



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON D.C. 20548

14964

*Gandy*  
*McM II*

B-198821

September 18, 1980

*[Promotion of Officers by Department of Navy]*

The Honorable William L. Dickinson  
House of Representatives

Dear Mr. Dickinson:

Further reference is made to your letter dated May 5, 1980, with enclosures, requesting our independent opinion concerning the following issue:

"Whether it is legally feasible for the Department of the Navy to institute procedures similar to those of the Departments of the Army and Air Force whereby officers may be promoted through action of the Board for Correction of Naval Records on recommendations of a non-statutory Standby Advisory Board where material error was present in the records of such officers when considered by an earlier statutory Selection Board."

Enclosed with your letter is correspondence from the Assistant Secretary of the Navy (Manpower, Reserve Affairs and Logistics) dated April 21, 1980, relating to this issue. The Assistant Secretary notes that the laws governing the system of promoting Navy and Marine Corps officers are in certain respects significantly different from those governing Army and Air Force officer promotions, and he says that in view of the comprehensive statutory system that has been established for the promotion of naval officers it has been the practice of the Department of the Navy to conduct its officer promotion activities strictly in accordance with that system. He recognizes, nevertheless, that on occasion and for various reasons, some officers are not accorded fair consideration for selection for promotion. In such cases it has been, and continues to be, the practice of the Department of the Navy to recommend to an officer who feels that an error or injustice has occurred in his promotion that he apply for relief to the Board for Correction of Naval Records, a body established by law in 10 U.S.C. 1552 (1976).

The Assistant Secretary states the opinion that the Board for Correction of Naval Records does not have authority to promote an officer; however, it can initiate factual correction in an officer's record to remove or correct errors

012104

B-198821

and can recommend correction to reflect that the officer has not previously been considered for promotion to the next higher grade. The Assistant Secretary explains that under procedures followed by the Navy, the corrected record is then submitted without prejudice to the appropriate next regularly scheduled selection board in order that the aggrieved officer may be considered for promotion properly and in consonance with the provisions of statutory law pertaining to Navy officer promotions. If the concerned officer is then selected and promoted, the Board for Correction of Naval Records has the requisite authority to recommend adjustment of his date of rank and lineal position to that which he would have had if he had been selected upon the first consideration for promotion. The Assistant Secretary says that although standby selection boards are considered by the Departments of the Army and the Air Force as useful and appropriate vehicles for correcting inequities, in his view, because of the significant differences between the Army/Air Force promotion framework and that of the Navy and Marine Corps, standby advisory selection boards are not desirable in the Department of the Navy.

Also enclosed with your letter is correspondence dated May 1, 1980, from Rear Admiral Penrose Lucas Albright, USNR, who expresses disagreement with the position taken by the Assistant Secretary of the Navy. Admiral Albright says that the procedure of the Army Board for Correction of Military Records acting upon the advice of advisory selection boards has been judicially upheld, and he sees no reason why similar actions to promote taken through the Board for Correction of Naval Records would be subject to question.

To illustrate the problem he perceives, Admiral Albright describes the case of a commander, O-5, who was passed over for promotion to captain, O-6, by a statutory selection board convened in January 1980. The promotion was not considered on its merits but the officer was passed over because his service records had been misplaced and were not available to the selection board. Admiral Albright indicates that if the passover is eventually determined to be erroneous or unjust, it will take more than a year to set the record straight under the procedures employed by the Navy to correct service records in cases of this nature. He expresses the belief that this delay in resolving the matter may prove to be detrimental

to the affected officer's career, and would not be in the best interests of either the Navy or the particular officer concerned. He says that the delay could be avoided if the Navy were to adopt procedures similar to those now used by the Army and Air Force, and in his judgment there is no statutory prohibition which would prevent the Navy from effecting the same result as obtained by the Departments of the Army and Air Force through their standby advisory boards.

Because of the conflicting positions taken by the Assistant Secretary of the Navy and Admiral Albright, you are asking for our independent advisory opinion as to whether the Navy can by regulation adopt a system similar to those now used by the Army and Air Force, or whether legislation would be required in order to authorize the Navy to establish standby advisory boards.

Provisions of statutory law governing the promotion of Army and Air Force commissioned officers generally authorize the Secretaries of the Army and Air Force to convene selection boards at such times and under such regulations as they may prescribe, and they also grant those service Secretaries broad authority to regulate the temporary promotion of officers under their jurisdiction. See 10 U.S.C. §§ 3297, 3362, 3442 (Army); and 10 U.S.C. §§ 8297, 8362, 8442 (Air Force). The Secretary of the Army has, pursuant to this statutory authority, issued regulations providing for "standby advisory boards" to reconsider the cases of certain Army officers for promotion, if the officers were inadvertently omitted from consideration or material error was present in their records at the time their regularly scheduled selection boards met. See paragraph 3-14 of Army Regulation 135-155, dated August 30, 1974; and paragraph 2-8(c) of Army Regulation 624-100, dated October 20, 1975. Similarly, the Secretary of the Air Force has issued regulations providing for "supplemental selection boards" to reconsider the cases of certain Air Force officers erroneously omitted from consideration for temporary promotion by a regularly scheduled selection board. See chapter 5, Air Force Regulation 36-89, dated October 21, 1977. These regulatory provisions do not, however, cover the case of every Army and Air Force officer passed over for promotion consideration through error or omission, and in many instances the officer concerned is not granted consideration by a standby or supplemental selection board but is instead left to seek

B-198821

relief from the Army or Air Force Board for Correction of Military Records.

Provisions of law governing the promotion of Navy and Marine Corps commissioned officers are contained in chapters 543 through 549 of title 10, United States Code. As is noted by the Assistant Secretary of the Navy in his letter to you, the statutory promotion system prescribed there is different in certain respects from those which have been established by law for the Army and the Air Force, and the Navy Department has not been granted as much latitude to regulate promotion procedures through administrative directives. The Assistant Secretary states that the Navy's statutory promotion system does not contain authority to convene standby selection boards like those of the Army and the Air Force. We agree with his assessment of the matter in that regard due to the more specific statutory officer promotion system established for the Navy and the discretion allowed the Secretaries concerned under the statutory promotion system established for the Army and the Air Force.

However, section 1552 of title 10, United States Code, authorizes the correction of a service member's records to rectify an error or remove an injustice, and it applies equally to all the branches of the Armed Forces. Subsection 1552(a) provides as follows:

"(a) 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. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States." (Under-scoring added.)

In his correspondence with you, the Assistant Secretary takes the position that the above-quoted statutory language does not authorize the Secretary of the Navy to retroactively

promote Navy and Marine Corps officers. It appears that support for his position may be found in a 1948 opinion of the Attorney General, who noted that the United States Constitution provides that the appointment of officers upon promotion shall be made by the President with the consent of the Senate, and who therefore concluded that the Secretary of the Navy could not use 10 U.S.C. 1552 to effect Navy and Marine Corps officer promotions. See 41 Op. Atty. Gen. 10 (1948). In any event, we are not aware of any case in which the Navy has promoted an officer under the provisions of 10 U.S.C. 1552.

In contrast, our Office and the Federal courts have consistently upheld the authority of the Army, Air Force and Coast Guard to make promotions retroactively effective under the authority of 10 U.S.C. 1552.

Also, it has also been recognized that pursuant to the authority vested in them by 10 U.S.C. 1552, the service Secretaries may properly use the assistance of advisory boards of military officers or reconstituted selection boards in reaching a determination on whether a particular officer should be retroactively promoted to correct an error or remove an injustice. See Doyle v. United States, 599 F. 2d 984 and 609 F. 2d 990 (Ct. Cl. 1979), U.S. Supreme Court cert. denied, June 2, 1980 (involving Army officers); Stewart v. United States, 611 F. 2d 1356 (Ct. Cl. 1979) (Air Force); Knehans v. Callaway, 403 F. Supp. 290 (D. D.C. 1975), aff'd, 566 F. 2d 312 (D.C. Cir. 1977), cert. denied, 435 U.S. 995 (1978) (Army); 57 Comp. Gen. 554 (1978) (Army); 56 Comp. Gen. 587 (1977) (Army); 50 Comp. Gen. 125 (1970) (Air Force); 45 Comp. Gen. 819 (1966) (Army); and other Federal court opinions and Comptroller General decisions therein cited.

However, the Secretary of the Navy's interpretation of the laws he is charged with executing should be given great weight, and it is his view that the provisions of 10 U.S.C. 1552 do not permit him to promote officers without regard to the specific laws governing promotions in the Navy. Acting within the scope of his perceived authority the Secretary has established a procedure for dealing with errors and inadequacies in the promotion procedures. While the method adopted by the Navy for dealing with cases of this nature is not illegal or invalid, there is, as stated above, precedent which indicates that the Secretary of the Navy, using the Board for the Correction of Naval Records, could adopt a procedure more similar to that

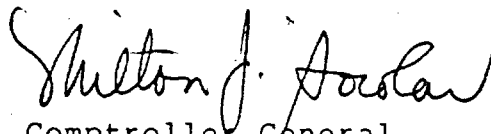
B-198821

applicable in the Army and the Air Force. Therefore, in the event the Secretary of the Navy adopts procedures similar to the Army and the Air Force, our Office would not offer objection to their implementation.

We recognize, on the other hand, that the Secretary of the Navy may well have completely valid reasons for his position on this matter. Thus, should he determine no change in the Navy's present procedures is warranted, our Office would be in no position to view his action as erroneous.

We trust this will serve the purpose of your inquiry.

Sincerely yours,

A handwritten signature in cursive script, reading "Milton J. Jordan".

For the Comptroller General  
of the United States