



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

ELP  
Docket No. 4617-01  
3 June 2002

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

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

Encl: (1) Case Summary  
(2) Subject's Naval Record

1. Pursuant to the provisions of reference (a), Petitioner, a retired enlisted member of the Navy, applied to this Board requesting, in effect, that the record be corrected to show that he was advanced to petty officer first class (GMG1; E-6) upon his transfer to the Retired List.

2. The Board, consisting of Messrs. Milner, Hogue, and Cooper, reviewed Petitioner's allegations of error and injustice on 29 May 2002 and, pursuant to its regulations, determined that the partial corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, 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. Although it appears that Petitioner's application to the Board was not filed in a timely manner, it is in the interest of justice to waive the statute of limitations and review the application on its merits.

c. Petitioner reenlisted in the Navy on 30 April 1984 for four years as a gunner's mate (guns) second class (GMG2; E-5). At the time of his reenlistment, he completed nearly 18 years of prior active service which included service in Vietnam with the Army. After serving well and without disciplinary incident for five years as a GMG2, Petitioner was advanced to GMG1 on 16 June 1984. He extended his enlistment for an additional period of 12 months on 4 April 1988.

d. Petitioner served without incident until 11 January 1989 when he received a nonjudicial punishment for communicating a bomb hoax on board USS ARCADIA, assaulting two crewmembers, and breaching the peace. Punishment imposed consisted of a reduction in rate to GMG2 and 45 days of restriction and extra duty.

e. On 14 February 1989 Petitioner was notified that administrative discharge action had been initiated by reason of misconduct due to commission of a serious offense. He was advised of his procedural rights and elected to present his case to an administrative discharge board (ADB). He also requested that he be transferred to the Fleet Reserve, with the understanding that a reduction to GMG3 (E-4) could be directed prior to transfer.

f. On 10 March 1989 Petitioner appeared before an ADB with counsel. The ADB found that Petitioner had committed misconduct due to commission of a serious offense and recommended that he be separated with a general discharge. The ADB further recommended that he be transferred to the Fleet Reserve in his current rate of GMG2. The commanding officer (CO) concurred with the findings and recommendation of the ADB and recommended that Petitioner's discharge be held in abeyance pending his transfer to the Fleet Reserve in his current pay grade.

g. Since Petitioner had over 18 years of service, the Commander, Naval Military Personnel Command (NMPC 83) forwarded the case to the Chief of Naval Operations (CNO), for final action on 10 April 1989. NMPC recommended suspension of the discharge pending transfer to the Fleet Reserve, with a reduction in rate to GMG3. On 18 April 1989 CNO approved separation with a general discharge by reason of misconduct but held execution of the discharge in abeyance subject to Petitioner's transfer to the Fleet Reserve as a GMG3. Petitioner was honorably transferred to the Fleet Reserve as a GMG3 on 31 May 1989. At the time of transfer, he had completed

23 years, 2 months, and 14 days of active service. About 16 years of this service was aboard ship.

h. Petitioner's Fleet Reserve Transfer Authorization stated that he would complete 30 years of service on 13 February 1996. On that date, it appears that in accordance with 10 U.S.C. 6331, he was transferred to the Retired List upon completion of 30 years of service on active duty and in the Fleet Reserve. Although 10 U.S.C. 6334 authorized advancement on the Retired List to the highest grade in which he served satisfactorily, Petitioner was not advanced in grade beyond GMG3, the rate at which he was transferred to the Fleet Reserve.

i. At enclosure (1) is an advisory opinion from the Enlisted Retirements Branch within the Navy Personnel Command (Pers-823) which states that a determination was made that Petitioner's service as a GMG1 was not satisfactory, and advancement on the Retired List in that grade was not authorized.

j. Subsequently, the Deputy Assistant Judge Advocate General (JAG) for Administrative Law was asked whether it was proper to transfer Petitioner to the Fleet Reserve in the rate of GMG3 vice GMG2 given his satisfactory service in that rate and, if so, whether CNO could disapprove the recommendation of the ADB to transfer him in the higher rate. JAG was also asked whether Petitioner should be advanced to GMG2 on the Retired List. In an advisory opinion of 19 May 2002 JAG responded as follows:

. . . (SECNAVINST 1910.4A) allows the (ADB), in considering its recommendation regarding pay grade upon transfer to the Fleet Reserve/Retired List, to perform a subjective balancing test on competing factors such as the "nature and severity of the misconduct." "performance evaluations and other portions of the service record bearing on performance..." and "time in current grade and its relationship to the time of the misconduct." The ADB found that (Petitioner) should be processed for discharge due to commission of a serious offense. Under the provisions of paragraph 9k of enclosure (6) to (SECNAVINST 1910.4A), it was reasonable for the ADB to recommend (Petitioner) be transferred to the Fleet Reserve in his current grade. In accordance with the provisions of (DOD Instruction 1332.14), (SECNAVINST 1910.4A), and Article 3610200 of (the Naval Military Personnel Manual [MILPERSMAN]), it was

permissible and reasonable for the separation authority, CNO, to direct (Petitioner's) transfer to the Fleet Reserve in the next inferior grade. This is true despite the contrary recommendation of the ADB and (Petitioner's) periods of satisfactory service in the grade of GMG2.

. . . (SECNAVINST 1910.4A) provides authority for the separation authority to "[c]hange the Board's recommendation concerning transfer to the IRR...." This provision can be reasonably interpreted to afford CNO the authority to disapprove a recommendation by an ADB to transfer a service member to the Fleet Reserve in their current pay grade. Article 3640370.1b(4)(b)2 of (the MILPERSMAN) clarified this authority by stating that CNO may "disapprove the board's recommendation to retain the respondent's current pay grade and reduce the respondent to the next inferior grade prior to transfer to the Fleet Reserve/Retired List." CNO acting as the separation authority, had the authority under both regulations to direct (Petitioner) be transferred to the Fleet Reserve in the next inferior grade.

(10 U.S.C. 6334) allows service members transferred to the Fleet Reserve after 4 December 1987, whose Active and Reserve service totals 30 years, to be advanced on the retired list "to the highest grade in which he served on active duty satisfactorily, as determined by the Secretary of the Navy." (The Pers-823 advisory opinion) opines that (Petitioner) did not serve satisfactorily in the grade of GMG1 (E-6). Thus it was reasonable and proper for NPC to recommend against the advancement of Petitioner on the retired list based on the specifics of his request. (the opinion) however, makes no comment regarding (Petitioner's) satisfactory service on active duty in the grade of GMG2 (E-5)... Under the provisions of (10 U.S.C. 6334), (Petitioner) can be advanced on the retired list to that grade.

k. Subparagraphs 9h and 9i of enclosure (6) to SECNAVINST 1910.4A stated that an ADB would make recommendations on the issues of retention or separation and characterization of service. Subparagraph 9j and 9k stated as follows concerning further issues that the ADB was required to consider:

. . . Recommendation on Transfer to the Ready Reserve (IRR). The (ADB) shall recommend whether the respondent

should be retained in the Ready Reserve as a mobilization asset to fulfill the respondent's total service obligation. . . . In recommending retention in the Ready Reserve, the (ADB) should consider investment in the respondent's training, probable availability for future recall and potential for useful service under conditions of full mobilization. The requirement of transfer to the Ready Reserve applies to cases involving separation from active duty. . .

. . . Recommendation on Paygrade Upon transfer to the Fleet Reserve. When the respondent is eligible for transfer to the Fleet Reserve/Retired List and the (ADB) recommends separation, the (ADB) shall make a further recommendation on whether the transfer should be in the paygrade currently held or in the next inferior paygrade. In making its recommendation the (ADB) will consider the following factors:

. . . Nature and severity of the misconduct, and its relationship to and effect upon the performance of military duties.

. . . All performance evaluations and other portions of the service record bearing on performance in the current paygrade . . .

. . . Time in current grade and its relationship to the time of the misconduct.

. . . Other relevant matters presented by the record or the respondent.

1. Paragraph 11 of enclosure (6) to SECNAVINST 1910.4A authorized the separation authority to take final action on an ADB. Subparagraph 11a stated that if the ADB finds evidence supporting the reason for separation and recommends separation, the separation authority may "approve the (ADB's) findings and recommendation. . ." This subparagraph also authorized the separation authority to disapprove the recommendation for separation and retain the respondent, approve or disapprove suspension of a recommended separation despite the recommendation of the ADB on this issue, or direct a more favorable characterization of service than that recommended by the ADB. The separation authority was also authorized to "change the (ADB's) recommendation concerning transfer to the

IRR." The comparable provision of the MILPERSMAN, Article 3640370, also authorized the separation authority to disapprove the ADB's recommendation to transfer the respondent to the Fleet Reserve in his current paygrade, and direct transfer in the next inferior paygrade.

m. Federal courts have held that if two regulations contain conflicting guidance, the directive from the higher source will prevail, unless the lower source provides greater rights for the individual. United States v. Lopez, 35 M.J. 39 (CMA 1992); United States v. Davis, 47. M.J. 484, 485 (1998); Gilchrist v. United States, 33 Fed. Cl. 791, 800-01 (1995).

#### CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial favorable action in the form of a correction to the record to show that he was transferred to the Fleet Reserve in the rate of GMG2 instead of GMG3. In this regard, the Board concludes that his transfer in the latter rate was both unfair and improper.

The record clearly reflects that from 1979 to 1984, Petitioner served well and without incident as a GMG2. After his promotion to GMG1, he continued to serve well until the NJP of 11 January 1989. After being reduced to GMG2, Petitioner served in that rate without incident until his transfer to the Fleet Reserve. Based on these facts, and applying the standards set forth in subparagraph 9k of enclosure (6) of SECNAVINST 1910.4A, the Board concludes that the ADB and the CO "got it right" when they recommended Petitioner's transfer to the Fleet Reserve as a GMG2. Although at first blush, Petitioner's misconduct appears to have been severe, the command chose to dispose of it at NJP, a forum reserved for minor offenses. Petitioner's performance evaluations as a GMG2 were at least satisfactory and, for the most part, excellent. They were sufficiently meritorious to warrant his selection for GMG1 in 1984. At the time of Petitioner's ADB, he had more than five years of service as a GMG2, and his misconduct was not committed while serving in that rate. Additionally, he had over 23 years of active service, of which 16 years were spent at sea, and he served his country in Vietnam during his prior Army service. Finally, the Board cannot ignore the fact that at the NJP of 11 January 1989, Petitioner was reduced from GMG1 to GMG2. To reduce him further to GMG3 four months later, with no intervening misconduct seems unfair and unwarranted. Accordingly, the Board concludes that

fairness and equity dictated that Petitioner be transferred to the Fleet Reserve as a GMG2 vice as a GMG3.

The Board further concludes that not only was Petitioner's transfer as a GMG3 unfair, it also was improper. In subparagraph 11a of enclosure (6), SECNAVINST 1910.4A sets forth the various actions a separation authority could take upon receiving a case in which the ADB found misconduct and recommended separation. Nowhere in that subparagraph was the separation authority allowed to disapprove the recommendation of an ADB that a respondent be transferred to the Fleet Reserve in his current paygrade. In this regard, the Board rejects that part of the JAG advisory opinion which states that such authority may be inferred from the separation authority's power to modify the ADB's recommendation pertaining to transfer to the IRR. It is very clear from subparagraph 9k that transfer to the IRR and the Fleet Reserve were treated as separate and distinct issues. They were dealt with in two different subparagraphs. Further, in deciding whether an individual should be transferred to the IRR, the ADB had to consider whether the individual could be available for recall as a mobilization asset. However, an individual eligible for transfer to the Fleet Reserve was to be permitted to do so, the only issue being his grade upon transfer. Accordingly, since SECNAVINST 1910.4A did not authorize the separation authority to reduce a respondent's paygrade upon transfer to the Fleet Reserve, the provision in the MILPERSMAN authorizing such action is void and of no force and effect.

Since Petitioner's service as a GMG1 was not satisfactory, as evidenced by the NJP of 11 January 1989, the Board concludes there is no justification to grant Petitioner's request to advance him to that rate on the Retired List.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that on 31 May 1989 he was honorably transferred to the Fleet Reserve as a GMG2 (E-5), vice the transfer as a GMG3 (E-4) now of record.

b. That no further relief be granted.

c. That this Report of Proceedings be filed in Petitioner's naval record.

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 action of the Board is submitted for your review and action.



W. DEAN PFEIFFER

Reviewed and Approved: SEP 6 2002



JOSEPH G. LYNCH  
Assistant General Counsel  
(Manpower and Reserve Affairs)