



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

TRG

Docket No: 4661-01
30 July 2001

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) Case Summary

1. Pursuant to the provisions of reference (a), Petitioner, a retired commissioned officer in the United States Naval Reserve (USNR) filed an application with this Board requesting that his record be corrected to show that he transferred to the Retired List on 17 May 1979 vice on any other date.

2. The Board, consisting of Mr. Cooper, Mr. Lightle and Mr. McPartlin, reviewed Petitioner's allegations of error and injustice on 17 July 2001 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosure, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner's application was filed in a timely manner.

c. Petitioner was a member of the National Guard and the Army Reserve during the period 10 December 1936 to 7 January 1946. However, he was not called to active duty during World War II because he was found to be physically unqualified.

d. Petitioner completed medical school and on 28 June 1954 he was commissioned a reserve LT (O-3) in the Navy Medical Corps. He subsequently served on active duty for about 28 months and was honorably discharged on 15 December 1956. He then received a commission as a CDR (O-5), USNR, on 15 November 1957 and earned over 11 continuous qualifying years for reserve retirement. On 1 December 1971 he transferred to the inactive status list and was

credited with 20 years of qualifying service at that time. He became 60 years of age on 17 May 1979 and applied for his retired pay. Only then was he informed that he was not eligible for retired pay because he did not meet the wartime service requirements set forth in Title 10 U.S.C. 1331 (now renumbered as 12731). On 1 June 1981 he was transferred to the Retired Reserve without eligibility for retired pay at age 60.

e. Title 10 U.S.C. 12731 denies retired pay to individuals who were members of a reserve component during World War I, World War II, the Korean War, the Berlin Crisis or the Vietnam era, but who did not serve on active duty during any of these periods. Petitioner had no active duty during any of these periods.

f. The Department of the Navy's policy in cases such as Petitioner's is set forth in a memorandum from the Assistant Secretary of the Navy, dated 11 April 1997, which states, in pertinent part, as follows:

... Board for Correction of Naval Records panels should be informed that retirement benefits may be awarded in the following circumstances:

(1) The petitioner had requested to serve on active duty (other than for training) ... and the request had been denied, or petitioner establishes that making such a request would have been a futile gesture;

(2) That the petitioner served in a named service or otherwise served the war effort in a manner characteristic of military service; and

(3) The petitioner substantially incurred the same risks as military members who served on active duty.

g. Based on the foregoing, the Board has corrected the records of numerous Merchant Marine officers who had Naval Reserve commissions during World War II to show one day of active duty. These individuals were not called to active duty because they were needed as Merchant Marine officers. Since these officers met all of the other requirements for reserve retired pay, this action allowed payment of retired pay, retroactive to their 60th birthdays.

h. Petitioner applied to the Board in 1999 requesting that his record be corrected to allow his entitlement for retired pay. Since none of his service in the Navy met the requirements set

forth in the Assistant Secretary's memorandum, the Board denied his request for retired pay. A copy of the Board's denial letter is attached to enclosure (1). However, he was informed that given his service in the Army Guard and Reserve from 1936 to 1946 he could apply to the Army Board for Correction of Military Records (BCMR) because that Board could correct his record to show active service during World War II.

i. On 8 March 2001 the BCMR concluded that had Petitioner been physically able, he would have served on active duty during World War II, and that it was unjust and inequitable to deny him retired pay simply because he never served on active duty as an Army Reservist. Therefore, it was directed that his record be corrected to show that he performed one day of active duty, other than for training, during World War II. A copy of the BCMR's action is attached to enclosure (1).

j. The BCMR's action was sent to the Naval Reserve Personnel Center, which added the one day to his record of service and sent him a letter, dated 17 April 2001, authorizing his retired pay "effective 17 May 1979, his 60th birthday. However, the Defense Finance and Accounting Service then applied the six-year statute of limitations for pay claims against the government and only paid him six years of back pay.

k. Petitioner then applied to the Board requesting that his record be corrected to show that he transferred to the Retired List on 17 May 1979, his 60th birthday, so that he can receive approximately another 16 years of retired pay.

MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, the majority, consisting of Mr. Lightle and Mr. Cooper, concludes that Petitioner's request warrants favorable action. The majority notes that all of the Merchant Marine officers received retired pay retroactive to their 60th birthday. The majority also notes that the Army Board could not act to correct Petitioner's naval record to show that he transferred to the Retired List on his 60th birthday. Finally, the majority notes that Petitioner participated in good faith in the Naval Reserve with the expectation that he would receive retired pay at age 60. Therefore, the majority concludes that Petitioner's record should be corrected to show that he transferred to the Retired List on

17 May 1979, his 60th birthday, to establish his eligibility for retired pay from that date.

In view of the foregoing, the majority finds the existence of an injustice warranting the following corrective action.

MAJORITY RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he transferred to the Retired List in the grade of CDR on 17 May 1979 his 60th birthday.

b. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

MINORITY CONCLUSION:

Mr. McPartlin disagrees with the majority and concludes that Petitioner's request does not warrant favorable action. In this regard, he notes that Petitioner was properly denied his retired pay in 1979 by action of law. Although the action by the BCMR Board established his eligibility for retired pay, this action would not and could not have been granted by this Board. Finally, and most importantly, he does not meet the criteria of the Assistant Secretary's memorandum of 17 April 1977. Therefore, he concludes that six years of back retired pay is sufficient relief in this case.

In view of the foregoing, the minority finds no injustice warranting corrective action.

MINORITY RECOMMENDATION:

That Petitioner's request be denied.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder

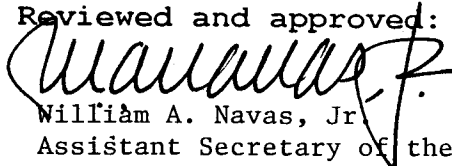

ALAN E. GOLDSMITH
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.


W. DEAN PFEIFFER

MAJORITY REPORT:

Reviewed and approved:



William A. Navas, Jr.
Assistant Secretary of the Navy
(Manpower and Reserve Affairs)

AUG 16 2001

~~MINORITY REPORT:~~

~~Reviewed and approved:~~