



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

BJG
Docket No: 4135-02
15 August 2002

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

Subj: RADM [REDACTED], USN [REDACTED]
REVIEW OF NAVAL RECORD

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

Encl: (1) DD Form 149 dtd 9 Apr 02 w/attachments
(2) OJAG ltr dtd 30 Jul 02 w/encl
(3) Subject's naval record

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 change the date of rank and effective date of his promotion to the grade of rear admiral, pay grade O-8, from 21 March 2002 to 6 October 2000; and that his lineal position be adjusted accordingly. He also requested that his date of confirmation by the United States Senate be changed to 6 October 2000. The Board did not consider this request, as they have no jurisdiction concerning records of the Senate.

2. The Board, consisting of Messrs. Kastner, Schultz and Zsalmán, reviewed Petitioner's allegations of error and injustice on 8 August 2002, 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 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 promotion to rear admiral, which was scheduled for 6 October 2000, was delayed because of a Naval Inspector General (NIG) investigation. The NIG found the allegations against him to be unsubstantiated, and he was promoted to rear admiral on 6 March 2002.

c. In correspondence attached as enclosure (2), the Office of the Judge Advocate General has commented to the effect that Petitioner's request has merit and warrants

favorable action. They concluded that the failure to afford him the effective date of rank he would have received, but for the delay of his promotion, "...was error because it was a failure to comply with applicable statute." They added that if this Board so finds, it is within the Board's authority to recommend the relief he seeks.

CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of the contents of enclosure (2), the Board finds the existence of an error and injustice warranting the requested relief. While they find the applicable statute mandates that Petitioner receive the relief he seeks, enclosure (2) reflects the position that action by this Board is needed to effectuate it. Accordingly, the Board directs the following corrective action:

RECOMMENDATION:

a. That Petitioner's naval record be corrected, where appropriate, to show his date of rank and effective date in the grade of rear admiral as 6 October 2000, vice 21 March 2002; and that his lineal precedence be adjusted accordingly.

b. That any material or entries inconsistent with or relating to the Board'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.

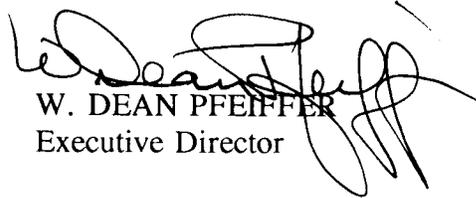
c. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

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


JONATHAN S. RUSKIN
Acting Recorder

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



W. DEAN PFEIFFER
Executive Director

Reviewed and approved: 10



Joseph G. Lynch
Assistant General Counsel
(Manpower and Reserve Affairs)



DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON NAVY YARD DC 20374-5066

IN REPLY REFER TO

1400
Ser 13/1BC11674.02
30 Jul 02

From: Deputy Assistant Judge Advocate General (Administrative Law)
To: Chairman, Board for Correction of Naval Records

Subj: REQUEST FOR COMMENTS AND RECOMMENDATION IN THE CASE OF
RADM. [REDACTED] USNR, [REDACTED]

Ref: (a) Your ltr BJD Docket No 04135-02 of 16 May 02

Encl: (1) Legal Analysis

1. This responds to your reference (a) request for our comments and recommendation on subject case.
2. Issue. Whether a Reserve flag officer whose Senate confirmation for promotion to rear admiral (O-8) is delayed pending the results of an investigation and who is subsequently cleared in the investigation, confirmed by the Senate for such promotion, and promoted, is entitled to pay and allowances for that higher rank, and credit for time in service in that grade, from the effective date of rank he would have received, but for the delay?
3. Short answer. Yes. By specific operation of statute, an officer in such circumstances is entitled to correction of his date of rank and backdated pay and allowances.
4. Discussion. Enclosure (1) provides a detailed legal analysis of the central issue described above.
5. Point of contact. My point of contact for this matter is LCDR [REDACTED] at [REDACTED].
[REDACTED]

Legal Analysis

1. Issue. Whether a Reserve flag officer whose Senate confirmation for promotion to rear admiral (O-8) is delayed pending the results of an investigation and who is subsequently cleared in the investigation, confirmed by the Senate for such promotion, and promoted, is entitled to pay and allowances for that higher rank, and credit for time in service in that grade, from the effective date of rank he would have received, but for the delay?

2. Short Answer. Yes. By specific operation of statute, an officer in such circumstances is entitled to correction of his date of rank and backdated pay and allowances.

3. Background. The Fiscal Year 2001 Naval Reserve O-8 Engineering Duty Promotion Selection Board recommended that then-Rear Admiral (Lower Half) Stephen S. Israel, USNR (Petitioner) be promoted to Rear Admiral. The President approved the list of those so recommended for promotion on 19 December 1999. The President subsequently forwarded Petitioner's nomination for promotion to the Senate for confirmation, together with the nominations for promotion to O-8 of two other Reserve flag officers. On 15 June 2000, the Naval Inspector General opened a Senior Official Case against Petitioner, to inquire into allegations arising out of Petitioner's one-year recall to Naval Sea Systems Command (NAVSEA) in or about 1999.¹

On 23 June 2000, the Office of the Secretary of Defense, on behalf of the President, requested that the Senate take no action on Petitioner's nomination, pending completion of the investigation. The Naval Inspector General found the allegations against Petitioner to be unsubstantiated on or before 1 November 2001, whereupon the Secretary of the Navy recommended that the Secretary of Defense endorse Petitioner's nomination to the Senate for confirmation. On 21 December 2001, the Deputy Secretary of Defense recommended that the President approve Petitioner's nomination. The President did so, and Senate confirmed the nomination on 21 March 2002. The Bureau of Naval Personnel thereupon issued Petitioner an effective date of rank for his promotion to rear admiral (O-8).

4. Discussion. In his request for relief, Petitioner claims that, although "[n]o formal involuntary delay of promotion proceedings were initiated in [his] case under 10 U.S.C. 14311(a)(2)", he "deserve[s] the protections described in 10 U.S.C. 14311(a)(2) regarding date of rank, pay and allowances as if involuntarily delayed under 10 U.S.C. 14311(a)(1)." As a matter of law, however, 10 U.S.C. § 14311 is directly applicable to

¹ The allegations against Petitioner were as follows: (1) That he is racist because he displayed Civil War pictures in his NAVSEA office that included depictions of the confederate flag; and (2) that he discriminated against a civilian employee in a hiring decision based on race and sex and as reprisal for a previous equal opportunity complaint.

petitioner's case and compels the relief he seeks, as set forth in more detail below.²

a. General Statutory and Regulatory Promotion Scheme for Reserve Officers.

(1) The Promotion List. Congress has established a statutory promotion scheme for Reserve officers, codified in title 10, U.S. Code. Under 10 U.S.C. § 14308(a), service secretaries are required to place all officers approved by the President for promotion within a competitive category "on a single list for that competitive category, to be known as a promotion list, in the order of seniority of those officers on the reserve active-status list."³ Further, "except as provided in section 14311, 14312, or 14502(e) of this title or in subsection (d) or (e)",⁴ the statute requires that Reserve officers on a promotion list for a competitive category be promoted "in the order in which the names of officers appear on the promotion list and after officers previously selected for promotion in that competitive category have been promoted."⁵

(2) Appointments. The promotion of a military officer is an appointment to a higher grade. Language throughout title 10 of the U.S. Code denotes a "promotion" as an "appointment to a higher grade." The legal effects of an appointment and the steps necessary to make such an appointment have been well settled since the Supreme Court decided ~~Ex parte Millard~~. ~~In~~ ~~the~~ Court held that there are three distinct operations necessary to effect an appointment. These are: the nomination, which "is the sole act of the President;" the appointment, which is also the act of the President "performed by and with the advice and consent of the Senate;" and, the commission, which may be considered as providing evidence of the appointment.⁷ An appointment is only effective when the President has performed the "last act to be done."⁸

(3) Date of Rank. In 10 U.S.C. § 14308(c), Congress

² Petitioner's assertion apparently stems from a misreading of the statutory scheme. See footnote 17, *infra*. Of course, our disagreement with his assertion here has no effect on the outcome from his perspective, as we agree with him that relief is warranted.

³ 10 U.S.C. § 14308(a).

⁴ Section 14312 deals with voluntary delays in promotion, and section 14502(e) deals with the promotion of officers selected by special promotion selection boards. Neither case applies here. Subsection 14308(d) refers to officers to whom a running mate system applies, and subsection 14308(e) governs the promotion of Army and Air Force Reserve officers to fill vacancies. Neither subsection has a bearing on the question presented here. Section 14311 covers involuntary delays in promotion, and is central to the question, as discussed in detail below.

⁵ 10 U.S.C. § 14308(b)(2).

~~Ex parte Millard~~ 5 U.S. 137 (1803).

⁷ *Id.* at 155-6.

⁸ *Id.* at 157.

requires Reserve officer dates of rank to be "determined under" 10 U.S.C. § 741(d)(2), which provides that "the date of rank of an officer who holds a grade as the result of a promotion is the date of his appointment to that grade." [emphasis supplied]. This is subject to statutory exception.

(4) Delays and Retroactive Appointments. Congress specifically authorizes retroactive appointments of Reserve officers in certain circumstances, per 10 U.S.C. § 14311. By allowing appointments to be delayed "[u]nder regulations prescribed by the Secretary of the military department concerned,"⁹ Congress has, in effect, made the service secretaries agents of the President for the appointing of Reserve military officers, as it has, via a separate statutory provision, in the case of regular military officers.¹⁰ The foundation for this appointment process is, as discussed above, the creation of a promotion list. Congress mandates that the promotion list be created by the secretary concerned upon approval of the selection board's report by the President.¹¹ Appointments are then made from that list in the order prescribed by law. This comprises the process of appointment, which cannot exist without each of its essential parts. Most important for this analysis, the process cannot take place without the promotion list. Thus, once a Reserve officer's name is part of a promotion list created under 10 U.S.C. §§ 14101 and 14308, any action which has the effect of delaying that officer's appointment -- i.e., that officer's promotion -- for reasons permitted under 10 U.S.C. § 14311(a) or (b) must invoke their provisions. Of key importance here is that these provisions include the requirement that, if the reasons for delay are not substantiated or if dispositive action is not otherwise taken, "the officer shall be retained on the promotion list . . . or list of officers nominated by the President to the Senate for appointment in a higher reserve grade and shall, upon promotion to the next higher grade, have the same date of rank, the same effective date for the pay allowances of the grade to which promoted, and the same position on the reserve active-status list as the officer would have had if no delay had intervened", unless the secretary concerned determines that the officer is unqualified for promotion for any part of the delay.¹²

b. Analysis of Petitioner's Claim

(1) Summary Review of Facts. The selection board report recommending Petitioner for promotion to O-8, which was made pursuant to 10 U.S.C. § 14108, was approved by the President on 19 December 1999. At that time, the Secretary of the Navy placed Petitioner's name on the promotion list described in and required

⁹ 10 U.S.C. § 14311(a) and (b).

¹⁰ See 10 U.S.C. § 624(d).

¹¹ See 10 U.S.C. § 14311 (a), 14111(a).

¹² 10 U.S.C. § 14311(a)(2); see also § 14311(b)(2).

by 10 U.S.C. § 14308(a).¹³ Subsequently, pending the results of the Senior Officer Case opened by the Naval Inspector General to inquire into allegations against Petitioner, the Secretary of Defense requested that the Senate take no action on Petitioner's nomination. After the Inspector General found the allegation to be unsubstantiated, the President approved Petitioner's nomination, which the Senate confirmed. Petitioner received an effective date of rank as rear admiral of 22 March 2002. According to Petitioner, absent the delay, his effective date of rank would have been 6 October 2000.¹⁴

(2) Application of Law. Because Petitioner's appointment was delayed pending a Naval Inspector General investigation after he was placed on a promotion list, the provisions of 10 U.S.C. § 14311(a) and (b) apply.¹⁵ By operation of one or both of these provisions, Petitioner was retained on "the promotion list . . . or list of officers nominated by the President to the Senate for appointment in a higher reserve grade", pending the outcome of the investigation and attendant review.¹⁶ Once the investigation and review were completed without further action, the statutory provisions required that, upon promotion, Petitioner be given the effective date of rank he would have received, but for the delay.¹⁷

¹³ The record supplied by Petitioner confirms this. It includes a memorandum from the Secretary of the Navy to the Assistant Secretary of Defense that notes that, on 20 June 2000, Petitioner's name was before the Senate for confirmation. Petitioner's name would have had to be on a promotion list for that to occur. See Petition, BCNR Docket No. 04135-02.

¹⁴ *Id.*

¹⁵ A Naval Inspector General investigation into allegations of discrimination clearly invokes the possibility of discipline. In addition, there can be no doubt that it raises implications concerning the subject's moral or professional fitness to serve in the higher grade to which selected. Thus, the provisions of both 10 U.S.C. § 14311(a) and (b) are triggered.

¹⁶ See 10 U.S.C. § 14311(a)(2) and (b). Note that Petitioner's name was removed from neither the promotion list nor the list of approved nominations. Rather, it was variously described in various Executive Branch memoranda as "on hold", "inactive", "returned". See documents attached to Petitioner's petition, BCNR Docket No. 04135-02. See also the discussion at footnote 17, *infra*.

¹⁷ As noted above, Petitioner states that "[n]o formal involuntary delay of promotion proceedings were initiated in my case under 10 USC 14322(a)(1). However, I deserve the protections described in 10 USC 14311(a)(2) regarding date of rank, pay and allowances as if involuntarily delayed under 10 USC 14311(a)(1)[sic]". On the contrary, this legal analysis demonstrates that the actions taken in the record constituted sufficient "formal" process to invoke the provision. Petitioner's assertion may be based on a misreading of the statutory scheme. It is noteworthy that, while 10 U.S.C. § 14308(a) mandates creation of the promotion list once the President has approved the selection board report under 10 U.S.C. § 14101(a), 10 U.S.C. § 14308(b)(1) provides that "[o]fficers on a promotion list for a competitive category shall be promoted in the manner specified in section 12203 of this title." [emphasis supplied] In turn, § 12203 provides in relevant part that "[a]ppointments of reserve officers in commissioned grades above lieutenant colonel and commander shall be made by the President, by and with the advice and consent of the Senate [except as provided in provisions not relevant here]." 10 U.S.C § 12203(a). Petitioner may be misconstruing these sections together to provide that the promotion list, upon which the applicability of § 14311 depends, does not exist for officers whose appointments require the advice and consent of the Senate until their nominations receive such approval. On the contrary, by the plain language of 10 U.S.C. § 14308(b)(1), action under § 12203, including Senatorial advice and consent, occurs only when there is a promotion list.

(3) Corrective Authority. The failure to afford Petitioner the effective date of rank he would have received but for the delay was error because it was a failure to comply with applicable statute. If the Board for the Correction of Naval Records so finds, it is reasonably within the Board's authority¹⁸ to recommend the corrective action Petitioner seeks.

c. Conclusion. [REDACTED] if an officer's appointment after that officer has been placed on a promotion list under 10 U.S.C. § 14308(a) invokes the provisions of 10 U.S.C. § 14311, which require that the officer be given a back-dated date of rank unless the Secretary of the Navy determines he was unqualified for all or a period of the delay. Petitioner's circumstances fall within this characterization; therefore, he is entitled to the relief he requests.

¹⁸ See 10 U.S.C. § 1552.