



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

REC
Docket No: 03698-10
9 February 2011

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) JAG ltr JAG 131.1:TDK:cse, Ser 13/5631 of 18Jan79
(c) JAG ltr JAG 131.1:TDS:cse, Ser 13/5273 of 25Jul80
(d) JAG ltr JAG 131.1:TDS:cse, Ser 13/5274 of 25Jul80

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 United States Marine Corps, filed enclosure (1) with this Board requesting, in effect, that his record be corrected to show a characterization of his service rather than a void enlistment. He received the void enlistment on 21 March 1977.

2. The Board, consisting of Mr. [REDACTED] and Mr. [REDACTED] reviewed Petitioner's allegations of error and injustice on 9 February 2011 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. 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.

b. Petitioner enlisted in the Marine Corps on 5 March 1976, and began a period of active duty on 28 May 1976.

c. On 9 November 1976, he received nonjudicial punishment (NJP) for being in an unauthorized absence (UA) status for three days. On 29 November 1976, he commenced a period of UA which lasted 43 days. He had one additional period of UA which lasted one day. On 25 February 1977, his commanding officer requested to void his enlistment on the grounds that it was discovered that prior to his enlistment he pled guilty to second degree burglary. However, on 12 March 1976, he was sentenced to one year probation, 10 days in county jail, and restitution. His recruiter was informed of the situation and negotiated with his parole officer for an early release of his probation. Under the assumption that he was released, his recruiter shipped Petitioner to recruit training. However, on 11 June 1976, the court dismissed his remaining probationary period and dismissed the charges. On 21 March 1977, Petitioner was discharged with a void enlistment. His final conduct average was 1.5, which is not sufficient for an honorable characterization of service.

d. Pursuant to the Court of Military Appeals decision in United States v. Russo, 23 C.M.A. 511, 50 C.M.R. 650, 1 J.J. 134 (C.M.A. 1975) and United States v. Catlow, 23 C.M.A. 142, 48 C.M.R. 758 (1974), it was determined that individuals who fraudulently enlisted in the service with the complicity of their recruiters were insulated from trial by court-martial for any offenses they committed. However, they were members of the armed forces for all other purposes. As indicated in references (b), (c), and (d), the Navy Judge Advocate General (JAG) has opined that since these individuals were members of the armed forces for all other purposes, they should have been separated in accordance with Department of Defense directive 1332.14 of 29 September 1976, which provided binding guidance on enlisted administrative separations. That directive did not allow administrative separation or release from active duty without discharge or credit for actual time served. Elsewhere in the references, JAG discusses the ramifications of backdating erroneous discharges and the

possibility of issuing corrected discharges under other than honorable conditions. JAG essentially concludes that a characterized discharge may be substituted for a void enlistment, but such a discharge cannot be characterized as being under other than honorable conditions. In essence, JAG states that the discharge must be characterized as either honorable or general, as is warranted by the individual's service record.

e. In accordance with references (b) through (d), the Board has routinely recommended the substitution of a general discharge for a void enlistment in cases of this nature, and such recommendations have been approved.

f. The Uniform Code of Military Justice was changed in 1979 to essentially state in most instances, that individuals who enlisted in the armed forces and accepted pay and allowances are subject to trial by court-martial, even if recruiter misconduct occurred during the enlistment process.

CONCLUSION:

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

The Board's decision is based upon the circumstances of the case and particularly the opinions of the JAG as outlined in references (b) through (d). In view of Petitioner's disciplinary record and periods of UA, the Board concludes that a general discharge by reason of misconduct is the type warranted by his service record.

In view of the foregoing, the Board finds the existence of an error and 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 misconduct on 21 March 1977, vice being issued a void enlistment on the same day.

b. 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.

c. 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. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c) 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

BRIAN J. GEORGE
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.



W. DEAN PFEIFFER
By direction