



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

SJN
Docket No: 09822-09
19 April 2010

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) JAG ltr JAG 131.1:TDK:cse, Ser 13/5631 of 18 Jan 79
(c) JAG ltr JAG 131.1:TDS:cse, Ser 13/5273 of 25 Jul 80
(d) JAG ltr JAG 131.1:TDS:cse, Ser 13/5274 of 25 Jul 80

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 United States Navy, filed enclosure (1) with this Board requesting, in effect, that his void enlistment of 6 October 1978 be changed.

2. The Board, consisting of Mr. [REDACTED], Mr. [REDACTED], and Mr. [REDACTED] reviewed Petitioner's allegations of error and injustice on 13 April 2010 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 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 and began a period of active duty on 11 October 1977 at the age of 18. His record reflects that he served for almost one year until 4 October 1978, when he was informed by the Chief of Naval Personnel that his enlistment may be void because of irregularities in its

execution. Given the option of being released, he elected to be separated. Subsequently, he was notified that he was being considered for an administrative separation by reason of defective enlistment due to void entry into the naval service. In this regard, Petitioner waived his right to consult with legal counsel and did not object to the separation. On 6 October 1978, Petitioner was issued a void enlistment due to being enlisted in error.

d. Pursuant to the Court of Military Appeals decision in United States v. Russo, 23 C.M.A. 511, 50 C.M.R. 650, 1 M.J. 134 (C.M.A. 1975) and United States v. Catlow, 23 C.M.A. 142, 48 C.M.R. 758 (1974) it was determined that individuals who fraudulently enlisted in the service with the complicity of their recruiters were insulated from trial by court-martial for any offenses they committed. However, they were members of the armed forces for all other purposes.

e. As indicated in reference (b), (c), and (d), the Judge Advocate General (JAG) has opined that a characterized discharge may be substituted for a void enlistment, but such a discharge cannot be characterized as being under other than honorable conditions. In essence, the discharge must be characterized as either honorable or general, as is warranted by the Petitioner's service record. In accordance with the references, the Board has routinely recommended corrective action for a void enlistment in cases of this nature, and such recommendations have been approved.

CONCLUSION:

Upon review and consideration of all the evidence of record and especially in light of JAG opinions, the Board concludes that Petitioner's request warrants favorable relief. In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

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 received an honorable discharge on 6 October 1978 vice the void enlistment actually issued on that date. Additionally, the issuance of a new Certificate of Release or Discharge from Active Duty (DD Form 214) and honorable discharge certificate is directed.

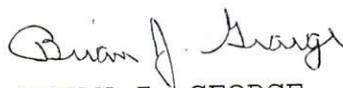
b. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

c. That any material directed to be removed from Petitioner's Naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's Naval record.

d. That upon request, the Department of Veterans Affairs be informed that Petitioner's application was received on 15 September 2009.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c) 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


BRIAN J. GEORGE
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.


W. DEAN PFEIFFER
Executive director