



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

CRS
Docket No: 3908-01
17 December 2001

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) 10 U.S.C. 1552
(b) SECNAVINST 1910.4B

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 former enlisted member of the Marine Corps, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected to show a more favorable type of discharge than the undesirable discharge issued on 21 August 1964.

2. The Board, consisting of Messrs. Pfeiffer, Leeman, and McCulloch, reviewed Petitioner's allegations of error and injustice on 12 December 2001 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 timely manner, it is in the interest of justice to waive the statute of limitations and review the application on its merits.

c. Petitioner enlisted in the Marine Corps on 5 April 1962 at age 17.

d. A special court-martial convened on 19 February 1964 and found Petitioner guilty of an unauthorized absence of 118 days. The court sentenced him to confinement at hard labor for six months, forfeitures of \$50 per month for six months, and

reduction in rank.

e. On 22 April 1964 Petitioner made a sworn statement to the effect that prior to and during his service, he had committed homosexual acts with civilians.

f. On 28 July 1964 the commanding officer recommended an undesirable discharge by reason of unfitness due to homosexual acts. After review by the discharge authority, the recommendation for separation was approved and Petitioner was discharged with an undesirable discharge on 21 August 1964.

g. Character of service was normally based, in part, on one's conduct and proficiency averages, both of which were computed from marks assigned during periodic evaluations. Petitioner's conduct and proficiency averages were 3.5 and 4.3, respectively. The minimum average marks required for a fully honorable characterization of service at the time of Petitioner's separation were 4.0 in conduct and 3.8 in proficiency. However, since Petitioner was discharged by reason of unfitness, those averages were not used to determine the characterization of service.

h. Reference (b) sets forth the Department of the Navy's current policies, standards and procedures for administratively separating enlisted servicemembers. With regard to homosexuality, reference (b) declares such behavior to be incompatible with naval service. It provides Navy and Marine Corps officials with the authority to involuntarily separate those servicemembers who commit a homosexual act or acts. If separated, the servicemember's discharge and character of service must be based on his or her total performance of duty and conduct. Reference (b) expressly prohibits the issuance of a discharge under conditions other than honorable unless the individuals committed a homosexual act under one of the following circumstances:

- (1) By using force, coercion, or intimidation;
- (2) with a person under 16 years of age;
- (3) with a subordinate in circumstances that violate customary naval superior-subordinate relationships;
- (4) openly in public view;
- (5) for compensation;
- (6) aboard a naval vessel or aircraft; or
- (7) in another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

i. Petitioner's military records fail to disclose the presence

of any of the aggravating circumstances which would warrant the issuance of an other than honorable discharge under the provisions of reference (b).

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants favorable action. Based upon Petitioner's overall record of service and current Department of the Navy policy as established in reference (b) and its radical departure from the policy which was in effect on 21 August 1964, the date of Petitioner's discharge, the Board concludes that it would be in the interests of justice to retroactively apply the standards of reference (b) to Petitioner's case. Using the standards of reference (b), the Board finds that given Petitioner's final conduct and proficiency averages, relief in the form of recharacterization to a general discharge is appropriate.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was issued a general discharge by reason of unfitness on 21 August 1964 vice the undesirable discharge actually issued on that date.

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

c. That, upon request, the Veterans Administration be informed that Petitioner's application was received by the Board on 14 May 2001.

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