



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

TJR
Docket No: 6906-01
20 March 2002

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

Subj: REVIEW OF NAVAL OF RECORD [REDACTED]

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

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 that the characterization of his discharge be changed.

2. The Board, consisting of Messrs. Frankfurt, Geisler, and Mackey, reviewed Petitioner's allegations of error and injustice on 12 March 2002 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 30 July 1940 at the age of 18. He then served without incident for more than two years and was advanced in rank to CPL .

d. On 24 August 1942 Petitioner was arrested by civil authorities and charged with sexual perversion in that he was observed participating in oral sex with another man in a parked car at about 2100 hours . On 18 September 1942, the foregoing charge was dismissed because Petitioner was allegedly under the

influence of alcohol to an extent that he was not responsible for his actions.

e. Subsequently, Petitioner was processed for an administrative separation by reason of moral turpitude/sexual perversion. During the processing of his case, it was noted that when apprehended, neither Petitioner nor his co-actor indicated that he was drunk, let alone that he was intoxicated to a degree that he was not responsible for his actions. On 21 January 1943 he received an undesirable discharge. At the time of his discharge Petitioner's conduct average of 4.8 was higher than the average mark of 4.0 which was required for a fully honorable characterization of service.

f. 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.

g. Petitioner's military records fail to disclose the presence of any of the aggravating circumstances which would warrant the issuance of an other than honorable discharge under the provisions of reference (b).

CONCLUSION:

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

The Board notes the nature of Petitioner's indiscretion and concludes that given the circumstances of the case, his homosexual activity might be deemed to have occurred openly and in public view. However, the activity occurred in a parked car after dark, and it does not appear that he or his co-actor intended that their homosexual activity be observed. The Board further notes that Petitioner had no disciplinary infractions during his entire period of service, and was advanced in rank. Based on the foregoing, the Board finds that despite the arguable presence of an aggravating factor, no useful purpose is served by continuing to characterize Petitioner's service as having been under other than honorable conditions. Accordingly, the Board concludes that relief in the form of recharacterization of Petitioner's discharge to general, under honorable conditions, is now appropriate.

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 to show that he received a general discharge on 21 January 1943 vice the undesirable discharge 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 Veterans Administration be informed that Petitioner's application was received by the Board on 30 August 2001.

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 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.



For W. DEAN PFEIFFER
Executive Director