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

ELP
Docket No. 415-98
10 May 1999

[redacted]

Dear [redacted]

This is in reference to your application for correction of your naval record pursuant to the provisions of Title 10, United States Code, Section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 21 April 1999. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinions furnished by the Enlisted Performance Branch, Bureau of Naval Personnel (Pers-832C) and the Deputy Assistant Judge Advocate General (JAG) for Administrative Law, copies of which are enclosed.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice

The Board found that you reenlisted in the Navy on 21 April 1975 for six years as an MSC (E-7). At the time of your reenlistment, you had completed more than 14 years of active service.

The record further reflects that you served without incident until 16 August 1976 when you were convicted by general court-martial of conspiracy to fraudulently enlist recruits, five specifications of false enlistment of recruits, four specifications of executing a false document, and four specifications of receiving money from individuals to effect their enlistment in the Navy. You were sentenced to confinement at hard labor for six months, forfeitures of $350 per month for six months, and reduction in rate to MS2 (E-5).

On 13 January 1997 the commanding officer (CO) advised the Bureau of Naval Personnel that you had been convicted by general court-martial but no punitive discharge had been adjudged. The CO noted that regulations provided for the discharge of individuals convicted by civil authorities, but were silent regarding discharge processing due to a court-martial conviction. Since it appeared that neither the Bureau of Naval Personnel Manual (BUPERSMAN) nor other regulations allowed for discharge under such conditions, the CO requested advice or instructions prior to your release from confinement. On 25 January 1997, the Chief of Naval Personnel (CNP) directed separation with the type of discharge warranted by the service record by reason of convenience of the government under BUPERSMAN Article 3850220. A separation code of "JFG" and an RE-4 reenlistment code were also directed.

On 4 February 1977 you submitted a letter to the CNP, via your CO, stating that you had been informally advised of the separation action by reason of convenience of the government. You asserted that you had received no formal notification of discharge nor was it your intention to be discharged with more than 16 years of active service. You requested that you be officially notified and advised of your rights. The CO forwarded your letter for such action deemed appropriate by CNP and noted that discharge had already been directed. The CO stated that your defense counsel had inquired into the status of discharge processing and was informed that you were being processed for convenience of the government. It was noted that although you were not entitled to legal counsel under the foregoing BUPERSMAN article, it was anticipated that your defense counsel would assist you in this matter. You were honorably discharged on 18 February 1977.

BUPERSMAN Article 3850220, then in effect, authorized the separation of enlisted personnel prior to the expiration of their enlistment for any one of 26 separate reasons. These reasons included substandard personal behavior which reflected discredit upon the service or adversely affected the member's performance of duty; and as a result of an action taken with respect to the decision or recommendation of the Naval Clemency and Parole Board, a Navy Review Board, a Navy Enlisted Performance Evaluation Board, or similar boards.

BUPERS Instruction 1900.2J promulgated instructions for preparation of the Certificate of Release or Discharge from Active Duty (DD Form 214) and listed the authorized reasons for discharge, separation and reenlistment codes shown on that form. The separation code "JFG" means that you were discharged "as a result of action taken with respect to decisions and recommendations of a Navy Clemency Board, Navy Review Board, Navy

Enlisted Performance Evaluation Board or similar board, or at the discretion of the Chief of Naval Personnel." Neither the reason for discharge nor the reenlistment code is entered on blocks 9c or 10 of your DD Form 214 because the foregoing instruction stated that no such entries would be made.

In its review of your application, the Board carefully considered your requests to reinstate you to MSC, set aside your discharge, and grant sufficient constructive service for transfer to the Fleet Reserve. In this regard, the Board noted the biographical sketch detailing your life prior to service and Navy career, your viewpoint of the circumstances leading up to your convictions and discharge, and the copy of the congressional hearings into recruiting malpractice by the Army two years after you were discharged.

The Board also particularly noted counsel's contentions to the effect that no regulations provided for the discharge of an individual for misconduct due to a conviction by court-martial; no legal basis existed for discharge by reason of convenience of the government since none of the criteria set forth in BUPERSMAN Article 3850220 applied to you; your due process rights were violated since you were not afforded adequate notice of the discharge processing or an opportunity to consult with counsel and respond to the proposed discharge; you were coerced into signing your discharge papers; and you should have been permitted to serve the remainder of your enlistment since the general court-martial did not sentence you to a punitive discharge. The Board also considered counsel's claim that after you were discharged, your last command was dismantled and the CO was relieved because of improper recruiting practices, yet you were the only service member to be charged with any improprieties. Counsel also argues that since the convening authority chose not to impose a punitive discharge, your administrative discharge for convenience of the government was simply a guise for additional punitive measures. Counsel asserts that although you received an honorable discharge, it had the effect of a dishonorable discharge since you were not recommended for reenlistment and received an RE-4 reenlistment code. The Board also noted that counsel's rebuttal to the JAG advisory opinion essentially reiterated the previous contentions.

Despite counsel's argument and contentions to the contrary, the Board substantially concurred with the findings and conclusions set forth in the JAG advisory opinion. In this regard, the Board concluded that CNP clearly had the authority to discharge you for convenience of the government. The Board also believed that you were actually discharged due to "substandard personal behavior which reflected discredit upon the naval service." The offenses of which you were convicted by general court-martial included the improper enlistment of recruits, executing false documents, and

taking money from individuals in return to enlisting them in the Navy. These actions certainly constituted personal behavior of a nature that brought great discredit upon the Navy, your command, and yourself. The fact that regulations at the time did not authorize your discharge by reason of misconduct did not preclude CNP from directing discharge for another reason authorized by regulations, specifically, convenience of the government. The Board also concluded that a clerical error occurred in identifying the specific reason for discharge but that the error was not legally significant. The Board further agreed with JAG that since all procedural requirements set forth in the BUPERSMAN were followed in processing you for separation, there was no violation of due process of law in your case.

Counsel's contention that you should not have been administratively discharged since the convening authority chose not to impose a punitive discharge is without merit. First, the convening authority could not impose a punitive discharge since it was not part of the court-martial sentence. The convening authority can only reduce, suspend, disapprove, or approve the sentence. Further, the fact that a punitive discharge was not imposed did not in any way preclude discharge through the administrative separation process. The Board concluded that administrative separation in your case was proper and appropriate given the serious offenses of which you were convicted by general court-martial.

The Board believed that you were fortunate to have been honorably discharged since under current regulations you could be discharged under other than honorable conditions by reason of misconduct due to commission of a serious offense. With an honorable characterization of service, no stigma attaches and you are eligible for all veterans benefits. A punitive discharge from a general court-martial would have resulted in considerable stigma, and may have resulted in ineligibility for some veterans' benefits.

Your contentions that your former command was subsequently dismantled and the CO relieved for improper recruiting practices is neither supported by the evidence of record nor by any evidence submitted in support of your application. You fail to satisfactorily explain the relevance of the congressional hearings enclosed with your application on your court-martial conviction or the circumstances which led to your discharge.

Based on all of the foregoing, the Board concluded that there is no basis for granting any of your requests for corrective action. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures

DEPARTMENT OF THE NAVY
BUREAU OF NAVAL PERSONNEL
WASHINGTON, D.C. 20370-5000

IN REPLY REFER TO

5420
Pers-832C
2 Jun 98

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR)

Via: BUPERS/BCNR COORDINATOR, PERS-00XCB

Subj: [redacted]

Encl: (1) BCNR File 00415-98
(2) Petitioner's Microfiche Record

1. The petition and naval records of subject petitioner have been reviewed relative to his request for removal of derogatory material, void discharge and authorize retirement benefits.

2. The review indicates that petitioner was convicted by a General Court-Martial for several recruiting related offenses. Subsequently his chain of command and the Chief of Naval Personnel determined that his services were no longer desired. Since a court-martial conviction was not covered under misconduct in the BUPERS Manual, the only other alternative method for an administrative discharge was to use Convenience of the Government at the discretion of the Chief of Naval Personnel. After a major revision to the MILPERSMAN in 1982, this method of discharge evolved into Best Interest of the Service which, to this date, does not authorize an administrative board for members being processed. Also during this period, courts-martial convictions were included under misconduct due to commission of a serious offense and became binding on administrative boards to make findings of misconduct. Although it may appear to the petitioner that he was not afforded due process, at that time the GCM conviction based on a full trial was sufficient justification to allow BUPERS authority to issue discharge without notice or further procedure. Therefore, favorable action on this petition is not recommended.

[redacted]
Technical Advisor
to the Head, Enlisted
Performance Branch

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON NAVY YARD
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON DC 20374-5066

IN REPLY REFER TO
5800
Ser 13/1MA12126.98
30 Nov 98

From: Deputy Assistant Judge Advocate General (Administrative Law)
To: Executive Director, Board for Correction of Naval Records

Subj: REQUEST FOR COMMENTS AND RECOMMENDATION IN THE CASE OF [redacted]

Ref: (a) Your ltr ELP Docket No. 415-98 of 13 Aug 98

Encl: (1) Legal analysis

1. Purpose. This responds to your reference (a) request for our opinion on whether the 1977 discharge of [redacted] comported with the requirements of due process and applicable regulations.

2. Short Answer. Yes. Because he received an honorable discharge, free from stigma or derogatory information, ex-MS2 [redacted] was not entitled to notice, hearing, or the opportunity to consult with counsel prior to his discharge. Additionally, the administrative separation action complied with all then-applicable regulations.

3. Discussion. Enclosure (1) contains a detailed analysis of this issue.

4. Point of contact. My action officer on this issue is LCDR [redacted], JAGC, USN, who may be reached at (703) 604-8212.

[redacted]

LEGAL ANALYSIS

1. Issue. Whether the 1977 discharge of [redacted], [hereinafter "Petitioner"] comported with the requirements of due process and applicable regulations?

2. Short Answer. Yes. Because he received an honorable discharge, free from stigma or derogatory information, ex-MS2 [redacted] was not entitled to notice, hearing, or the opportunity to consult with counsel prior to his discharge. Additionally, the administrative separation action complied with all then-applicable regulations.

3. Background. Petitioner, a chief petty officer, was convicted by general court-martial on 16 August 1976 of several charges related to recruiting misconduct. His sentence included reduction to pay grade E-5, forfeitures, and confinement for six months, but did not include a punitive discharge. While serving his sentence of confinement, he was processed for administrative separation. At that time, applicable regulations did not provide for separation due to misconduct for a member who was convicted by a court-martial. Thus, Petitioner's command requested guidance regarding separation processing from the Chief of Naval Personnel. On 25 January 1977, the Chief of Naval Personnel directed that Petitioner be separated by reason of convenience of the government, with "JFG" as the separation code. Additionally, the Chief of Naval Personnel specified that Petitioner receive a type warranted by service record discharge and be assigned an "RE-4" reenlistment code. Petitioner was honorably discharged from the Navy on 18 February 1977, having completed over 16 years of service.

4. Discussion. Petitioner claims that his discharge from the Navy was illegal because he was not afforded due process of law and because there was no proper regulatory basis for such discharge.

a. Due process. Petitioner claims that because he was not afforded notice of the proposed action and given an opportunity to respond and seek counsel,[1] he was denied due process of law. The Constitution mandates that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law."[2] Thus, only deprivations of "life, liberty, or property" trigger the Constitutional protections of due process. In this regard, Petitioner was not deprived of any interest that would trigger due process protections. Because a service member "does not have a right *per se* to remain in service until the expiration" of a current enlistment, no member has a property interest in continued

[1] We note that Petitioner, in his letter of 4 February 1977, acknowledged that he received notice that he was to be separated from the Navy and stated that he objected to such action. We also note that his detailed defense counsel was aware of such action and was available to assist him. Nonetheless, based on applicable law, such facts need not be considered in the disposition of this case.
[2] U.S. CONST. amend. V.

ENCLOSURE (1)

military service.[3] While some courts have found a "reputation" liberty interest in certain types of military discharges, such a finding requires that the discharge carry a "stigma or derogatory connotation to the public at large."[4] Because Petitioner received an honorable discharge, no stigma attached to his discharge. Petitioner claims that because an "RE-4" code, preventing his future enlistment, was assigned to him and because he was discharged before the expiration of his term of service, "the discharge carried additional stigma."[5] This claim is without merit and "can be summarily rejected."[6] In *Keef*, the Court of Claims stated that because "Congress has explicitly provided for a discharge before the expiration of an enlistment term" the court could not "conclude that early discharges must be preceded by notice and a hearing."[7] The court also addressed a bar to reenlistment by stating that "standing alone, the mere fact that [a member] cannot reenlist is not a stigma."[8] Accordingly, because Petitioner's discharge was honorable and did not contain any stigmatizing or derogatory information, he was not deprived of a liberty or property interest and was not entitled to the protections of Constitutional due process.

b. Regulatory provisions. It is axiomatic that an agency is bound by its regulations[9] and that administrative separations may not violate applicable regulations to the prejudice of a member. In this case, applicable regulations were followed. Petitioner was processed for separation by reason of convenience of the Government, under section 3850220 of the Bureau of Naval Personnel Manual (BUPERSMAN). Subparagraph 1k of this section provides the specific basis applicable to Petitioner's separation. This subparagraph states that a member may be separated based on "[s]ubstandard personal behavior which reflects discredit upon the service or adversely affects the member's performance of duty." Because Petitioner had been found guilty beyond a reasonable doubt and convicted by general court-martial of several violations of the Uniform Code of Military Justice, there was adequate factual support for this basis of separation. Accordingly, separation was not arbitrary and capricious, as Petitioner alleges. While subparagraph 1o was identified as the reason for separation on Petitioner's DD214, this clerical error is not legally significant. The reason for this is that the "basis for discharge as stated ... is paramount" and that "any subsequent incorrect designations ... are inconsequential."[10] In Petitioner's case, the 25 January 1977

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[3] Birt v. United States, 180 Ct. Cl. 910 (1967).
[4] *Id.*
[5] Petitioner's Brief at p. 9. Petitioner also claims that his discharge "had the effect of being Dishonorable" and constituted "additional punitive punishment." Petitioners brief at p. 3-4.
[6] Keef v. United States, 185 Ct. Cl. 454 (1968).
[7] *Id.*
[8] *Id.*
[9] *See, e.g.*, Service v. Dulles, 354 U.S. 363 (1957).
[10] Keef, 185 Ct. Cl. 454.

message from the Chief of Naval Personnel identified the correct general reference for separation. Subsequent clerical error does not invalidate the initial decision. Finally, action to separate Petitioner complied with all applicable regulatory provisions. Because Petitioner received an honorable discharge, he had no regulatory right to notice and hearing or to consult with counsel. The Navy did not violate any then-applicable regulations when it discharged Petitioner.

c. Regulatory consistency. Another issue identified is whether the separation provisions of the BUPERSMAN were consistent with DOD Directive 1332.14 of 29 December 1976. Paragraph B14 of enclosure (2) to DOD Directive 1332.14 states that the Secretary of a Military Department may direct the separation of an enlisted member when "in the best interest of the service." This provision is an expression of the authority of a Service Secretary to direct separation. It is not applicable to Petitioner's case. Because Petitioner was discharged by reason of substandard personal behavior, he was not discharged on the basis of "best interest of the service." The applicable portion of DOD Directive 1332.14 is paragraph B13 of enclosure (2), which provides for discharge under "such other reasons as may be prescribed by the Secretary of the Military Department concerned." Because "substandard personal behavior" was properly prescribed in a Navy regulation as a basis for administrative separation, there is no inconsistency or conflict between DOD and Navy regulations. Separation of Petitioner was consistent with the DOD Directive.

d. Timeliness of petition. Because Petitioner waited over 20 years to petition BCNR for relief, timeliness of the petition is obviously in question. A limitations period is established in the statutory section authorizing correction of military records. This section states that "[n]o correction may be made ... unless the claimant or his heir or legal representative files a request for the correction within three years after he discovers the error or injustice."[11] Case law has established that, in discharge cases, the period of limitations begins to run on the date of discharge.[12] Commencing the period of limitations on the date of discharge is appropriate because all facts are established and known or reasonably available. In his DD Form 149, Petitioner claims a date of discovery as 19 November 1997. In his statement, Petitioner states that he "only recently" became "aware of the kind of discharge ... [and his] right to request that the record be corrected." In this regard, "discovery of an error or injustice" should not be confused "with discovery of one's legal rights and remedies."[13] Because Petitioner knew that he had been discharged

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[11] 10 U.S.C. § 1552(b).
[12] *See* Ortiz v. Secretary, 842 F.Supp. 7, 10-11 (D.D.C. 1993). *See also* Kendall v. Army Board for Correction of Military Records, 996 F.2d 362, 364-5 (D.C. Cir. 1993).
[13] McFarlane v. Secretary, 867 F.Supp. 405, 413-4 (E.D. Va. 1994).

and knew of the circumstances of such discharge, discovery of the alleged error or injustice occurred when Petitioner was discharged on 18 February 1977. Petitioner may claim that he only recently obtained copies of relevant documents. Such a claim is not material: he was aware of the basic facts and compilation of supporting material does not constitute "discovery" of error. The period of limitations commences upon "discovery of the facts underlying" the claim and not upon "discovery of the law."[14] While there is a statutory provision to excuse untimely filing "in the interest of justice,"[15] Petitioner has provided no evidence of circumstances which would warrant such excusal. Accordingly, this petition may be denied on the ground that it was not filed within the limitations period.

5. Conclusion. Because Petitioner waited over 20 years after his discharge and discovery of the alleged error or injustice to file his petition for correction of his records, his petition may be denied as untimely. However, even if BCNR elects to consider the merits of his petition, no relief is warranted. Petitioner received an honorable discharge, free from stigma. Accordingly, he was not deprived of a liberty or property interest and received all Constitutional process that was due. Additionally, Petitioner's separation by reason of substandard personal behavior was factually supported by the general court-martial conviction, which proved his misconduct beyond a reasonable doubt. Finally, separation action complied with all applicable regulatory provisions and did not violate law or policy. Accordingly, Petitioner's request should be denied.

[14] *Id.*
[15] 10 U.S.C. § 1552(b).