115 state veterans benefits, and M.G.L. c. 115, § 6B reiterates this prerequisite for section 6B annuity benefits eligibility.

The ambiguity is one for the legislature to resolve by statutory amendment or new legislation, if it chooses to do so. DALA is without legal authority to resolve the ambiguity in the legislature's place. With the ambiguity unresolved, I cannot find that Mr. Mello's 1968 state Guard active service was not for training purposes or, thus, that this service qualifies him for the M.G.L. c. 115, § 6B annuity benefit.

Conclusion and Disposition

For the reasons stated above, I conclude that:

(1) Mr. Mello's 1964 United States Army active duty does not qualify him for the M.G.L. c. 115, § 6B annuity because it was mostly active duty for training purposes;

(2) Mr. Mello performed state Guard active service as a member of the Massachusetts National Guard in 1968 by Order of the Governor, at least one day of which occurred during a wartime era (Vietnam II);

(3) Most, if not all, of this state Guard active service was for the purpose of maintaining the Guard's readiness to deploy to the streets of Massachusetts municipalities to maintain order—which was a Massachusetts National Guard priority function throughout 1968—as no such deployment

occurred during that year;

(4) However, it is unclear, as a matter of law, whether Mr. Mello's 1968 state Guard active service was, or was not, for training purposes. It is for the legislature to resolve this ambiguity via statutory amendment or new legislation, if it chooses to do so. Without this legislative resolution, Mr. Mello's state Guard active service in 1968 cannot be found to qualify as active service not for training purposes under M.G.L. c. 4, § 7, cl. 43rd, or, thus, to qualify him for the M.G.L. c. 115, § 6B state veterans' annuity.

Accordingly, the denial by DVS (now EOVS) of Mr. Mello's application for the M.G.L. c. 115, § 6B annuity is *affirmed*.

This outcome is without prejudice to the right of Mr. Mello, any of the other parties, or any other person, to seek a legislative remedy that would allow prior state Massachusetts National Guard active service pursuant to M.G.L. c. 33 and/or a Governor's order to perform such service, including maintaining readiness for deployment to perform it, to be classified as having not been for training purposes and, therefore, as qualifying a Guard member who performed such service for Chapter 115 benefits generally and/or for the M.G.L. c. 115, § 6B annuity benefit specifically.

SO ORDERED.

This is a final decision. Each of the parties is hereby notified that (1) it may seek further review of this decision, pursuant to M.G.L. c. 115, § 2, upon application made to the Governor and Council within ten days after receipt of this Decision; and (2) whether or not an application for further review is made to the Governor and Council, the decision of the Division of Administrative Law Appeals—or the decision of the Governor and Council if an application for further review is

made—is subject to judicial review in accordance with the provisions of M.G.L. c. 30A, § 14. An appeal seeking judicial review must be instituted within 30 days of receipt of such decision and filed with the Superior Court Department of the Trial Court.

Each of the parties is also hereby notified that within ten days from the date on which this decision is mailed to it, it may file a motion to reconsider this decision, pursuant to 801 C.M.R. § 1.01(7)(I), in order to “correct a clerical or mechanical error in the decision or a significant factor that [DALA or the Administrative Magistrate] may have overlooked in deciding the case” (if any).

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Mark L. Silverstein

Mark L. Silverstein
Administrative Magistrate

Dated: September 18, 2023

[An Appendix of Filings and Orders Considered follows below]

**APPENDIX TO THE DECISION:
FILINGS AND ORDERS CONSIDERED**

(1) Appeal by Roger A. Mello from Nov. 25, 2020 DVS Decision, dated November 28, 2020.

Attachments to the Appeal:

(a) Affidavit of David Pinto, dated Nov. 30, 2020 and notarized Dec. 31, 2021);

(b) Copy of an article from *U.S. News and World Report* dated July 12, 2017 entitled “Race Troubles: 109 U.S. Cities faced Violence in 1967;”

(c) Copy of a printout from the U.S. Dep’t of Housing and Urban Development, Office of Policy Development and Research, entitled “History of Federal Disaster Policy” dated Winter 2015;

(d) Copy of an article from the *Boston Sun* entitled “Gov. Baker Deactivates the National Guard After a Few Days,” dated Sept. 3, 2020; and

(e) Copy of a “Fact Sheet” from the National Guard Association of the United States entitled “Understanding the Guard’s Duty Status” (first page only), with handwritten notation “Ann-2010.”

(2) *DVS Decision* (Vallerie Stein, DVS Hearing Officer), dated Nov. 25, 2020.

Hearing Exhibits attached to the DVS Decision:

(Exh. 1): Letter, Massachusetts Department of Veterans’ Services to Roger A. Mello re determination of ineligibility for Commonwealth of Massachusetts annuity (M.G.L. c. 115, §§ 6A, 6B, 6C), dated May 13, 2020.

(Exh. 2): Three documents:

(a) Application of Roger A. Mello to Massachusetts Dep’t of Veterans’ Services for Annuity (M.G.L. c. 115, §§ 6A, 6B, 6C), dated Apr., 15, 2020.

(b) United States Dep’t of Veterans’ Affairs, Decision of Decision Review Officer (Mar. 31, 2020) determining entitlement of Roger A. Mello to total disability based

on individual unemployability, granted effective Aug. 2, 2018.

(c) Mr. Mello's 1964 Form DD-214 (Armed Forces of the United States, Report of Transfer or Discharge, Form DD-214: Honorable discharge of Roger A. Mello, for service from Mar. 31, 1964 to Sept. 26, 1964.)

(Exh. 3): Hearing Request filed by Roger A. Mello with Massachusetts Dep't of Veterans' Services dated May 22, 2020 (re DVS determination of ineligibility for Commonwealth of Massachusetts annuity (M.G.L. c. 115, §§ 6A, 6B, 6C), dated May 13, 2020).

(Exh. 4): Massachusetts Military Division, The Adjutant General's Office, Special Order No. 54: Orders to active duty for training (recipients including Mello, Roger A., dated Mar. 13, 1964.

(Exh. 5): DVS Chart, "Definition of Massachusetts Veteran, M.G.L. c. 4, § 7, cl. 43rd as amended by the Acts of 2005, ch. 130" (rev. 01/31/11).

(3) Mr. Mello's document filing dated January 22, 2021.

Contents:

(a) Cover letter from Mr. Mello dated Jan. 22, 2021.

(b) Affidavit of Floyd J. Silvia, sworn-to Jan. 12, 2021.

(c) Copy of article from the *Milford Daily News* entitled "People can only take so much," by Kiernan Dunlop, dated Jul. 5, 2020.

(d) Letter, Roger A. Mello to DVS dated Jan. 25, 2021.

(e) Email, Brig. Gen. Leonid E. Kondratiuk, Director, Veterans Affairs, The Adjutant General's Office, Massachusetts Army National Guard, to Roger Mello, dated Jan, 25, 2021, re: 747th Military Police Records.

(4) NOTICE OF PREHEARING CONFERENCE (Feb. 16, 2021).

(5) Mr. Mello's document filing dated Mar. 9, 2021.

Contents:

Affidavit of John L. Whelan, sworn-to Feb. 18, 2021, with attached copy of Mr. Whelan's Form DD 214, filed by Roger A. Mello with DALA by email dated Mar. 9, 2021.

(6) ORDER FOLLOWING PREHEARING CONFERENCE SESSION (Mar. 29, 2021).

(7) ORDER FOLLOWING SECOND REHEARING CONFERENCE SESSION (Apr. 23, 2021).

(8) Mr. Mello's filing dated May 1, 2021.

Contents:

(a) Mr. Mello's letter dated May 1, 2021 (re his statement of issues, and comments following up on discussion at second prehearing conference held on April 23, 2021).

(b) Excerpts from United States General Accounting Office report GAO-05-79 (1979) regarding (among other issues) Army National Guard unit call-ups in times of domestic emergency or need, printed out (on or about May 1, 2021) from <https://www.govinfo.gov/content/pkg/GAOREPORTS-GAO-05-79/html/GAOREPORTS-GAO-05-79.htm>.

(9) Mr. Mello's filing dated May 8, 2021.

Contents:

(a) Mr. Mello's cover Email addressed to the Magistrate dated May 8, 2021, enclosing response to his public records request to the Massachusetts Army National Guard.

(b) Email, Timothy F. Cullen, Massachusetts Military Division, Legislative Liaison and Records Access Officer, Joint Force Headquarters, Hanscom Air Force Base (Massachusetts), to Roger A. Mello, dated May 6, 2021, regarding Mr. Mello's April 22, 2021 records request.

Attachment to Records Access Officer Cullen's Email dated May 6, 2021:

Massachusetts National Guard Organization graphic (undated), showing, per the Cullen Email, "Army and Air chain of command for the Massachusetts National

Guard” showing the Massachusetts Governor as the Commander-in-Chief of the Guard as to “State Active Duty Missions.”

(10) ORDER re RESPONSE TO PETITIONER’S RECORDS REQUEST and REQUEST TO DECIDE APPEAL (May 18, 2023).

(11) Petitioner’s response to the ORDER dated May 18, 2023 (in the form of Email, Roger Mello to Magistrate Mark Silverstein, dated June 8, 2021).