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Certified Mail RRR

The Honorable Pete Geren
Acting Secretary of the Army
101 Army Pentagon
Washington D.C. 20310

Subject: Major General Walter C. Short (Deceased)

This is a matter previously considered on 19 December 1991 by John W. Mathews, then Deputy Assistant Army Secretary. I have been requested by the family of Major General Walter C. Short (deceased) to look into the matter of his request for correction of military records on a pro bono basis.

Having read the record of proceedings, I am troubled by the decision of the Deputy Assistant Secretary wherein he rejected the Board's decision without making alternative findings of fact, thus opening his action to a contention that it was arbitrary or capricious, unsupported by substantial evidence and otherwise contrary to law. To prevail under 10 USC 1552 the statute requires a finding by the board of an error or an injustice. In General Short's case the Board specifically stated: "While the Board unanimously found no error in this case, the majority found evidence of injustice." The action of the Deputy Assistant Secretary without providing additional evidentiary facts and reasons therefore, simply adopted the view of the minority that there was no injustice. This strongly appears to be arbitrary and capricious treatment of Major General Short's case and makes it worthy of reconsideration.

This decision is also violative of an important precedent of long standing. In the case of *Proper v United States* 139 Ct.Cl.511, 154 F. Sup 317 (1957), the court held that the final authority over corrections is vested exclusively in the ABCMR. The Secretary of the Army, in denying plaintiff's application for correction of his military record did not act through the Army Board of civilian officers or employees as required by the applicable statute. The Government argued that the recommendations of the Correction Board were simply advisory. The court stated "Such an interpretation of Section 207 (the precursor of 10 USC 1052) makes the words 'acting through boards of civilian officers or employees' superfluous. Neither the act itself nor its legislative history warrants such interpretation."

Similarly, in the case of *Weiss v United States* 187 Ct CL1, 408 F 2d 416 (1969) the United States Court of Claims came to the same conclusion.

In my own case, the Honorable Hugh M Milton II, Assistant Secretary of the Army, denied my application for correction of military records on December 28, 1954 after favorable action by the board. However, after the ruling in the Proper case was brought to his attention, he reconsidered the case on his own motion, and ordered the correction of records on April 15, 1960.

10 USC 1552 (4) provides "Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States." Since the Deputy Assistant Secretary acting, through a board of civilians of the executive part of his department, recommended favorable action on Major General Short's record correction request on March 12, 1992, it appears that that correction was final and conclusive on all officers of the United States on that date, as a matter of law.

Lastly, the board of officers that heard the evidence in General Short's case were in a much better position than the Deputy Assistant Secretary to evaluate this matter. They had heard evidence adduced whereas the Deputy Assistant Secretary stated the he "... carefully considered the records in this case including the findings, conclusions and recommendation ...". He nevertheless made no contradictory findings. This I suggest was a fatal error as in the absence of contrary findings there was no opportunity on the part of the applicant for rebuttal. This was not due process of law.

After all these years of controversy since the attack on Pearl Harbor, shouldn't this admitted injustice finally be recognized as such, and Major General Short's records corrected?

Respectfully submitted,

Leonard Petkoff
Col, JAGC, USA, Ret.

Enclosure: Proceedings ABCMR