



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

TRG

Docket No: 7927-98

3 June 1999

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

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

Encl: (1) DD Form 149 w/attachments  
(2) Case Summary  
(3) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a retired Naval Reserve Officer filed enclosure (1) with this Board requesting that

2. The Board, consisting of Mr. Zsalman, Mr. Milner and Ms. Nofziger, reviewed Petitioner's allegations of error and injustice on 18 May 1999 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. Although it appears that enclosure (1) 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 was an employee of the Matson Navigation Company as a licensed engineering officer from 16 August 1937. On 7 July 1941 he accepted his commission as an Ensign in the Naval Reserve.

d. During World War II he served almost continuously at sea aboard five different merchant ships. Petitioner states that during the invasion of the Philippines his ship the SS NICHOLAS J. SINOTT was hit by a kamikaze.

e. After the war Petitioner retained his Naval Reserve commission. Title 10 U.S.C. 1332 provides that all reserve service prior to 1 July 1949 is creditable for reserve retirement

purposes. Therefore, Petitioner was credited with over eight years of qualifying service as of 1 July 1949. Petitioner began drilling in 1953 and then earned 16 qualifying years for reserve retirement purposes. During this period, on 9 August 1957, he was promoted to LCDR (O-4). This service, when added to his service prior to 1 July 1949, means that he has about 24 years of qualifying service for reserve retirement purposes. On 4 August 1969 he was transferred to the Retired Reserve. He became 60 years of age on 15 September 1976.

f. Title 10 U.S.C. 3331 which sets forth the age and service requirement for reserve retired pay states as it applies to this case, in part, as follows:

... (c) No person, who, before August 16, 1945 was a Reserve of an Armed Force .... is eligible for retired pay under this chapter, unless he performed active duty .... after September 8, 1940 and before January 1, 1947, or unless he performed active duty (other than for training) after June 26, 1950 and before July 28, 1953.

Petitioner was commissioned on 7 July 1941 and had no active duty during the required periods. Since he does not meet the active service requirements of 10 U.S.C. 1331, he is not eligible for retired pay at age 60.

g. Petitioner contends in his application, in effect, that the wartime active duty requirement constitutes an injustice for those officers who served at sea with the Merchant Marine during World War II and subsequently completed 20 years of qualifying service. These reservists are now being denied retired pay.

h. The Board has received applications from a number of reserve officers in the same situation as Petitioner. Evidence in several of these cases shows that over the years, attempts were made to get the law changed as it applied to Merchant Marine officers. However, Congress never acted on the proposed legislation. Evidence has also been submitted showing that the Air Force Board for Correction of Military Records (AFBCMR) has granted relief to at least three former Air Force Reserve officers in the same situation by correcting the record to show one day of active duty, other than for training, during the period 26 June 1950 to 28 July 1953. A review of those cases shows that the AFBCMR is apparently granting relief to all individuals who have been denied retired pay because of a lack of wartime service. In the one case before the Air Force Board in which the individual served as a Merchant Marine officer during World War II, AFBCMR concluded as follows:

... Given the total weight of the evidence in this case, we do not understand the reason for the failure of the Congress to enact the private relief legislation that has been introduced in behalf of the applicant and others similarly situated. Nonetheless, since private relief bills are not acted upon for a variety of reasons, we do not draw any conclusions from the failure of the proposed legislation to become law. Nor do we believe that the relief sought is beyond the scope of our recommending authority. To the contrary, we believe that this is precisely the relief the Congress envisioned when it created Correction Boards. Otherwise, there would be no need to invest such extraordinary powers in the service Secretaries, acting through boards of civilians. In view of the foregoing and in consideration of all the circumstances, in this case, we believe that the application's request for Reserve Retired pay should be approved as a matter of equity.

Some of the applicants to this Board have pointed to AFBCMR's actions, and contend that this Board should follow the Air Force precedent by granting relief in cases with the same facts. All of the available AFBCMR cases are attached to enclosure (1).

i. The Board's staff is aware that this Board has routinely denied requests such as this on the grounds that granting relief would be contrary to law. However, noting that the AFBCMR has granted relief in its cases, it was determined that policy guidance should be obtained from the Assistant Secretary of the Navy for Manpower and Reserve Affairs (M&RA). On 11 April 1997, the Assistant Secretary of the Navy (M&RA) stated that the Board should grant relief and award retirement benefits in the following circumstances:

(1) The Petitioner had requested to serve on active duty (other than for training) during World War II and the request had been denied, or petitioner established that making such a request would have been a futile gesture; and

(2) That the petitioner served in a named service, or otherwise served the war effort in a manner characteristic of military service; and

(3) the Petitioner substantially incurred the same risks as military members who served on active duty.

The Assistant Secretary concludes as follows:

Petitioner served during World War II as a member of the Merchant Marine, a named service. While so engaged, he was exposed to substantially the same dangers as active duty personnel serving in the fleet. Consequently, petitioner's failure to serve on active duty during World War II is not the type of failure to serve that Congress intended to address when (the law) was originally enacted.

j. The Board is aware that Petitioner could have been ordered to active duty at any time. However, the Navy chose not to do so because of the need for Merchant Marine officers. In addition, evidence has been submitted in other cases showing that the Selective Service System was directed not to induct individuals who were serving with the Merchant Marine because of the critical need for merchant seamen. Some of the applicants have stated that it was understood that a request for active duty in the Navy by licensed Merchant Marine officers would not be approved.

#### CONCLUSION:

Upon review and consideration of all the evidence of record and especially in light of the contents of enclosure (1), the Board concludes that Petitioner's request warrants favorable action. In this regard, the Board notes that Petitioner was a licensed Merchant Marine officer when he was commissioned in the Naval Reserve. Given the demands for merchant ships to support the war effort and the fact that he was a trained Merchant Marine officer, the Board believes that active duty orders would not have been issued even if they had been requested. Since Petitioner performed hazardous duty in support of the war effort, the Board agrees with the Assistant Secretary that corrective action to allow the payment of reserve retired pay is warranted.

The Board further concludes that the best way to implement this decision is to show that Petitioner had one day of active duty other than for training during the period 8 September 1940 to before 1 January 1947, thus meeting the requirement of the law for the payment of retired pay. Accordingly, 1 September 1945, the day before VJ day, has been arbitrarily selected.

Petitioner will be given an opportunity to make an election under the survivor benefit plan when his retired pay is started and action by the Board is not required.

The Board also concludes that this Report of Proceedings should be filed in Petitioner's naval record so that all future reviewers will understand his status in the Naval Reserve.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he served on active duty other than for training on 1 September 1945.

b. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

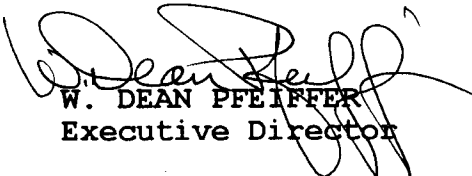
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN  
Recorder



ALAN E. GOLDSMITH  
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFEIFFER  
Executive Director