



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

SJN
Docket No: 06363-10
11 April 2011

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, in effect, that his undesirable discharge (UD) which he received on 13 June 1945 be upgraded.

2. The Board, consisting of Mr. Hicks, Ms. Zivnuska, and Mr. Dunn, reviewed Petitioner's allegations of error and injustice on 5 April 2011 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 21 April 1942. The Board found that based on the information currently contained in his record it appears that he served without incident until 1 May 1945, when he was charged with scandalous conduct tending to the destruction of good morals, after he and another servicemember were apprehended while committing a homosexual act. At that time he consented to accept a UD to avoid trial by court-martial. Subsequently, he was

administratively processed for separation by reason of unfitness due to participation in a homosexual act. His commanding officer forwarded his case and he received a UD by reason of unfitness. He was so discharged on 13 June 1945.

d. The Board found that available records indicate that his conduct average was 3.8., high enough under normal circumstances to warrant a better characterization of service. At that time, an average of 3.0 in conduct was required for an honorable discharge.

e. 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 concludes that Petitioner's request warrants favorable action.

It is clear that reference (b) does not mandate a discharge under other than honorable conditions, but only authorizes such a

characterization if an aggravating factor is found to exist. The Board concludes that based upon his overall record of service, the uncertainty of an aggravating factor, and current Department of the Navy policy as established in reference (b) and its radical departure from the policy which was in effect on 13 June 1945, the date of his discharge, it would be in the interest of justice to retroactively apply the standards of reference (b) to his case. Using the standards of reference (b), the Board finds that relief in the form of recharacterization is appropriate. The Board further concludes that with the absence of a complete record and uncertainty of an aggravating factor in this case, a general discharge is warranted.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was issued a general discharge on 13 June 1945 vice the UD actually issued on that date.

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

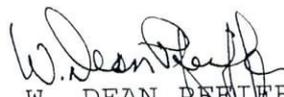
c. That, upon request, the Department of Veterans Affairs be informed that Petitioner's application was received by the Board on 14 June 2010.

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