

DATE: September 19, 1996

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In Re:

[Redacted]

Claimant

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Claims Case No. 96070218

## CLAIMS APPEALS BOARD DECISION

### DIGEST

A former member of the Navy applied for reserve retired pay pursuant to 10 U.S.C. 12731 (formerly 10 U.S.C. 1331), and was informed that he did not have sufficient qualifying years of service in the reserves. The member applied to the Board for Correction of Naval Records to have his record changed so that he would be eligible for retired pay. Despite a majority recommendation in favor of his petition, the Secretary of the Navy approved the minority recommendation which concluded that there was no injustice warranting corrective action, and the member's records were not changed. This office has no jurisdiction to review the actions of the Board for Correction of Naval Records or the actions of the Secretary of the Navy pursuant to 10 U.S.C. 1552.

### DECISION

A former member of the Navy requests consideration of his claim for retired pay. The claim was previously submitted to the United States General Accounting Office (GAO). By letter dated November 7, 1995, in GAO Settlement Z-2869825, GAO stated that it had no authority to review or change decisions made by the designated representative of the Assistant Secretary of the Navy for Anpower and Reserve Affairs acting within the discretion granted by 10 U.S.C. 1552(a). The member appeals that decision. Pursuant to Public Law No. 104-53, November 19, 1995, effective June 30, 1996, the authority of the GAO to adjudicate claims related to the uniformed services members' pay, allowances, travel, transportation, retired pay and survivor benefits was transferred to the Director, Office of Management and Budget, who delegated this authority to the Department of Defense (DoD).

### Background

The record as presented shows that the member had served for almost 6 years in the Army, Army Reserve and National Guard, when in April 1959, he enlisted in the Navy.<sup>(1)</sup> He continued to reenlist, with the final enlistment on November 4, 1968, for 6 years. He was honorably discharged on November 1, 1974, at which time he apparently was not recommended for reenlistment.

The member reenlisted on August 17, 1987, in the Navy Reserve. However, on April 13, 1988, he was transferred from drilling status to the Individual Ready Reserve, due to unsatisfactory drill participation. He was then transferred, upon his request, to the Retired Reserve in July 1990.<sup>(2)</sup>

Although the Navy prepared a statement for the member in October 1990, listing his reserve points, the base pay for his pay grade, years of service and an estimated monthly retired pay based on that information, the record reflects that in May 1990, the member was notified by certified mail that he was not physically qualified for retention in the Naval Reserve. He was offered three possible options. He could: 1) elect to be discharged from the Naval Reserve, 2) be transferred to the Retired Reserve (without pay), or 3) request a review by the Central Physical Evaluation Board. He elected to be transferred to the Retired Reserve (without pay) and was informed that he would not be eligible to receive retired pay, severance pay or any other benefits from the Naval Reserve. He was also informed that because of his physical disqualification remaining in the Ready Reserve to meet the "eight-year requirement" which would make him eligible for reserve retired pay was not an option available to him.

Beginning in 1992, the member corresponded with the Navy and his congressional representative regarding the possibility of obtaining reserve retirement benefits. He was repeatedly told that he was not eligible for reserve retired pay. The member was informed that he could petition the Board for Correction of Naval Records (BCNR), which could make him eligible for retired pay. In April of 1994, he filed a DD Form 149 applying for correction of his record.

In June 1995, the BCNR reviewed the member's record. They found that the member had 20 years, 5 months, and 7 days of qualifying service for reserve retirement purposes, but that he was still not eligible for reserve retirement since the law requires that the last 8 years of qualifying service be in the reserve component. <sup>(3)</sup>

The majority of the BCNR concluded that the member's request warranted favorable action. The minority found no injustice warranting corrective action. The matter was reviewed by the designated representative of the Assistant Secretary of the Navy for Manpower and Reserve Affairs in accordance with existing regulations. That individual conducted an independent review of the Board's proceedings and approved the minority recommendation. The member was informed that no correction to his records would be forthcoming. <sup>(4)</sup>

The member then wrote to GAO for assistance. GAO treated the matter as a claim and by letter dated November 7, 1995, responded to the member, explaining that GAO had no authority to review or change the decision issued by the designated representative of the Secretary.

The member wrote to GAO again in February 1996, April 1996 and June 1996. The matter was treated as an appeal of the letter of November 7, 1995. At the time of transfer of functions described above, this matter was transferred to this Office for consideration.

### **Discussion**

Section 1552(a) of title 10 of the United States Code provides that the Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. As noted by GAO, the Navy regulations are found in title 32 of the Code of Federal Regulations. Section 723.7 of that title provides that the record of proceedings of the BCNR will be forwarded to the Secretary of the Navy who will direct such action as he or his designated representative determines to be appropriate, including the authority to deny relief. In the present case, the Secretary's representative accepted the minority recommendation. Thus, the member's records were not corrected and the member remains ineligible for retired pay under section 12731.

GAO has long held that it has no jurisdiction to question the recommendation of a correction board or a Service Secretary's determination. See, e. g., Major General Edwin A. Walker, AUS (Retired), 62 Comp. Gen. 406, 408 (1983); and 44 Comp. Gen. 143, 146 (1964). The authority which transferred claim adjudication functions to DoD did not add jurisdiction to review such actions. Nor has any additional legislation been created which bestows authority or jurisdiction on this Office with regard to correction of military records. Thus, this Office has no authority to review actions of the BCNR or the Secretary of the Navy.

The member has indicated that he may litigate this matter. We note that the United States Court of Federal Claims has jurisdiction to review, and in appropriate cases, reverse a decision of a correction board or a Service Secretary. See Weiss v. United States, 408 F.2d 416 (Ct. Cl. 1969).

### **Conclusion**

Accordingly, we find that we have no authority to further consider this claim.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

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Christine M. Kopocis

Member, Claims Appeals Board

Signed: Joyce N. Maguire

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Joyce N. Maguire

Member, Claims Appeals Board

1. Documents in the record show that the member originally enlisted in 1953. The member claims he enlisted in 1952, but other than his assertion, he has not provided evidence of enlistment in that year.
2. According to a letter from the Naval Reserve Personnel Center to the member's congressional representative, dated September 24, 1992, the member earned no qualifying years of service ( a year in which he earned at least 50 retirement points) after 1974. Thus, although the member was in the Naval Reserve, he did not earn qualifying years of service toward reserve retirement after 1974.
3. Based on letters in the record, it appears that the member believes he needs only 6 years of reserve service to be eligible for reserve retirement. A letter to the member from the Office of the Assistant Secretary of Defense noted that Pub. L. No. 103-337, 636, 108 Stat. 2663, 2790 (1994), amended 10 U.S.C. 1331 (now 10 U.S.C. 12731) to require the last 6 rather than 8 years of service be in the reserves for those members who retired between October 5, 1994 and September 30, 1999. Since the member was transferred to the Retired Reserve in 1990, it does not appear to apply to him.
4. Despite numerous explanations in the record, it appears that the member does not understand that he does not have a sufficient number of *qualifying* years of military service in the reserves to entitle him to retired pay under 10 U. S. C. 12731. The member had reenlisted in the Navy in 1987, but none of the years of that enlistment was a *qualifying* year for purposes of retirement pay under section 12731. Although the complete records of the service member were not provided to this office, all documents and statements in the record make it clear that the member has less than the requisite 8 years of *qualifying* service in the reserve ranks which would entitle him to retired pay under section 12731. Other than his assertion, the member provided no evidence of sufficient qualifying service or eligibility under section 12731. It appears that the only way he would have been able to qualify for such retired pay was through action of the BCNR.