



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

TAL
Docket No: 11463-10
3 August 2011

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

Subj: [REDACTED]

Ref: (a) 10 U.S.C. 1552
(b) JAG ltr JAG 131.1:TDK:cse, Ser 13/5631 of 18Jan79
(c) JAG ltr JAG 131.1:TDS:cse, Ser 13/5273 of 25Jul80
(d) JAG ltr JAG 131.1:TDS:cse, Ser 13/5274 of 25Jul80

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 Marine Corps, filed enclosure (1) with this Board requesting that his record be corrected to show a characterization of his service rather than a void enlistment, and that all of his rights be restored.

2. The Board, consisting of Mr. Clemmons, Mr. Hotopp and Ms. Barrow, reviewed Petitioner's allegations of error and injustice on 27 July 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 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 Marine Corps on 9 January 1976 at age 18 for four years. On 25 June 1976, he received nonjudicial punishment for unauthorized absence (UA) from his unit for a period of 46 days. On 25 July 1976, he was again UA

from his unit until he was arrested by civil authorities in Seminole, Oklahoma, on charges of possession of marijuana and having a concealed weapon. He was convicted of the concealed weapon charge and sentenced to one year probation. He was returned to military control on 10 March 1977, a period of 226 days of lost time.

d. Petitioner alleged that he was recruited from Helena State School for Boys. He was sent there by a juvenile court on October 31, 1975, for possession of marijuana, hitting a truck, having an open bottle of wine, fighting, missing school and breaking probation from Whitaker State Children's Home. The recruiter gave him the answers to the Armed Services Vocational Aptitude Battery (ASVAB) test to study and he was able to pass the test.

e. On 18 May 1977, Petitioner was separated with a void enlistment and assigned an RE-4 reenlistment code.

f. Pursuant to the Court of Military Appeals decision in *United States v. Russo*, 23 C.M.A. 511, 50 C.M.R. 650, 1 J.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. As indicated in references (b), (c), and (d), the Navy Judge Advocate General (JAG) has opined that since these individuals were members of the armed forces for all other purposes, they should have been separated in accordance with Department of Defense directive 1332.14 of 29 September 1976, which provided binding guidance on enlisted administrative separations. That directive did not allow administrative separation or release from active duty without discharge or credit for actual time served. Elsewhere in the references, JAG discusses the ramifications of backdating erroneous discharges and the possibility of issuing corrected discharges under other than honorable conditions. JAG essentially concludes 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, JAG states that the discharge must be characterized as either honorable or general, as is warranted by the individual's service record.

g. In accordance with references (b) through (d), the Board has routinely recommended the substitution of a general discharge for a void enlistment in cases of this nature, and such recommendations have been approved.

h. The Uniform Code of Military Justice was changed in 1979 to essentially state in most instances that individuals who

enlisted in the armed forces and accepted pay and allowances are subject to trial by court-martial, even if recruiter misconduct occurred during the enlistment process.

i. Character of service is based in part, on conduct marks assigned on a periodic basis. Petitioner's conduct mark average was 2.6. A 4.0 conduct mark average was required for a fully honorable discharge.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants favorable action.

The Board's decision is based upon the circumstances of the case and particularly the advisory opinions of the JAG as outlined in references (b) through (d). In view of Petitioner's record and conduct score of 2.6, the Board concludes that a general discharge is the type warranted by his service record.

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

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was issued a general discharge on 18 May 1977 vice the separation by reason of a void enlistment actually issued on that day.

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 21 October 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