



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

CRS
Docket No: 3886-03
12 August 2003

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
(b) SECNAVINST 1910.4B

Encl: (1) DD Form 149 w/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, in effect, that his naval record be corrected to show a more favorable type of discharge than the undesirable discharge issued on 2 July 1964.

2. The Board, consisting of Ms. Nofziger, Mr. Dunne, and Mr. Swarens, reviewed Petitioner's allegations of error and injustice on 9 July 2003 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 timely manner, it is in the interest of justice to waive the statute of limitations and review the application on its merits.

c. Petitioner reenlisted in the Marine Corps after more than three years of prior active service.

d. On 19 February 1963 Petitioner was convicted by a special court-martial of stealing a government ambulance, willfully damaging the ambulance, driving in a reckless manner, and drunk and disorderly conduct. On 21 January 1964 he was convicted by

civil authorities of reckless driving. On 31 March 1964 he received nonjudicial punishment (NJP) for absence from his appointed place of duty.

e. On 8 May 1964 Petitioner made a statement to the effect that during his service, he had committed homosexual acts with civilians. Subsequently, he received a second NJP for absence from his appointed place of duty.

f. On 9 June 1964, after Petitioner was advised of administrative separation action and waived his right to an administrative discharge board, the commanding officer recommended that he be separated with an undesirable discharge by reason of unfitness due to homosexual acts. After review by the discharge authority, the recommendation for separation was approved and Petitioner was discharged with an undesirable discharge on 2 July 1964.

g. Character of service is normally based on conduct and proficiency averages, both of which are computed from marks assigned during periodic evaluations. Petitioner's conduct and proficiency averages were 3.5 and 4.0, respectively. The minimum average marks for a fully honorable characterization of service at the time of Petitioner's separation were 4.0 in conduct and 3.8 in proficiency.

h. Reference (b) sets forth the Department of the Navy's current policies, standards and procedures for administratively separating enlisted servicemembers. 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 servicemembers who commit a homosexual act or acts. If separated, the servicemember'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 individuals committed a homosexual act 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.

i. 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. Based upon Petitioner's overall record of service and current Department of the Navy policy as established in reference (b) and its radical departure from the policy which was in effect on 2 July 1964, the date of Petitioner's discharge, the Board concludes that it would be in the interests of justice to retroactively apply the standards of reference (b) to Petitioner's case. Given Petitioner's final conduct and proficiency averages, the Board concludes that relief in the form of recharacterization to a general discharge is 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 was issued a general discharge by reason of unfitness on 2 July 1964 vice the undesirable discharge actually issued on that date.

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 8 May 2003.

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