



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

TJR
Docket No: 3823-02
4 December 2002

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 with attachments
(2) Case summary
(3) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the Navy, filed enclosure (1) with this Board requesting that his discharge be upgraded.

2. The Board, consisting of Mr. Frankfurt, Ms. Humberd, and Mr. Leeman, reviewed Petitioner's allegations of error and injustice on 3 December 2002 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 a 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 Navy on 9 January 1951 at the age of 19.

d. Petitioner served nearly two years without disciplinary incident, but on 11 December 1953 he received nonjudicial punishment (NJP) for failure to obey a lawful order and was awarded restriction for three days.

e. On 31 August 1954, during an investigation by the Office.

of Naval Intelligence, Petitioner admitted to participating in homosexual acts with a civilian and another Sailor. The act with the civilian apparently occurred after he drove Petitioner to catch a ferry. The acts with the Sailor occurred in Petitioner's bunk, apparently in an open-bay barracks. According to Petitioner, he was drunk on at least one of those occasions. On 1 September 1954, Petitioner submitted an additional statement in which he requested the opportunity to complete his term of enlistment, and stressed that he was not a homosexual.

f. In September 1954 Petitioner was processed for an administrative separation based on his misconduct as evidenced by his voluntary statement in which he admitted committing homosexual acts. On 9 September 1954 the commanding officer recommended a general discharge, stating, in part, as follows:

The activity is cognizant of the department's policy in the administrative handling of homosexual cases, however, due to Member's faithful service, prior good conduct, aptitude, and his willingness and desire to become a respected citizen, it is recommended that consideration be given to release him under a general discharge.

g. On 24 September 1954 the Chief of Naval Personnel (CNP) directed an undesirable discharge by reason of unfitness as evidenced by Petitioner's participation in homosexual acts. On 12 October 1954 Petitioner was so discharged. At that time, Petitioner's conduct and proficiency marks would ordinarily have warranted an honorable discharge.

h. Reference (b) sets forth the Department of the Navy's current policies, standards, and procedures for administratively separating enlisted service members. 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 service members who commit a homosexual act or acts. If separated, the service member'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 homosexual act is committed 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.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board now finds the existence of an injustice warranting corrective action.

Based on 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 the date of Petitioner's discharge, the Board concludes that it would be in the interest of justice to retroactively apply the standards of reference (b) to Petitioner's case.

Using the standards of reference (b), the Board finds that the record does not clearly reflect the presence of any of the foregoing aggravating factors, but it appears that one or more of Petitioner's homosexual acts occurred openly and in public view. However, the Board is also aware that even under current standards, the presence of an aggravating factor does not compel the issuance of an other than honorable discharge but only authorizes such a characterization. Accordingly, given that Petitioner's period of service of about 45 months was marred by only one minor disciplinary action, and since his homosexual activity apparently was not observed by others and Petitioner's judgment may have been clouded by intoxication, the Board concludes that relief in the form of recharacterization is appropriate. However, given that there was some degree of aggravation, the Board concludes that recharacterization to a general discharge is the most appropriate course of action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was issued a general discharge on 12 October 1954 vice the undesirable discharge actually issued on that date.

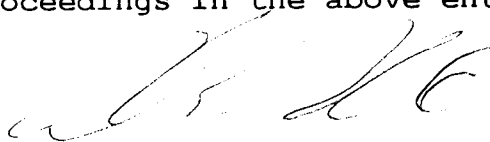
b. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

c. That, upon request, the Veterans Administration be informed

that Petitioner's application was received by the Board on 11 April 2002.

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 Regulation, 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.



For W. DEAN PFEIFFER
Executive Director