



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

██████████
Docket No: 08394-98
21 September 2000

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

Subj: CAPT ██████████, JAGC, USN (RET) ██████████
REVIEW OF NAVAL RECORD

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

Encl: (1) BCNR rept HD:hd Docket No: 08394-98
dtd 7 Feb 00 less encl (3)
(2) DASN (PP) memo dtd 29 Feb 00
(3) NJAG 5800 Ser 13/1MA11366.00 memo
dtd 2 Jun 00 w/encl
(4) Subject's ltr dtd 13 Jul 00
(5) Subject's naval record

1. Pursuant to reference (a), Subject, hereinafter Petitioner, filed written application, enclosure (1) of the Board's prior report in this case at enclosure (1), requesting that his naval record be corrected to show that when he retired on 1 February 1996, he retired as a rear admiral (lower half) (pay grade O-7) under title 10 U.S.C. 5149(b), rather than as a captain (pay grade O-6).

2. The Board, consisting of ██████████, initially reviewed Petitioner's case on 21 January 2000 and determined that the corrective action indicated in their report at enclosure (1) should be taken. Upon review of their report, the Deputy Assistant Secretary of the Navy (Personnel Programs) (DASN (PP)) directed, by memorandum at enclosure (2), that an opinion on Petitioner's case be secured from the Judge Advocate General of the Navy (NJAG). The DASN (PP) further directed that the Board consider this opinion when making a new recommendation to the Secretary of the Navy. The NJAG opinion obtained and Petitioner's reply are at enclosures (3) and (4), respectively. The Board, with the same members as before, reconsidered Petitioner's case on 14 September 2000. Pursuant to the Board's regulations, the majority, ██████████ s. ██████████, determined that the same corrective action previously recommended should be taken on the available evidence of record. The minority, ██████████, recommended that Petitioner's request be denied. 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. The Board adheres to all its findings at paragraph 3 of its previous report at enclosure (1).

b. Petitioner's fitness reports for 1 May 1987 to 31 July 1988 (extended to 31 October 1988) and 1 November 1988 to 14 July 1989 (last two documents at enclosure (1) to the Board's previous report) both show, in block 28 ("Duties Assigned"), that his duty was Assistant Judge Advocate General (Operations and Management) (AJAG (O&M)). There is no express statement in either report to the effect that he served as the Principal Deputy Assistant Judge Advocate General (PDAJAG) (O&M). Block 28 of the report ending 31 July 1988 shows he performed the duty of AJAG (O&M) for 15 months (the entire period of the report); however, the block 88 narrative states "On 14 August 1987 [Petitioner] 'fleeted up' to become the most junior officer ever to hold his present position." Block 52 ("Mission Contribution - Summary") of the report ending 31 July 1988 shows Petitioner compared with three other captains.

c. Petitioner did not retire immediately after his assignment to the Office of the Judge Advocate General (OJAG) ended on 14 July 1989. Therefore, it was necessary for him to have had at least 12 months of AJAG service to qualify for retirement as a rear admiral (lower half) under title 10 U.S.C. 5149(b).

d. The NJAG opinion at enclosure (3) concludes that Petitioner suffered no injustice when he was retired in pay grade O-6. The opinion states "As noted in [Petitioner's] fitness report for the period of 87May01 through 88Jul31, [Petitioner] served as the Principal Deputy Assistant Judge Advocate General." They conclude that the comparison group shown in this fitness report "is consistent not with the AJAGs, but with the DJAGs in the 06 [Operations and Management] portion of OJAG." They state from August 1987 to his detachment in July 1989, Petitioner held the PDAJAG position, and that although the AJAG (06), a rear admiral, was assigned additional duty outside OJAG during the pertinent period, this officer "remained serving as AJAG - he could not have served in pay grade O-7 otherwise." At various points in their opinion, NJAG cites the 1991 version of Judge Advocate General Instruction (JAGINST) 5400.1, the Standard Organization and Regulations Manual (SORM), although the period of concern in this case ended on 14 July 1989. From the 1991 version of the SORM, section 108, they quote the following description of the duties of the PDAJAG (O&M):

The Principal Deputy AJAG (Code 06A) assists the AJAG (Operations and Management), and supervises the DAJAGs within the Operations and Management organization; the Principal Deputy AJAG may communicate directly with the JAG or DJAG [Deputy Judge Advocate General]. In the absence of the AJAG (Operations and Management) when assigned ADDU [additional duty] as Commander, Naval Investigative Command, the Principal Deputy AJAG serves as the AJAG (Operations and Management) and Vice Commander, Naval Legal Service Command.

NJAG states that the pertinent part of this description of the PDAJAG (O&M) billet concerns "serving" as AJAG in that officer's absence, and that when the AJAG (06) was carrying out duties outside OJAG, the duties of the PDAJAG (O&M) under the SORM included certain duties previously assigned to AJAG (06). They stress that the PDAJAG's prescribed duties under the SORM included some AJAG (06) responsibilities in the event that officer was assigned outside OJAG. They conclude Petitioner "did not 'act' as AJAG, in that at all times he was performing duties properly assigned to PDAJAG." They further emphasize that the successions in effect during the pertinent period provided for the AJAG's to succeed the DJAG, so all the AJAG's would have preceded Petitioner for succession. They state "PDAJAG did not succeed to the AJAG (06) position, as it was never vacant." They conclude that Petitioner's service as the PDAJAG did not qualify for flag retirement under title 10 U.S.C. 5149(b), since Petitioner never served as AJAG, the AJAG (06) position having been filled continuously with an officer in pay grade O-7. Finally, noting that he did not request pay grade O-7 when he retired, and asserting that he "alleges no factual or legal basis for avoiding the consequences of administrative finality," they conclude he "should not now be heard to assert an injustice and seek reversal of his own act."

e. Petitioner's rebuttal at enclosure (4) to the NJAG opinion rejects their conclusion that during the pertinent period, he was only the PDAJAG and never the AJAG. He notes that his fitness reports ending 31 July 1988 and 14 July 1999 show his duty as AJAG. He takes issue with their statement that "As noted in [the report ending 31 July 1988], [he] served as the [PDAJAG]," noting this is contrary to the plain language of the report. He asserts the other captains with whom he was compared in this report were not DAJAG's. He says the applicable version of JAGINST 5400.1, section 108, reads as follows: "In the absence of the AJAG (O+M) when assigned ADDU on a permanent full-time basis outside the Office of the Judge Advocate General, the Principal Deputy AJAG (Code 06A) is the acting AJAG (O+M) unless otherwise provided." He maintains nothing was "otherwise provided," and that he served as AJAG for 20 months in the absence of the "nominal" AJAG (O&M), who was assigned permanently and full-time outside OJAG. He contends his case is like that of Captain D—, who was granted retirement in pay grade O-7 on the basis of having served as the AJAG. Concerning the matter of administrative finality, he reiterates his allegation that the reason he did not request pay grade O-7 when he retired is that he did not become aware, until much later, that there might be a valid basis to find he rated flag retirement.

MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, notwithstanding the NJAG opinion, and in concurrence with Petitioner's rebuttal, the majority still finds his request should be approved. In this regard, they find both the 1991 version of section 108 of the JAG SORM quoted by NJAG and the applicable version quoted in Petitioner's rebuttal effectively split the AJAG (O&M) position into two AJAG positions. Further, they note that Petitioner's fitness reports for the pertinent period show his duty as AJAG, rather than "Acting" AJAG. They are satisfied that Petitioner was an AJAG, for purposes of retirement

as a rear admiral (lower half) under title 10 U.S.C. 5149(b), for the requisite 12 months. In view of the above, the majority recommends the following corrective action:

MAJORITY RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that when he retired on 1 February 1996, he retired in the grade of rear admiral (lower half) (pay grade O-7) under title 10 U.S.C. 5149(b), rather than captain (pay grade O-6).

b. That any material or entries inconsistent with or relating to the majority's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

c. That a copy of this Report of Proceedings be filed at an appropriate location in Petitioner's naval record, and that another copy of this report be returned to this Board, together with any material directed to be removed from Petitioner's record, for retention in a confidential file maintained for such purpose.

MINORITY CONCLUSION:

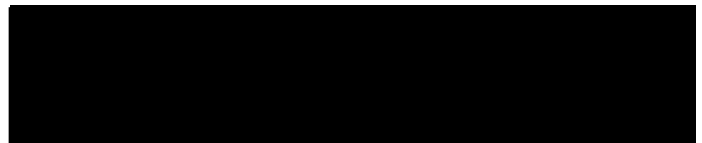
The minority substantially concurs with the NJAG opinion. She recognizes that their treatment of the PDAJAG's duties cites the 1991 version of the JAG SORM; but she observes that the applicable version indicated the PDAJAG was only the "acting" AJAG in the AJAG's absence. She acknowledges that Petitioner performed the duties of the AJAG (O&M) while the AJAG (O&M) was assigned outside OJAG. However, she particularly notes that the AJAG (O&M) position itself was never vacant while Petitioner was performing the duties of that position. In view of the foregoing, the minority recommends as follows:

MINORITY RECOMMENDATION:

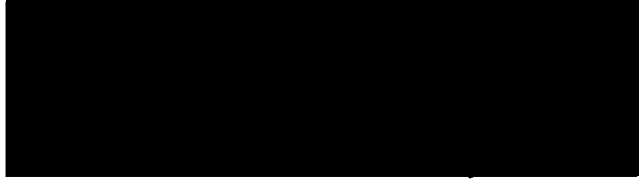
a. That Petitioner's application be denied.

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.


Recorder



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



MAJORITY REPORT

Reviewed and approved: _____

MINORITY REPORT

Reviewed and approved:



8394-98



DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON NAVY YARD
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON DC 20374-5086

IN REPLY REFER TO

5800
Ser 13/1MA11366.00
2 June 2000

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: REQUEST FOR COMMENTS AND RECOMMENDATIONS IN THE CASE OF
CAPTAIN [REDACTED], JAGC, USN [REDACTED]

Ref: (a) BCNR ltr HD:ks [REDACTED] of 6 Mar 00

Encl: (1) Legal Analysis

1. Reference (a) requested the opinion of the Judge Advocate General regarding the subject case pending before the Board for Correction of Naval Records.

2. Issue: Whether Captain [REDACTED], JAGC, U.S. Navy (Ret), suffered an injustice when he was retired in the grade of O-6.

3. Short Answer: No. [REDACTED] was retired in the appropriate grade. His service did not meet the requirements of 10 U.S.C. § 5149(b) for retirement in the grade O-7.

4. Enclosure (1) contains a legal analysis of the issues in this case. My point of contact is Commander [REDACTED], Deputy Assistant Judge Advocate General (Administrative Law), [REDACTED]



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Legal Analysis

1. Issue: Whether an officer who served as Principal Deputy Assistant Judge Advocate General (PDAJAG) from August 1987 until July 1989, subsequently requesting and receiving retirement in the grade of O-6, suffered an injustice by retiring in that grade rather than in the grade of O-7.

2. Short Answer. No. The officer did not meet the requirements of 10 U.S.C. § 5149(b) for retirement in the grade of O-7. Moreover, the officer was properly retired, at his own request, in the grade of O-6, an administratively final act. Under these circumstances, the officer suffered no injustice and should be afforded no relief.

3. Background

a. Captain [REDACTED] JAGC, U.S. Navy, served as Deputy Assistant Judge Advocate General (Management and Plans) from July 1984 until 14 August 1987, a period of more than three years. As noted in his fitness report for the period of 87May01 through 88Jul31, Captain [REDACTED] served as the Principal Deputy Assistant Judge Advocate General. He remained in this position until his detachment on 14 July 1989, a period of 23 months.

b. After leaving the Office of the Judge Advocate General (OJAG), [REDACTED] served as Commanding Officer, Naval Legal Service Office [San Francisco] (1989 - 1992), then as Staff Judge Advocate, Commander Naval Base [San Francisco] from 1992 until his retirement in 1996.

c. On 20 November 1993, [REDACTED] (Ret) filed a petition with the Board for Correction of Naval Records (BCNR), asking that his record be corrected to reflect retirement in the grade of O-7, pursuant to 10 U.S.C. § 5149(b). Captain [REDACTED] argues that he "performed the 'assigned duties'" of the Assistant Judge Advocate General (Operations and Management) (AJAG (06)) from 1 May 1987 until 14 July 1989. His support for this assertion consists of two fitness reports that list him as AJAG (06), the fact that his reporting senior was the Judge Advocate General, that he supervised subordinate Deputy Assistant Judge Advocates General, and that he was competitively ranked against the other serving AJAGs. Finally, [REDACTED] explains his failure to request retirement as a rear admiral because he did not believe that he met the criteria for such retirement. It was only after he learned of the retirement in that grade of other,

Enclosure (1)

similarly situated officers that he submitted the petition to the Board for Correction of Naval Records (BCNR).

4. Statutory Basis and Interpretation

a. The statute governing the Deputy Judge Advocate General position and the two AJAG positions is 10 U.S.C. § 5149(b) [hereinafter the "AJAG statute"]. Section 5149(b), as amended, provides:

"An officer of the Judge Advocate General's Corps who has the qualifications prescribed for the Judge Advocate General in section 5148(b) of this title **may be detailed** as Assistant Judge Advocate General of the Navy. While so serving, a judge advocate who holds a grade lower than rear admiral (lower half) shall hold the grade of rear admiral (lower half), if he is appointed to that grade by the President, by and with the advice and consent of the Senate. An officer who is **retired while serving** as Assistant Judge Advocate General of the Navy under this subsection or who, **after serving at least twelve months** as Assistant Judge Advocate General of the Navy, is retired after completion of that service while serving in a lower rank or grade, **may, in the discretion of the President, be retired with the rank and grade of [rear admiral (lower half)]**. If he is retired as a [rear admiral (lower half)], he is entitled to the retired pay of that grade, unless entitled to higher pay under another provision of law."

(Emphasis added). Subsection (c) provides substantially identical guidance for a Marine Corps AJAG position.

b. The legislative history behind the AJAG statute reveals that it was a product of compromise between the House and the Senate.¹ The House proposed to create two AJAG positions, one Navy and one Marine Corps, both of which were required to be filled by officers in the grade of O-7.² The Senate, reacting to Navy concerns about the availability of enough flag officer "numbers" to fill two positions, wished to create a single AJAG position,

¹ The compromise took place in the context of passage of the "JAG Corps Act of 1967," Act of Dec. 8, 1967, Pub. L. 90-179, 81 Stat. 545. The compromise also involved some concerns of Navy leadership, specifically the mandate of additional JAG flag positions to be counted against the unofficial SASC limits on flag numbers, the so-called "Stennis ceiling." Though the JAG statute enjoyed broad support in Congress, support within the Navy was mixed. [REDACTED], ORIGINS OF THE NAVY JUDGE ADVOCATE GENERAL'S CORPS, 652 - 685 (1997).

² H.R. Rep. No. 710, 90th Cong., 1st Sess. 6-7 (1967).

filled by either a Navy or Marine O-7.³ Senate [redacted] sponsored a compromise amendment that created the two present AJAG positions, one Navy and one Marine, whose incumbents could serve as O-7s and/or could retire in that grade.⁴ The record is replete with discussion of the underlying purpose of the AJAG statute - to provide incentive and reward for the most senior and capable judge advocates to continue serving in challenging billets of flag-level responsibility.

c. Navy practice in filling the AJAG positions and in use of the associated retirement provisions has varied over the years. Initially, the Navy filled the positions with officers serving in the grade of O-6.⁵ From 1981 until 1992, the Navy used the section 5149(b) position⁶ to support a third JAGC flag officer position on active duty, sharing a "flag number" with the line.⁷ These officers were assigned various duties within the Department of Defense or the Navy, while officers serving in the grade of O-6 served in the positions denominated "Assistant Judge Advocate General."⁸ Since the first officer was retired as an O-7 under the discretionary retirement provision of the statute in 1987, there have been eleven officers so retired,⁹ some of whom served as AJAG during a period in which either other officers served as O-7s

³ S. Rep. No. 748, 90th Cong., 1st Sess. (1967), reprinted in 1967 U.S. Code Cong. & Admin. News, p. 2113, 2116 (1967).

⁴ 113 Cong. Rec. 32764 (1967).

⁵ Problems with the language of the original statute allowed claims by two such officers for O-7 pay for the period of their service as [redacted] U.S., 498 F.2d 1354 (Ct. Cl. 1974). The officers later sued for retirement as O-7s, losing when the court upheld SECNAV's exercise of discretion refusing to retire the officers in that grade. [redacted] S., 723 F.2d 877 (Fed. Cir. 1983).

⁶ A Marine O-6 filled the § 5149(c) position.

⁷ [redacted] (1981 - 85); [redacted] (1985 - 86); [redacted] (1988 - 90); and RADM W [redacted] (1990 - 92). [redacted] retired using the "while serving" provision of § 5149(b). [redacted] retired as O-8s after service as Deputy JAG or JAG.

⁸ There have been as many as four positions titled AJAG with the Office of the Judge Advocate General: 01 - general law; 02 - military justice; 03 - civil law; and 06 - operations and management. Currently, there are two AJAG positions, consistent with the statute: 01 - civil law, and 02 - military justice. The 02 position is filled by a Marine officer, and has been for more than 20 years. Both positions are filled by O-6s who supervise other O-6 or O-5 Deputy Assistant Judge Advocates General (DAJAGs) and report directly to the Deputy JAG and JAG. Within OJAG there is also an O-6 position which replaced what had formerly been the AJAG for Operations and Management or 06. This position, denominated "Director of Operations," supervises DAJAGs and reports directly to the Deputy JAG and JAG. At various times, there has also been a "PDAJAG" or Principal Deputy Assistant Judge Advocate position that supervised DAJAGs and reported to JAG or DJAG. See *infra*.

⁹ [redacted] (1987); [redacted] (1989); [redacted] (1994); [redacted] (1996); [redacted] (1997); [redacted] (1997); [redacted] (1998); [redacted] (2000). Records were corrected in 1996 pursuant to BCNR action to reflect his retirement in the grade O-7. Note that [redacted] does not present the same issues as the instant case. [redacted] served as AJAG, not PDAJAG. In 1998, BCNR recommended and SECNAV agreed to correct the records of [redacted] and [redacted] reflect retirement as O-7s, despite the fact that both have been deceased for more than a decade.

under the AJAG statute, or other officers serving as O-6 AJAGs also received an O-7 retirement.

d. The strictest interpretation of the AJAG statute would seem to require that an officer have served 12 months or more in the one AJAG position created by 10 U.S.C. § 5149(b), or retire while serving in that position, to be eligible for O-7 retirement.¹⁰ Practice has enlarged this strict reading. Of the Navy officers retired as O-7s since 1987, only three could be said to have met both the explicit and the implicit requirements of the statute.¹¹ As discussed below, no officer serving as Principal Deputy Assistant Judge Advocate General has been retired in pay grade O-7.

5. Captain [redacted] Case. A recent petition at BCNR involved issues very similar to this case. Captain [redacted] (at) requested his records be corrected to show his retirement in the grade of rear admiral. As many of the issues in these cases are very similar, if not identical, a brief discussion of our last opinion may be valuable.

a. Captain [redacted] served only 11 months as an AJAG (General Law); this service was during the period [redacted] served on active duty as an O-7 AJAG. [redacted] subsequent service was as "Principal Deputy Assistant Judge Advocate General (PDAJAG)," a position nominally subordinate to the AJAG level within the structure of OJAG.¹² During this period, [redacted] served on active duty as an O-7 AJAG. The basis for Captain [redacted] claim for retirement as an O-7 was that his service as PDAJAG was functionally equivalent to service as an AJAG. Thus, two issues required resolution in Captain [redacted] favor if his request were to be found meritorious: first, that more than one officer may serve as a Navy AJAG under 10 U.S.C. § 5149(b) at a given time; and, second, that service as PDAJAG was equivalent to service as AJAG.

¹⁰ One of the great difficulties in application of the retirement provision has been determining which AJAG position was the § 5149(b) position. Attempts to "designate" one of the AJAG billets have been inconsistent. Moreover, practice in allowing the retirements of the officers listed in note 9, *supra*, indicates that service in either the 01/03 position or the 06 position qualifies under the statute. The use of a board selection process, see note 11, *infra*, should allow for clear identification of the statutory position in the future.

¹¹ RADM Albrecht [redacted] each served at least 12 months in a designated AJAG position, during a period in which no other officer served on active duty as an O-7 AJAG, and each was properly detailed to the position. In the case of [redacted] and his successor, [redacted] a board selection process was employed.

¹² Captain [redacted]s, BUPERS Order 2010 of 25 Jul 90 [CHNAVPERS WASHINGTON DC 252202Z JUL 90], detached him from duty in Jul 90 as "Assistant Judge Advocate General (General Law)" and ordered him to duty as "Deputy Assistant Judge Advocate General (Operations and Management)" and additional duty as "Vice Commander, Naval Legal Service Command."

(1) We have previously opined that, while the intent and the language of the AJAG statute make it clear that only two positions were created by Congress, one Marine and one Navy, the incentive purpose of the statute encourages a broad construction.¹³ Previous Secretaries have recognized the simultaneous assignment of more than one officer as AJAG for purposes of the AJAG retirement provision. Given Navy practice since 1987,¹⁴ this objection, though relevant, was not deemed controlling.¹⁵

(2) The more difficult question was whether Captain [redacted] service as PDAJAG could be construed as qualifying service under the statute. Practice did not support such an extension: all of the officers retired under the AJAG statute as O-7s served for more than 12 months in positions definitely and traditionally identified as AJAG positions. Moreover, the language of the statute very specifically states that such retirement may be granted to an officer if he is retired "after completion of that service" and "after serving at least twelve months as Assistant Judge Advocate General of the Navy" and speaks of "detail" to that specifically named position.¹⁶ Research reveals no basis in legislative history for extending benefits of the AJAG statute to persons arguably performing the duties of an AJAG without the position. Given the plain language of the statute, there was no authority to make service as PDAJAG equivalent to service as AJAG.¹⁷ Accordingly, we opined in that case that Captain [redacted] service did not qualify for retirement as a rear admiral under the authority of 10 U.S.C. § 5149(b).

b. Though the lack of sufficient qualifying service as an AJAG disposed of the question, it should briefly be noted that the doctrine of administrative finality was a factor both in that case and in that of Captain [redacted]. Administrative finality generally bars reopening administrative and discretionary matters that have

¹³ E.g., in the case of [redacted] Dec 97; see also JAG ESM (undated) in the case of [redacted]

¹⁴ See notes 8 and 9, supra.

¹⁵ Note, however, that in the context of [redacted] position, multiple AJAGs becomes a more troubling issue. See note 50, infra.

¹⁶ 10 U.S.C. § 5149(b) (emphasis added). The "while serving" retirement language is similarly premised on service "as Assistant Judge Advocate General of the Navy."

¹⁷ A more plausible argument could be made if the statute listed the AJAG's duties: it does not. For that reason, the fact that Captain Geer served as Vice Commander, Naval Legal Service Command, a duty generally associated with the O6 AJAG position, is not germane. Moreover, since practice has qualified service in any AJAG position for O-7 retirement, and since the specific AJAG duties differ so widely among the positions and over time, mere performance of any specific duty cannot be a principled basis for determining that some kind of "quasi-AJAG" service would entitle an officer to O-7 retirement. The only principled basis is 12 months' service in an AJAG position.

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been finalized.¹⁸ Only in limited circumstances may such matters be reopened.¹⁹ In the case of Captain [REDACTED], there were no circumstances to justify lifting the administrative finality bar. Captain [REDACTED] requested and received retirement as an O-6. Similarly, Captain [REDACTED] requested and received retirement as an O-6. He alleges no factual or legal basis for avoiding the consequences of administrative finality. Thus, he too should not now be heard to assert an injustice and seek reversal of his own act.²⁰

6. Captain [REDACTED] request. Notwithstanding the conclusion that administrative finality should bar relief for Captain [REDACTED], further analysis of the specific facts of this petition and applicable law is warranted.

a. AJAG/PDAJAG positions. As noted previously, there have been as many as four AJAG positions. At the inception of the AJAG statute after 1967, there were only two: AJAG (Civil Law - "01") and AJAG (Military Justice - "02"), consistent with the provisions of 10 U.S.C. § 5149(b) and (c) and legislative history. Currently, there are again only two AJAG positions, the original ones of AJAG (01) and AJAG (02). The AJAG position for Operations and Management was created in the late '70s to provide for a senior captain to assist in the daily management of OJAG and Naval Legal Service Command. This position title was transferred to RADM [REDACTED] in 1982 when another officer was brought into OJAG to assume the AJAG (01) position. The title of AJAG (06) was thereafter generally held by the third JAG flag officer, who usually worked outside of OJAG - either assigned to DOD or as Commander, Naval Security and Investigative Command.²¹ As a result of the AJAG serving outside of OJAG, a position was created called "Principal Deputy Assistant Judge Advocate General" or PDAJAG, and

¹⁸ [REDACTED], 125 U.S. 1 [REDACTED], United States, 19 Ct. Cl. 528 (1884).

¹⁹ If the action is the result of mistake of law, manifest error, fraud, or mathematical miscalculation, or if newly discovered evidence of sufficient probative value to raise a reasonable doubt about a material prior finding is discovered, the action may be reopened. See [REDACTED], v. United States, 132 Ct. Cl. 122 (1955).

²⁰ The finality in this case, it should be clear, is not the same finality issue raised in the [REDACTED] cases. In those latter cases, the action at issue was exercise of SECNAV's discretion under § 5149(b), after timely requests by the officers involved for retirement in the grade O-7. A plausible argument could be made that either SECNAV did not exercise that discretion with sufficient facts, or that circumstances had changed so radically as to warrant administrative reexamination of the decision. Finally, the BCNR process and 10 U.S.C. § 1552 give very broad power to SECNAV to correct records and "remove an injustice," in some sense providing a means to lift the bar of finality when "injustice" would otherwise be the result. In this case, however, the final action is that of Captain [REDACTED] himself. It is axiomatic that equitable relief should not lie where the action complained of resulted from the free decision of the person involved.

²¹ See note 7, *supra*, for officers who held the 06 position as while-so-serving O-7s.

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coded as 06A.²² A captain who supervised some divisions within OJAG and was assigned additional duty as Vice Commander, Naval Legal Service Command, filled this position.²³ After 1992, the position of PDAJAG was left unfilled.²⁴

b. Captain [redacted] position. Captain [redacted] states in his petition that he "performed the 'assigned duties' of Assistant Judge Advocate General (Operations and Management)." As discussed below, the evidence demonstrates that Captain [redacted] served during that time period as PDAJAG, not as AJAG.

(1) Fitness Report Evidence

(a) The sole documentary evidence that indicates that Captain Bohaboy served as "AJAG" consists of two fitness reports. The first, covering the period 87May01 through 88Jul31,²⁵ lists in block 28, Duties Assigned: "AJAG - ASSISTANT JUDGE ADVOCATE GENERAL (OPERATIONS AND MANAGEMENT) - 15." The "15" indicates that Captain [redacted] served all 15 months of the report period in the listed billet. This information is internally inconsistent with the block 88, Comments section.²⁶ The fitness report ranks Captain Bohaboy 1 of 4 officers in his comparison group and describes his position as "one of the JAG Corps' three flag billets." The report is signed by the then-Judge Advocate General, RADM Campbell.

(b) The second fitness report covers the period of 88Nov01 through 89Jul14, the date Captain [redacted] detached from OJAG.²⁷ This report, signed by the new Judge Advocate General, RADM Stumbaugh, also listed Captain [redacted] duties as "AJAG," but - as this was a "detaching officer" report - does not rank him against any other officer. The comments section discusses "flag responsibilities" discharged by Captain [redacted] in his position.

²² See JAGINST 5400.1 of 1991, section 108(b). The 1991 revision was done to update and change, inter alia, the 06A position description. See OJAG 131 memorandum of 5 Mar 91.

²³ Similarly, in 1989, the position of AJAG (General Law - "03") was created to supervise several of the OJAG divisions reporting to AJAG (Civil Law). The 01/03 split was undone in 1992 when then-CAPT [redacted] both positions. Since then, both positions have been held by a single AJAG.

²⁴ The position remained in the JAG SORM (JAGINST 5400.1) after 1992, but was removed sometime in a later revision. It is not contained in the current edition.

²⁵ This appears to be the source also of the dates of service claimed by Captain [redacted] the period covered by the fitness report. It is noteworthy that the first line in the comments of the fitness report makes clear that Captain [redacted] served in the claimed position after 14 August 1987.

²⁶ See note 25, supra.

²⁷ The gap between the two fitness reports is explained by the fact that [redacted] detached unexpectedly and extended all his prior fitness reports by approximately three months.

(c) Both fitness reports largely describe the duties performed by "Vice Commander, Naval Legal Service Command," that is, the officer who effectively managed the daily affairs of the Echelon II command, which at that time included 21 Naval Legal Service Offices worldwide.²⁸ This is consistent with the position description of the PDAJAG.²⁹ The rating group against which Captain [redacted] is compared in the first fitness report cannot be reconciled with the actual numbers of AJAG positions assigned to OJAG during the periods in question. During the period of this report (May 87 - July 88), there were only three positions entitled "AJAG:" 01 (Civil Law), 06 (Operations and Management), and 02 (Military Justice). [redacted], who served in the grade of O-7 as Deputy Assistant Secretary of Defense for Legislative Affairs, held the AJAG (06) position. A Marine officer, Colonel [redacted] held AJAG (02) position. A Navy officer in the grade of O-6, Captain [redacted] held the AJAG (01) position. As Captain Bohaboy could not properly have been rated against an O-7 or a Marine, the comparison group of officers in blocks 65 and 66 of the fitness report could not have been the AJAGs, despite the position title.³⁰ At most, he could have been rated "one of two." In fact, the numbers are consistent with the DAJAGs within the Operations and Management or "06" branch of OJAG.³¹

(d) Despite the comments and the position title in the fitness reports, the balance of the evidence in the reports seems to indicate that Captain Bohaboy was PDAJAG, not AJAG. All the existing AJAG positions were filled with other officers, and the duties described by the reports are those of the PDAJAG, predominantly those of Vice Commander, Naval Legal Service Command, responsibilities assigned to PDAJAG (06A) in the absence of the AJAG (06). Finally, the comparison group noted in the first fitness report is consistent not with the AJAGs, but with the DAJAGs in the 06 portion of OJAG.

(2) Objective Evidence. Objective evidence aside from the fitness reports confirms that Captain [redacted] was the PDAJAG. From Dec 84 until Aug 87, the PDAJAG position was held by Captain

²⁸ Naval Legal Service Command (NLSC) was created in 1980, succeeding a prior organization called "Naval Legal Service." See OPNAVNOTE 5450 of 4 Jan 80. NLSC was established as [redacted] command, commanded by the JAG, reporting to VCNO. Id. On 2 Feb 89, Secretary [redacted] restructured NLSC, making the Deputy Judge Advocate General Commander, NLSC.

²⁹ See note 22, *supra*.

³⁰ That he was not rated against officers serving in a higher grade or Marines is confirmed by the fitness report comments: "In rating him number one of four of the finest O-6's in the JAG Corps...."

³¹ Code [redacted] Code 62 [redacted] and Code 63 [redacted] when [redacted] For Code 63 two officers are listed in order to cover the period of interest - the end date of [redacted] first fitness report as "AJAG."

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██████████³² From Aug 87 until his detachment in July 89, Captain ██████████ held this position. All records extant concerning the assignment of officers within OJAG during the period list Captain ██████████ position as the PDAJAG.³³

(3) Conclusion. Captain ██████████ was not assigned the position of AJAG, despite the title used in his two fitness reports. In fact, during the period in question, Captain ██████████ was assigned as the Principal Deputy Assistant Judge Advocate General, Code 06A.

c. Analysis of Captain ██████████ Request. As the evidence is clear that Captain ██████████ is not assigned to the AJAG position, the only viable contention he could raise is that, as PDAJAG, he performed duties somehow associated with or integral to the position of AJAG contemplated in the statute.³⁴ The legal question therefore becomes: Did Captain ██████████ perform the "duties" of the AJAG and would such service qualify an officer for retirement under the provisions of 10 U.S.C. § 5149(b)?³⁵

(1) Duties of the AJAG. The statutory provision creating the AJAG positions is silent on the duties of the position itself.³⁶ It does, however, mandate that the AJAG will perform the duties of the JAG, in the absence or disability of that officer provided the Deputy JAG is also absent or unable to perform JAG's duties.³⁷ Aside from this successor function, the assignment of

³² See JAG Directory entries for 1 Oct 85, 1 Nov 86, and 1 May 87 (indicating a voluntary retirement date of "B710," consistent with a detachment date in August). Of specific interest to the issue at hand, CAP ██████████ requested retirement in pay grade O-7 as a result of his service as PDAJAG. His request was specifically denied by SECNAV, upon recommendations from the chain of command, for the reason that service as PDAJAG did not qualify for retirement under the AJAG statute. See Legal Counsel to Chief of Naval Personnel memorandum 1811 Pers-14 dated 20 Dec 88, paragraph 3d.

³³ These sources include the "Organizational Guides" for OJAG published in Nov 87 and May 89, the "Judge Advocate General's Corps Directory," editions published in 1 Oct 85, 1 Nov 86, 1 May 87, 1 Oct 87, 1 Apr 88, 1 Oct 88, 1 Apr 89, 1 Oct 89, and 1 Apr 90. All entries are consistent with CAP ██████████'s assignment to 06A, PDAJAG.

³⁴ Note that the issue is not one of "acting" as the AJAG: all the AJAG positions were filled and performing duties assigned. This distinction is important when considering past practice in crediting officers with AJAG service.

³⁵ For purposes of this discussion, we will assume that ██████████'s duties as PDAJAG or 06A were similar to those assigned the AJAG (06) position. We note that this is not necessarily the case, as most of the commentary in ██████████'s fitness reports is concerned with the duties of Vice Commander, Naval Legal Service Command and to a small degree supervision of the 06 divisions. It is questionable to what extent ██████████ actually supervised the division directors. See note 47, *infra*, and notes 30 and 31, *supra*.

³⁶ See 10 U.S.C. § 5149(b) and (c).

³⁷ 10 U.S.C. § 5149(e). As there are two AJAG positions, SECNAV must prescribe the order in which they succeed to JAG's duties in the absence of JAG and DJAG. *Id.* SECNAV has designated an order of succession to the duties of the JAG several times since 1980: SECNAV ltr of 20 Aug 81 (DJAG, then AJAG (01) and AJAG (02) in order of seniority, then after the two statutory AJAG positions, AJAG (06), then DAJAGs in order of seniority); SECNAV ltr of 2 Nov 88 (DJAG, then AJAG (06), then AJAG (01) and AJAG (02) in order of seniority, then DAJAGs in order of seniority); SECNAV ltr of 17 Aug

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duties is within the discretion of the Judge Advocate General and, ultimately, the Secretary of the Navy.³⁸ By instruction, the JAG Standard Organization and Regulations Manual or "SORM" list duties for all OJAG positions. The [REDACTED] the period in question lists the duties of the AJAG as follows;

"The AJAG (Operations and Management) has primary responsibility over operations and management, and also serves as Vice Commander, Naval Legal Service Command (VCNLSC)."³⁹

These duties are obviously quite general. Additional guidance is found in the SORM:⁴⁰

"The AJAGs are assigned functional areas of responsibility as described below. When neither JAG nor the DJAG is able to perform assigned duties, AJAGs will carry out the JAG's duties in the order directed by JAG. Each AJAG, in addition to the duties assigned by the JAG or DJAG, supervises the Deputy Assistant Judge Advocates General (DAJAGs) and their staffs assigned within their areas of responsibility. AJAG supervisory authority includes preparing and signing fitness reports for the assigned DAJAGs."⁴¹

From this information, and the succession memoranda, it becomes clear that the SORM-assigned duties of AJAG (06) are to manage the operations of NLSC, to supervise the DAJAGs assigned to the operations and management divisions, including acting as their reporting senior for fitness reports, and to succeed to the duties of JAG when JAG and DJAG are not present.⁴² During the period in question, AJAG (06) was assigned additional duty outside OJAG. Specifically, AJAG (06) [REDACTED] was assigned as Commander,

³⁹ (DJAG, then AJAG (06), then to one of the three AJAGs (01, 03, 02) in order of seniority, then DAJAGs in order of seniority), and SECNAV ltr dated 13 Feb 98 (DJAG, then AJAG (01), then Director of Operations (06), then DAJAGs and Special Assistants to JAG in an order to be prescribed). None of the succession memoranda mention the PDAJAG position.

³⁸ SECNAV has not set forth any duties for the AJAG positions. Notably, however, [REDACTED] recognized the importance of the position having a discretionary flag retirement associated with it. In a 10 Oct 65 memorandum, Secretary Lehman directed that the procedure and format for future AJAG assignments would be that used for flag nominations.

³⁹ JAGINST 5400.1, section 108a.

⁴⁰ The specific duties for 01/03 and 02 are listed in the SORM at sections 105a and 107a, respectively. As they are not directly germane to this discussion, they are not quoted here.

⁴¹ JAGINST 5400.1, section 104.

⁴² After 2 Nov 88, AJAG (06) followed directly the DJAG for succession purposes, coming before AJAG (01) and AJAG (02) regardless of seniority. See note 37, supra.

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Naval Security and Investigative Command (Commander, NISCOM).⁴³ Thus, the duties of the AJAG (06) were assigned by SECNAV, superceding some of those listed in the [REDACTED].⁴⁴ This is an important point: the officer serving as AJAG remained serving as AJAG - he could not have served in pay grade O-7 otherwise.⁴⁵

(2) PDAJAG's duties. Again, reference to the JAG SORM indicates the "standard" duties of the 06A position:

"The Principal Deputy AJAG (Code 06A) assists the AJAG (Operations and Management), and supervises the DAJAGs within the Operations and Management organization; the Principal Deputy AJAG may communicate directly with the JAG or DJAG. In the absence of the AJAG (Operations and Management) when assigned ADDU as Commander, Naval Investigative Command, the Principal Deputy AJAG serves as the AJAG (Operations and Management) and Vice Commander, Naval Legal Service Command."⁴⁶

Aside from the general scope of the duties listed above, which largely parallel those of the AJAG (06), the pertinent part of this billet description concerns PDAJAG "serving" as AJAG in that officer's absence. In other words, when the AJAG (06) was carrying out duties assigned as Commander, NISCOM, PDAJAG's duties under the SORM included certain duties previously assigned to AJAG (06). This too is an important point: PDAJAG's prescribed duties under the SORM *included* some AJAG (06) responsibilities in the event that officer was assigned as Commander, NISCOM.

(3) Conclusion. Captain [REDACTED] did not "act" as AJAG, in that at all times he was performing duties properly assigned to PDAJAG. Specifically, during the additional duty of the AJAG as Commander, NISCOM, PDAJAG's duties included Vice Commander, Naval Legal Service Command, and some responsibilities for supervision of the DAJAGs in the Operations and Management divisions. These duties did not include writing fitness reports on the assigned DAJAGs; in fact, as discussed above, Captain [REDACTED] s own fitness

[REDACTED] been Deputy ASD for Legislative Affairs until September 1987, when he became Commander, NIS Command. See JAG Directory dated 1 Oct 87. He assumed these duties about one month after [REDACTED] left [REDACTED].

⁴³ Unquestionably SECNAV has this authority. See 10 U.S.C. § 5013(g)(1).

⁴⁵ The AJAG statute authorizes a "while so serving" promotion to pay grade O-7. See 10 U.S.C. § 5149(b). No active-duty judge advocate goes before a regular DOPMA promotion board for promotion above the grade of O-6; all such promotions are accomplished through either the JAG or DJAG/AJAG statutes. Compare 10 U.S.C. §§ 611 et seq., with 10 U.S.C. §§ 5148 and 5149. Thus [REDACTED] could hold the rank of rear admiral (lower half) only so long as he held the AJAG position.

⁴⁶ JAGINST 5400.1, section 108b.

reporting group consisted of the DAJAGs he supervised.⁴⁷ Also of importance, the JAG successions in effect during Captain [redacted] tenure as PDAJAG clearly provide for the AJAGs to succeed the DJAG.⁴⁸ Thus, all the AJAGs would have preceded Captain [redacted] for succession. Indeed, under the terms of the succession letters, all the DAJAGs, including the PDAJAG, would be considered as a group, with the senior among them succeeding.⁴⁹ This point is especially important, as the only duty of the AJAG position imposed by statute is the succession duty; Captain [redacted] clearly did not have that duty - the actual AJAGs, RADM [redacted] and then [redacted] did. Given the explicit structure of the PDAJAG position to incorporate certain duties if the assigned AJAG were performing additional duties as Commander, NISCOM, the PDAJAG never "acted" as AJAG. Moreover, PDAJAG did not succeed to the AJAG (06) position, as it was never vacant.

d. Service as PDAJAG does not qualify for flag retirement. As noted above, the AJAG provision lists only the duty of succession. The AJAG position under § 5149(b) has varied among several different jobs, each with very different duties. The legal result is that no specific duties qualify an officer for flag retirement under the statute. Rather, selection for the position of AJAG and carrying out duties assigned as an AJAG for the requisite period are the qualifying factors. Captain [redacted] never served as AJAG; he served only as PDAJAG, carrying out duties properly assigned to that position. During his tenure as PDAJAG, the AJAG (06) position was continuously filled with an officer serving as rear admiral (lower half). Additionally, the other Navy AJAGs during this period subsequently retired in pay grade O-7.⁵⁰ PDAJAGs have previously requested retirement as rear admiral and been denied, for the conclusive reason that service as PDAJAG is not service as AJAG under 10 U.S.C. § 5149(b).⁵¹

7. Conclusion. Captain [redacted] requested and received retirement in the grade of O-6. That retirement is administratively final and should not be disturbed. Moreover, Capt [redacted] service

⁴⁷ See note 31, supra. We have been able to confirm that at least one of the DAJAGs during this period, [redacted] his fitness report written by [redacted] this was for the period ending in August 1988. At that time, [redacted] had assumed the AJAG (06) position, following RADM [redacted] noteworthy is the fact that duty assigned recorded in that fitness report was "AJAG," indicating that the duty assignments placed on fitness reports could frequently be inaccurate.

⁴⁸ The SECNAV ltrs of 20 Aug 81 and 2 Nov 88. See note 37, supra.

⁴⁹ [redacted] (DOR: 8406001) was junior to one of the officers who served as DAJAGs during his tenure as PDAJAG [redacted] (DOR: 830601).

⁵⁰ [redacted]

[redacted] See note 32, supra, and paragraph 5, supra, respectively.

does not qualify for flag retirement under 10 U.S.C. § 5149(b). Despite Captain [REDACTED] two fitness reports purporting to list his position as "Assistant Judge Advocate General," he never served as AJAG. During the period in question, Captain [REDACTED] served as Principal Deputy Assistant Judge Advocate General or Code 06A. This service does not qualify for the statutory AJAG retirement provision. This opinion is consistent with the prior JAG opinion and BCNR action in the [REDACTED], and in the [REDACTED] case.⁵²

⁵² RADM [REDACTED] case concerned his service in the AJAG positions or 01 and 03. See note 9, supra.