



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

BIM
Docket: NR9239-13
11 April 2014

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

Subj: [REDACTED]

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

- Encl: (1) DD Form 149, w/attachments
(2) Fax from Petitioner to BCNR, dtd 5 Dec 12
(3) BCNR MEMO, 5400 EM, dtd 20 Jun 13,
(4) Email from Petitioner to BCNR, dtd 11 Sep 13
(5) OJAG MEMO 5420 Ser 13/1BC1009.13, dtd 23 Oct 13
(6) BCNR ltr, datd 5 Nov 13
(7) MEMO from Petitioner, dtd 1 Dec 13
(8) Brief of [REDACTED] in *Prochazka v United States*, National Veteran's Legal Services Program
(9) BCNR Decision, dtd 16 Mar 11, in the Matter of [REDACTED]

1. Pursuant to the provisions of reference (a) Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected to reflect a mandatory retirement date (MRD) of 1 July 2008 or a date otherwise compatible with 30 years of active service computed from his Active Duty Service Date (ADSD) of 20 February 1978. Petitioner asserts that his MRD was incorrectly adjusted based upon inactive service while he was in the Law Student Program (LSP). Petitioner requests an adjustment of active duty service pay to reflect the corrected MRD and adjustments to his retired pay.

a. Petitioner alleges that since his accession into the LSP and throughout his career, he was informed that his time in the inactive reserve in the LSP did not count toward retirement and served only to accelerate his advancement to O-3. Petitioner asserts he was surprised

when he received retirement orders in late 2006 with a retirement date effective 1 July 2007 as he was under the impression that he would serve until 1 July 2008. Petitioner asserts he requested an extension on active duty to meet a MRD based upon 30 years of active service from his ADSD and that he received no response. Petitioner also alleges that he submitted a request to exclude the LSP inactive service from his MRD calculation and received no response.

b. Petitioner's original submissions argue that in light of the holding in the [REDACTED], he believes he was wrongfully retired in 2007. Petitioner provides copies of his DD 214, Statement of Service, Law Student Program Agreement, copy of [REDACTED] US Court of Federal Claims Case No. [REDACTED] copy of his request for extension on active duty (AD); copy of his retirement orders; and copy of his request to exclude LSP inactive service from his MRD computation.

c. On 5 December 2012, Petitioner faxed a copy of an email from Navy JAG Senior Detailer and PERS 4416 to him (dated 24 January 2004) to the Board for inclusion in the record. Petitioner asserts the email is evidence that the person responsible for detailing, advice, community management, and direct access to the Bureau of Personnel's (BUPER) computer, believed his mandatory loss date to be 2008 vice 2007.

d. The case was originally sent to the Navy Military Personnel Command for an advisory opinion but was returned without action. The case was then forwarded to the Office of The Judge Advocate General (OJAG) for an advisory opinion and was held in abeyance pending resolution of the final litigation in the [REDACTED] case that Petitioner relies upon as a basis for relief. The case was further processed once the Government decided not to appeal the [REDACTED] matter.

e. On 22 October 2013, OJAG rendered an advisory opinion in this matter. Affording the Navy appropriate deference in interpreting and administering the statutes and regulations at issue, OJAG concluded that the Navy's interpretation of 10 USC § 6388 was permissible and that no correction should be made. The opinion went on to state

that if the Board concluded that the application of regulations after the ██████████ case would create an injustice to Petitioner, the Board could recommend appropriate corrective action.

f. On 1 December 2013, Petitioner responded to the advisory opinion and reiterated his reliance on the court decision in ██████████. Petitioner disagreed with the advisory opinion's assertion that the Navy's interpretation was permissible and asserted that the court's decision on this matter, while not binding, is dispositive on his request.

2. In the following weeks, the Board, consisting of Mr. Green, Mr. Ivins, and Mr. Rothlein, thoroughly reviewed Petitioner's allegations of error and injustice and in a closed session on 24 February 2014 determined, pursuant to its regulations, that the 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. Petitioner's naval records reflect his participation in the Navy LSP beginning on 24 February 1976.

c. Petitioner's naval records reflect an ADSD of 20 February 1978 and an Active Commissioned Service Date of 20 February 1978.

d. On 22 January 2004, Petitioner inquired about his MRD as the Judge Advocate General's Corps (JAGC) Personnel Directory noted his loss date as 1 July 2007. On 24 January 2004, Petitioner received an email from his JAGC detailer at Navy Personnel Command, noting that his statutory date for retirement was May 2008.

e. On or about 18 October 2006, Petitioner received retirement orders with an effective date of 30 June 2007.

f. Petitioner requested an extension on active duty to meet a MRD based upon 30 years of active service from his ADSD and received no response. Petitioner also submitted a request to exclude the LSP inactive service from his MRD calculation and received no response.

g. Petitioner was retired on 30 June 2007.

CONCLUSION:

Upon review and consideration of all the evidence of record, and in light of the contents of enclosure (2), a majority of the Board, consisting of Mr. Green, Mr, Ivins, and Mr. Rothlein concludes that Petitioner's request should be approved.

a. In reaching its conclusion, the majority found some of the arguments set forth by the court in the *Prochazka* case to be compelling. The Board conducted an analysis of the facts in the [REDACTED] case with those in the present matter. The Board determined that the officers were similarly situated and that Petitioner had a reasonable belief in interpreting the provisions of 10 USC § 6388 to allow him to exclude his time in the LSP from the calculation for his mandatory retirement date.

b. The Board noted the confusion in the interpretation of 10 USC § 6388 and the presumptions that such confusion created for Petitioner regarding his ability to serve 30 years of active service prior to retirement. The Board noted that such confusion and application of the Navy's position in this case would create an injustice to Petitioner.

c. The Board further relied upon evidence submitted by Petitioner in the form of an email, from his JAGC detailer, which noted that Petitioner had a statutory retirement date of May 2008. The Board concluded that the detailer should have known the proper method of calculation, or should have inquired further based upon Petitioner's inquiry disputing information indicating that his MRD was 30 June 2007. The Board concluded that this email supported Petitioner's belief that his LSP time did not count towards his

mandatory retirement date. However, the Board was not convinced that the May 2008 date was the proper calculation.

d. The Board noted that Petitioner had an ADSD of 20 February 1978. The Board concluded that under Petitioner's theory that he should have been able to complete 30 years of active service, the Petitioner's MRD should have been 28 February 2008.

e. As such, the Board concluded that as a matter of equity, the Petitioner's request to correct his record to reflect that he completed 30 years of active service should be granted.

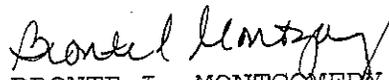
RECOMMENDATION:

a. That Petitioner's naval record be corrected to reflect his retirement date effective 30 years from his ADSD of 20 February 1978, which is 28 February 2008 vice 30 June 2007.

b. That Petitioner be entitled to all back pay and allowances of active service pay, subject to civilian earnings.

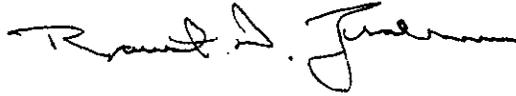
c. That Petitioner be entitled to an adjustment in his retired pay.

ROBERT D. ZSALMAN
Recorder


BRONTE I. MONTGOMERY
Acting Recorder

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

11 April 2014



ROBERT D. ZSALMAN
Acting Executive Director

Reviewed and approved.

6/12/14



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