



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

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OFFICE OF GENERAL COUNSEL

IN REPLY REFER TO: B-192232

December 19, 1978

Mr. William T. Underwood, Chairman
Board for Correction of Military
Records (TGC-20)
Office of General Counsel

Department of Transportation
[Correction of Military Records]

Dear Mr. Underwood:

Reference is made to your letter dated June 20, 1978, with enclosures, wherein you request our views concerning a matter currently before the Coast Guard Board for Correction of Military Records wherein a petitioner seeks, among other things, to have his Coast Guard records corrected to show that he was promoted to a warrant officer grade and so retired, rather than being retired as an enlisted member.

The material in the file indicates that the petitioner, having had prior service in the United States Navy, enlisted in the Coast Guard in June 1949. In November 1965, while his name was on the list for advancement from an enlisted grade to a warrant officer grade, he was injured in an automobile accident. A subsequent Coast Guard investigation concluded that the injuries sustained by him were due to his own misconduct and not incurred in line of duty. In 1966, the member was apparently further injured in a second accident, the investigation of which also found that his injuries were the result of his own misconduct and not in line of duty. As a result of the foregoing, his name was removed from the warrant officer promotion list.

Thereafter, the member filed an application with the Correction Board, requesting, in essence, that the "misconduct - not in line of duty" determinations be removed from his record and that his name be restored to the warrant officer promotion list. In its decision, the Board granted relief on the question of misconduct, but denied relief on the issue of restoration of his name to the warrant officer promotion list.

The member, who had been serving in grade E-7, remained in that grade and so retired on June 30, 1971, having performed over 24 years of active duty for retirement purposes and 26 years,

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8 months and 29 days of service for pay purposes. Since he was an enlisted member of the Regular Coast Guard on September 6, 1963, his retired pay was increased by 10 percent of his active duty pay because it was determined that he maintained average marks in conduct of not less than 97-1/2 percent of the maximum (14 U. S. C. 357(c) (1958 ed.), as amended by Public Law 88-114, 77 Stat. 144).

On November 14, 1972, the member, then retired, filed an application with the Correction Board to correct his service records to show that he was advanced to the grade of warrant pharmacist in June 1967, along with other changes to reflect this advancement including, but not limited to, subsequent advancement in grade on retirement. The error and injustice alleged in that application was that the reasons originally given as grounds for the removal of his name from the warrant officer promotion list became invalid when his records were corrected in 1967 and his name should have been restored to the list at that time.

On subsequent consideration by the Board and ultimate ruling on December 12, 1976, by the then Deputy General Counsel for the Department of Transportation on behalf of the Secretary of Transportation, it was concluded that the member's service record was to be corrected to show that his name was restored to that list; that he was promoted to Warrant Officer (W-2) in June 1967; and so retired in that grade on June 30, 1971.

Upon computation of the member's active duty pay from 1967 until retirement in 1971 based on the corrected record, it was determined that he was entitled to additional pay for the period. However, on computing his retired pay as a W-2 thereafter, it was discovered that even though the basic pay rate for a W-2 was greater than an E-7, because of the 10 percent add-on to his retired pay as an E-7, his rate of retired pay as a W-2 from his 1971 retirement date would be less than the rate he actually received as an E-7. Further, not only would he receive less retired pay, but since he was no longer an E-7 by virtue of that record correction, any excess retired pay received by him had to be refunded.

As a result of this discovery, the record correction decision was delayed. By letter dated August 12, 1977, the member was advised of the situation and the adverse financial impact he would

experience if the record correction decision were implemented. In the alternative, that letter suggested that the problem could be avoided if he requested that the 1976 correction action be vacated and he chose to remain an E-7 on the record.

According to the file, the member rejected these options and suggested an alternative, which he views as being consistent with the relief requested in his application. Apparently, it is his view that had he actually been promoted to W-2 in 1967, he would have been promoted to W-3 before his retirement date in 1971. Further, he expresses the view that had he been so promoted he would not have retired in 1971, but would have remained in the service for the full 30 years and as a result probably would have been promoted to W-4.

The material in the file indicates that there has been no specific ruling on the matter, but that such an option has apparently met some administrative resistance on the grounds that such a promotion to W-3 by 1971; his continuation in the service to acquire 30 years or be promoted to W-4 is too speculative to be favorably considered. In an effort to resolve the matter, you ask whether it would be technically and legally sound to promote the member from E-7 to a W-2 effective June 1967, and in recognition of his actual retirement date, return him to an E-7 and then retire him in that grade.

At the outset it is noted that some question has arisen concerning the member's years of service which are to be used in the computation of his retired pay.

Section 423 of title 14, United States Code, provides in part:

"The retired pay of a grade or rating shall be computed at the rate of 2-1/2 percent of the sum of the basic pay of that grade or rating, and all permanent additions thereto including longevity credits to which the officer or enlisted man concerned was entitled at the time of retirement, multiplied by the number of years of service that may be credited to him under section 1405 of title 10. * * * A fractional year of six months or more shall be considered a full year in computing the number of years of service by which the rate of 2-1/2 percent is multiplied."

Section 1405 of title 10, United States Code, provides in part:

"* * * the years of service of a member of the armed forces are computed by adding--

"(1) his years of active service;

* * * * *

"(3) the years of service * * * with which he was entitled to be credited, on the day before the effective date of his section, in computing his basic pay * * *."

According to information supplied to us by the Coast Guard Retired Pay Branch, the member entered upon active duty in the Coast Guard in 1949, and when he retired on June 30, 1971, he had performed 22 years, 0 months and 2 days active service in the Coast Guard. In addition, he had previously served 2 years, 5 months and 21 days active duty in the United States Navy and 2 years, 3 months and 6 days inactive duty in the Naval Reserve for a total of 26 years, 8 months and 29 days of creditable service for pay purposes.

On the assumption that the foregoing information correctly reflects the member's Navy and Coast Guard service, our unofficial computation of his rate of retired pay as an E-7 and as a W-2, effective July 1, 1971, and as projected based on Consumer Price Index adjustments to the present, generally agree with the retired pay computation made by the Coast Guard Retired Pay Branch. We are enclosing copies of their computations, including those for pay grades W-3 and W-4 at the "over 26" rate.

With regard to the Correction Board action proposed in your letter, 10 U.S.C. 1552 (1976) provides in pertinent part:

"(a) The Secretary * * * may correct any military record of that department when he considers it necessary to correct an error or remove an injustice."

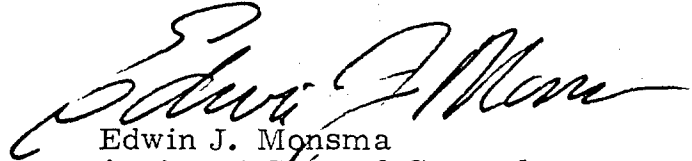
Under the foregoing authority the proposed course of action appears legally permissible. As to its technical soundness, while we are unaware of any legal prohibition against such action, since correction

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actions are somewhat in the nature of "turning back the clock," whatever is done to correct a member's records, in the matter and to the extent that the records are to be corrected, should have a reasonable foundation. The question remains as to the basis upon which a member serving in a higher grade would be reduced in grade and thereafter retired in that lower grade.

We trust the foregoing will be of assistance to you.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Edwin J. Monsma".

Edwin J. Monsma
Assistant General Counsel

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