



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Admiral Jonathan T. Howe, USN
(Retired)—Reconsideration

File: B-255792.2

Date: November 9, 1995

DIGEST

Prior decision which held that change in retirement date of officer by Naval Board for the Correction of Military Records permitted officer's accrued leave to be liquidated at 0-10 rather than 0-8 rate is modified because officer was retained on active duty for one month following corrected retirement date and regulation implementing 37 U.S.C. § 501(b)(1) states that leave is to be liquidated at rate of basic pay at time of discharge.

DECISION

The Defense Finance and Accounting Service has requested reconsideration of our decision in the matter of Admiral Jonathan T. Howe, USN (Retired), 73 Comp. Gen. ____ (1994) (B-255792, May 9, 1994), in which we found that Admiral Howe was entitled to have his accrued leave liquidated at the grade of Admiral (0-10) rather than the grade of Rear Admiral (0-8). For the reasons which follow, we modify our prior holding.

Admiral Howe was serving in a position under 10 U.S.C. § 601 for which he was entitled to the grade of 0-10, Admiral. However, Admiral Howe was to revert to his permanent grade of 0-8, Rear Admiral, prior to his projected retirement sometime before June 4, 1992. As a result, legislation was enacted to continue him in the grade of Admiral through June 4, 1992. See Pub. L. No. 102-297, June 2, 1992, 106 Stat. 216. Admiral Howe, however, was not transferred to the retired list until July 1, 1992, by which time the extension of his 0-10 grade had expired, so that the 60 days of excess leave he had accumulated were liquidated at the 0-8 rate to which he had reverted.

Section 1370 of title 10, United States Code, provides that an officer may be retired in the grade in which he was serving under 10 U.S.C. § 601, in the discretion of the President with the advice and consent of the Senate. Although the President had

nominated Admiral Howe in late 1991 for retirement at grade 0-10, due to a delay in forwarding the request for confirmation, and delay in the Senate, his retirement at that grade was not confirmed by the Senate until July 2, 1992.

On June 9, 1993, the Board for the Correction of Naval Records corrected Admiral Howe's military records to show that he was transferred to the retired list on June 1, 1992, and was retained on active duty until June 30, 1992. The Board found that there was never an intent to delay the confirmation of his retirement in grade 0-10 pursuant to the President's nomination. DFAS requested our decision because 37 U.S.C. § 501(b)(1) provides that a member who has accrued leave to his credit at the time of his discharge is entitled to be paid for such leave based on the rate of basic pay to which he was entitled on the date of his discharge and Admiral Howe actually retired on July 1, 1992, at which time he was an 0-8.

We found that the Correction Board's action required that Admiral Howe's leave be liquidated at the 0-10 rate since, under 10 U.S.C § 1552(a)(4), such records corrections are "final and conclusive on all officers of the United States," except when procured by fraud. The statutory requirements that he be retired in the grade of Admiral in the discretion of the President with the advice and consent of the Senate had been met and the record correction merely reflected an earlier retirement date to rectify the problem caused by the delay in the Senatorial retirement process.

DFAS has requested reconsideration of our decision. DFAS states that the administrative regulations in this area, which were not cited in its submission to our Office, preclude the payment of the accrued leave at the higher rate, notwithstanding the action of the Correction Board, because Admiral Howe was continued on active duty through June 30, 1992. Specifically, paragraph 40401a of the Department of Defense Financial Management Regulation DoD 7000.14-R, Volume 7A, states that a member is entitled to payment of unused accrued leave "unless the member continues on active duty under conditions which require accrued leave to be carried forward." Rule 1 of table 4-4-2 of the regulation states that if an officer is retired and then immediately reenters on active duty, accrued leave is not payable. Thus, DFAS states, since the Correction Board only changed the date of retirement of Admiral Howe from July 1, 1992, to June 1, 1992, but showed him being retained on active duty until June 30, 1992, he would have still reverted to the 0-8 grade when he was finally discharged on June 30, 1992.

In view of the DOD regulation, we agree with DFAS that Admiral Howe reverted to the 0-8 rate at the time of his final discharge from duty, when his accrued leave was liquidated. As DFAS notes in its letter, a change in a member's record only gives the member what entitlement the member is due under pertinent statutes and regulations.

Accordingly, we modify our prior decision in accordance with the above. While Admiral Howe has been paid his accrued leave at the 0-10 rate, we agree with DFAS that the Admiral qualifies for waiver of the overpayment under 10 U.S.C. § 2774, since the payment was based on a decision of our Office, and therefore Admiral Howe is without fault in the matter.

Robert P. Murphy
General Counsel