



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

TRG
Docket No: 873-01
3 January 2002

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) Title 10 U.S.C. 1552

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

1. Pursuant to the provisions of reference (a), Petitioner, a commissioned officer in the United States Marine Corps Reserve filed an application with this Board requesting that his record be corrected to show that he was retained on active duty until he qualified for retirement, vice being released from active duty on 24 August 1999.

2. The Board, consisting of Mr. Pfeiffer, Mr. Whitener and Mr. McPartlin, reviewed Petitioner's allegations of error and injustice on 18 December 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. Petitioner's application was filed in a timely manner.

c. Petitioner, a LTCOL (O-5) in the Marine Corps Reserve, was issued Active Duty for Special Work (ADSW) orders commencing on 19 June 1999 and ending on 31 December 1999. These orders were erroneously issued without the required waiver provisions, limiting the right to claim the 18-year sanctuary provided by 10 U.S.C. 12686(b). Subsequently, Headquarters Marine Corps (HQMC) discovered that as of 19 June 1999, Petitioner had accumulated 17 years, 10 months and 4 days of active service. Therefore, the ADSW orders were modified to include the waiver of sanctuary protection, which Petitioner refused to sign. Since he refused to sign the waiver, the ADSW orders were terminated effective 24 August 1999.

d. When Petitioner learned that his orders were being terminated, he pointed out that his Career Retirement Credit Report (CRCR) was incorrect in that it did not include an approximately 80 day period of active duty training he served while assigned to the Platoon Leaders Course prior to being commissioned in 1977. Since this 80 day period put him over 18 years of active duty, he requested sanctuary and retention on active duty to qualify for retirement. However, as indicated, Petitioner was released from active duty on 24 August 1999.

e. On 2 March 2000 HQMC informed a Congressman that since Petitioner had already been released from active duty, he could no longer be granted sanctuary since he was serving in the Individual Ready Reserve (IRR). HQMC recommended that Petitioner apply to this Board if he believed that he was erroneously denied the statutory 18 year sanctuary.

f. Attached to enclosure (1) are three advisory opinions from HQMC. On 19 March 2001, the Separation and Retirement Branch (MMSR) provided a CRCR which shows over 18 years of active duty. Since Petitioner did not consent to release from active duty MMSR believes that he should have been retained on active duty until he became eligible for a regular retirement. However, MMSR deferred to the Staff Judge Advocate (SJA) and Reserve Affairs Policy division (RAM) for further comment.

g. In an advisory opinion, dated 13 April 2001, RAM stated, in part, as follows:

... As set forth in the enclosures, there are circumstances surrounding (Petitioner's) orders that may bear on the applicability of (Petitioner's) claim of sanctuary. First those orders, upon which he relies for his sanctuary claim, did not comply with existing Marine Corps policy. Those orders did not contain the 10 U.S.C. § 12688(b) sanctuary waiver Second (Petitioner's) ability to immediately point out that 80 days of Platoon Leaders Class (PLC) active duty training from 22 years earlier were not included in his Career Retirement Credit Report (CRCR) causes one to pause, especially when coupled with the lack of the required sanctuary waiver. Consequently, there is a question as to whether (Petitioner's) own acts and conduct contributed to or caused the circumstances giving rise to this sanctuary claim.

... The issues of (1) whether (Petitioner) deliberately maneuvered himself into a position of sanctuary whether his claim of sanctuary is

vitiated by those acts are not under the cognizance of this Division. We defer to the Staff Judge Advocate for comment on and resolution of those issues.

... If the Staff Judge Advocate should determine that (Petitioner) is entitled to sanctuary as a matter of law, then we request return of this matter to comment on (Petitioner's) request for retirement credit. If the Staff Judge Advocate should determine that (Petitioner) is not entitled to sanctuary as a matter of law, then we request his petition be denied.

h. Subsequently, the SJA to the Commandant of the Marine Corps has provided an advisory opinion which analyzes the issues as follows:

.... (1) Petitioner has met the requirements for sanctuary. On the date he was released from active duty, he had over 18 years service, and should not have been ordered off active service. ... Reservists on active duty who are within 2 years of becoming eligible for retired pay "may not be involuntarily released from active duty before he becomes eligible for that pay, unless the release is approved by the Secretary." There is no evidence the Secretary approved a release in his case.

(2) Absent evidence that Petitioner somehow defrauded the Marine Corps, there is no provision in law or regulation that prohibits counting his 78 days of PLC training under these circumstances. The pertinent facts are simply that Petitioner served over 18 years active duty. Although the attached correspondence indicates a variety of suggestions and innuendo that Petitioner "sandbagged" the Marine Corps with the late revelation that he had 78 days of active service, no investigation ever made that case.

(3) In fact, Petitioner's command and higher headquarters had numerous opportunities to fully investigate this matter, but apparently chose not to do so. Instead, he was released from active duty and perfunctorily told to petition the Board for Correction of Naval Record if he disagreed with the Marine Corps findings.

(4) Petitioner's alleged failure to "certify" his CRCR is not a bar to sanctuary. While Reserve regulations require Reservists to certify and correct inaccuracies in their CRCR, the Marine Corps

has been unable to show whether Petitioner did or did not do this in the annual audit process. Again this was not investigated, and even if it was, we doubt whether a U. S. Federal Court would place the onus of record keeping upon the Petitioner, vice that of the government agency.¹

(5) The validity of the waiver provision does not apply in this case. Sanctuary was already attained by the time Petitioner re-signed his orders with the waiver provision.²

(6) In sum, had the Marine Corps kept accurate record of (Petitioner's) PLC active duty time, his records would have clearly shown he entered sanctuary before he was threatened with termination of his orders on 17 August 1999. Interestingly, (Petitioner) was released from active duty - and not reinstated even after the PLC active duty time error was verified. At that juncture, it seems there was an obligation to pursue one of two courses of action: reinstatement or fully investigate for fraud. Neither occurred.³ Instead, Petitioner was forced to leave active service - when the facts more than likely indicate he should have been on the Marine Corps active duty list for the past 2 years.

¹ Should this go to court, the Government's case would be hindered by numerous administrative missteps. First, Petitioner was ordered to ADSW without the benefits of reviewing his entire service record. Second, he was ordered to ADSW for 196 days, thus precluding applicability of the statutory waiver provisions. Third, there was no waiver provision in his orders. Fourth, when the error was corrected the waiver was reinserted and the orders changed to 180 days. Finally, the legality of waiver provisions, in general, is questionable absent a Secretarial delegation. In sum, given the Government's many and varied missteps, it would be difficult for them to cite ... Petitioner's misfeasance as a basis to deny relief.

² (Regulations) permit Reservists to waive sanctuary claims. Doing this requires insertion of the waiver into ADSW orders of Reservists who have over 17 years of active duty. We note, however, ... that the Secretary has not delegated waiver authority to the U. S. Marine Corps - which raises questions whether waivers (as presently implemented) are enforceable when tested by a Federal Court. Since Petitioner already reached sanctuary on 17 August, we will not comment on the sufficiency of the modified ADSW orders (that included a waiver provision).

³ In December 1999, we recommended investigating this case.

(7) Under these circumstances, it would be unjust to force (Petitioner) to return to active duty for approximately 2 years to earn an active duty 20-year retirement, since that amount of time has already expired from the date of his erroneous release on 24 August 1999.

The SJA to CMC concludes that Petitioner was entitled to sanctuary and recommends that the Board grant active duty credit, for retirement purposes, from 24 August 1999 through the date Petitioner was first eligible for an active duty 20-year retirement.

i. After reviewing the foregoing advisory opinion, the Reserve Affairs Division requested that the Board defer its decision until an investigation could be conducted into the circumstances surrounding (Petitioner's) submission of his 22 year old Platoon Leaders Class orders to substantiate his sanctuary claim.

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants favorable action. The Board adopts the analysis and recommendation made in the advisory opinion from the SJA to CMC. Further, the Board especially agrees with that portion of this advisory opinion to the effect that any investigation should have been conducted at an earlier date. Therefore, the Board declines to further defer its consideration of the case, as recommended by RAM.

Therefore, the Board concludes that Petitioner's record should be corrected to show that he was not released from active duty on 24 August 1999 but continued to serve until the date he first became eligible for a 20 year active duty retirement. This date is estimated to be 1 July 2001, but the actual date will be computed by HQMC and adjusted as appropriate.

That this Report of Proceedings be filed in Petitioner's naval record so that all future reviewers will understand his retired status.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was not released from active duty on 22 August 1999 but continued to serve on active duty until the earliest date he qualified for 20 year active duty retirement. The actual date of retirement will be computed by HQMC.

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

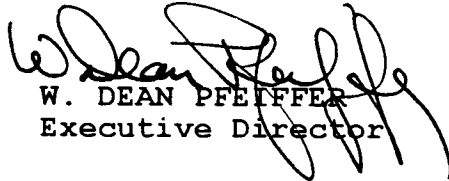
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



ALAN E. GOLDSMITH
Acting Recorder

5. 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 Regulations, 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