



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

TJR  
Docket No: 7049-00  
9 June 2001

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

Encl: (1) Case summary  
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the United States Navy, applied to this Board requesting, in effect, that his naval record be corrected by upgrading his discharge, changing the narrative reason for separation, and by removing all references to a period of unauthorized absence (UA).

2. The Board, consisting of Messrs. Pfeiffer, Cooper and Ensley, reviewed Petitioner's allegations of error and injustice on 5 June 2001 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 Petitioner's application 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 13 September 1994. He then served without disciplinary incident until 10 June 1997, when he received nonjudicial punishment (NJP) for absence from his appointed place of duty; a 12 day period of UA, from 15 to 26 March 1997; and two specifications of failure to obey a lawful order, specifically, failure to properly check out on leave and failure to shave. In addition to the Court Memorandum (P.601-7R)

documenting the NJP, the record contains a Record of Unauthorized Absence (P.601-6R) to document the 12-day period of UA. Petitioner's Certificate of Release or Discharge from Active Duty (DD Form 214) also reflects that this period of UA was charged as time lost.

d. On 15 July 1997 Petitioner received an enlisted performance evaluation which indicated that he had failed a semi-annual physical readiness test (PRT). The evaluation also mentioned the recent NJP.

e. Petitioner was administratively separated with a general discharge on 31 July 1997. The record does not contain a complete separation package, but does contain conflicting documentation regarding the reason for separation. The DD Form 214 states that the reason for separation was misconduct due to the commission of a serious offense. However, the record also contains a letter from the separation authority directing discharge by reason of failure to meet physical standards with Petitioner's social security number, but the name of another Sailor.

f. In 2000 the Naval Discharge Review Board (NDRB) denied Petitioner's request to recharacterize the general discharge. NDRB's decisional document notes the reason for separation as weight control failure due to failure to meet the prescribed physical readiness standards.

g. With his application, Petitioner has submitted a leave request/authorization form (NAVCOMPT 3065) which shows that his request for leave from 15 to 26 March 1997 was routed through the chain of command and approved on 13 March 1997.

h. The Board received an advisory opinion (AO) from the Navy Personnel Command, Pers-832C, which recommends that Petitioner's requests for correction of his naval record be denied due to insufficient documentation. The AO notes, in part, as follows:

.... Petitioner's records have been reviewed relative to his request to remove lost time and change his characterization of service to honorable.

The review reveals that Petitioner did, in fact, have an approved leave chit as of 13 March 1997. The leave chit shows a check out time with a signature of a BUCR as the OOD. Return from leave is undocumented. However, the NAVPERS 1070/607 specifically documents VUCMJ Art. 92 for failing to properly check out on leave. The NAVPERS 1070/606 specifically records 12 days lost time for the period in question. I believe that the lost time is valid.

It is unfortunate that the administrative separation package is not in the record. In speculation, the Petitioner could have been and probably was processed for misconduct due to commission of a serious offense and PRT failure. The DD-214 reflects an SPD code of GKQ indicating that an administrative board recommended the general discharge characterization for misconduct due to commission of a serious offense. Unless Petitioner can provide a copy of the administration separation package to the contrary, favorable action on this petition is not recommended.

i. The military courts have held that if an individual is authorized leave but fails to follow local check-out procedures he or she may be guilty of failure to obey a lawful order, but not of UA. *United States v. Wheeler*, 21 CMR 456, 457 (ABR 1956); *United States v. Hale*, 20 USCMA 150, 42 CMR 342, 349 (1970); *United States v. Dukes*, 30 MJ 793, 794 (NMCMR 1990).

j. Applicable directives state that an individual discharged by reason of misconduct due to commission of a serious offense is normally discharged under other than honorable conditions, but may receive a general discharge. Service members discharged due to failure to meet physical standards may receive either an honorable or a general discharge.

k. An individual may be discharged for best interest of the service (BIOTS), in accordance with the plenary authority of the Secretary of the Navy, if discharge is appropriate but none of the established reasons for separation fit the circumstances of the case. A servicemember separated for this reason receives an honorable or general discharge.

#### CONCLUSION:

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

Concerning the UA of 15 to 26 March 1997 shown on the P. 601-6R, the NJP and the DD Form 214, the Board notes the document Petitioner has submitted which shows that he was authorized leave for this period. It appears to the Board that he was deemed to be UA for this period because he neglected to properly check out on leave. However, as shown by the applicable case law, this failure does not constitute UA if the individual was authorized leave. Therefore, the Board concludes that all documentation referencing this period of UA should be removed from the record.

After reviewing the relevant evidence of record, the Board has no idea whether Petitioner was separated by reason of misconduct or due to failure to meet physical standards. The record contains

documentation which could arguably support either reason for separation. Accordingly, in the absence of a complete separation package and because of the conflicting documentation in the record, the Board concludes that the narrative reason for separation should be changed to best interest of the service. In this regard, given the corrective action to the NJP, the Board has some doubts as to whether a separation for misconduct would now be appropriate.

Concerning the characterization of service, the Board notes that Petitioner received NJP and failed at least one PRT. Accordingly, since a general discharge is authorized when an individual is separated due to BIOTS, the Board concludes that this characterization is appropriate despite the change in the reason for separation, and declines to upgrade Petitioner's discharge to fully honorable.

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 by removing all references to the period of UA from 15 to 26 March 1996, including but not necessarily limited to the following:

- 1) the P.601-6R dated 28 July 1997;
- 2) from the P.601-7R dated 10 June 1997, "Spec 2: UA fm NMCB FOUR fm 97MAR15 until 97MAR26";
- 3) from the DD Form 214, block 29: "TL: 97MAR15 - 97MAR26";
- 4) from the NDRB decisional document, the entry on page 3, "970315: Applicant on unauthorized absence from NMCB FOUR at Port Hueneme, CA;" and the entries on page 4, "970326: Applicant surrendered on board NMCB FOUR at Port Hueneme," and "970610: Spec 2: UA from NMCB Four from 970315 to 970326 [12days/s]".

b. That the record be further corrected to show that on 31 July 1997 Petitioner received a general discharge by reason of best interest of the service vice the discharge for misconduct actually issued on that date.

c. That no further relief be granted.

d. 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.

e. 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.

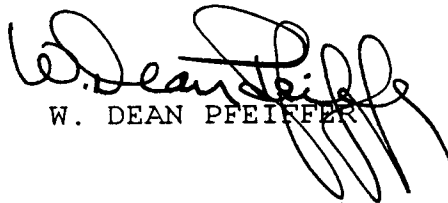
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN  
Recorder



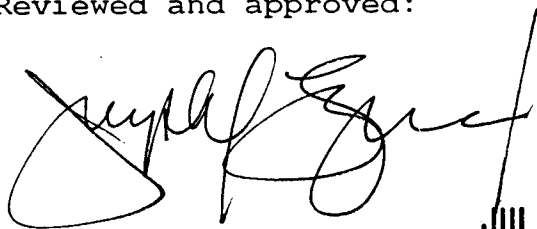
ALAN E. GOLDSMITH  
Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.



W. DEAN PFEIFFER

Reviewed and approved:



JUL 16 2001

**JOSEPH G. LYNCH**  
Assistant General Counsel  
(Manpower And Reserve Affairs)