



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

ELP

Docket No. 2329-00

2 March 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) 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, applied to this Board requesting, in effect, that his record be corrected by upgrading his general discharge, changing the reason for discharge to expiration of enlistment, and removing all derogatory information.

2. The Board, consisting of Messrs. Pfeiffer, Ensley, and Bishop reviewed Petitioner's allegations of error and injustice on 22 February 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 to the Board 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 22 July 1982 for four years at age 21. The record reflects that he was advanced to LCPL (E-3) and served for 21 months without incident. However, during the four month period from April to August 1984, he received two nonjudicial punishments (NJP) for use of marijuana and disrespect. On 16 April 1984 he was counseled on the use of illegal drugs and his frequent involvement with military authorities.

d. The record reflects that on 19 November 1984, Petitioner was transferred from the 3rd Tank Battalion at 29 Palms, CA and reported the following day to the 9th Communication Battalion at Camp Pendleton, CA. On 29 November 1984, a Navy drug laboratory reported to the commanding general at 29 Palms that Petitioner's urine sample, received on 23 November 1984, had tested positive for marijuana. The specific date of the urinalysis is not shown in the record. Out of the 76 urine samples submitted, the two which tested positive were assigned consecutive accession numbers.

e. On 19 December 1984, Petitioner received his third NJP for use of marijuana while at his previous command. Punishment imposed consisted of reduction in rank to PVT (E-1), forfeitures of \$200 per month for two months, and 30 days of restriction and extra duty. The NJP authority suspended the restriction for a period of 30 days. On the following day, Petitioner was referred for a dependency evaluation and the commanding officer's endorsement indicated Petitioner had potential for further service. Petitioner was determined by a medical officer to be non-dependent. Petitioner denied use of marijuana or any use of drugs since his NJP in April 1984. He desired to remain in the Marine Corps to help support his mother. During the month of January 1985, Petitioner provided five urine samples, the results of which are not documented in the record.

f. On 22 January 1985, Petitioner was notified that he was being processed for discharge under other than honorable conditions by reason of misconduct due to drug abuse. He was advised of his procedural rights and elected present his case to an administrative discharge board. (ADB). On 28 January 1985 the commanding general directed that the ADB be conducted expeditiously, giving due consideration to counsel's need to prepare for Petitioner's case. Thereafter, the company commander recommended to the legal services support team that

Petitioner be discharged with a general discharge under less than honorable conditions [sic].

g. On 1 February 1985, an ADB recommended that Petitioner be discharged under other than honorable conditions by reason of misconduct due to drug abuse. The ADB's record of proceedings is not on file in the record. The discharge authority approved the ADB recommendation and directed discharge under other than honorable conditions. Petitioner was so discharged on 6 March 1985.

h. On 8 March 1990, Petitioner appeared with counsel before the Naval Discharge Review Board (NDRB). Petitioner's explained the circumstances that led to his first two NJPs. With regard to the first NJP, he claimed that he ingested marijuana unknowingly when his girlfriend prepared some tea with marijuana in it, and the second NJP was only a technical violation because he told a noncommissioned officer (NCO) to back off after being harassed and poked by the NCO. The NDRB found both explanations to be plausible and credible, but could not completely dismiss his culpability. With regard to the third NJP, the NDRB specifically noted that it was somewhat unusual that the two positive tests out of 76 samples submitted had consecutive sequence numbers, and that a social security number had been incorrectly transcribed. The NDRB believed that this increased the probability of irregular collection procedures. The NDRB noted the contention of Petitioner and counsel that on 20 November 1984, he submitted urine specimens upon transfer and upon reporting to his new command, and that one was positive and the other was negative. The NDRB also noted a number of inconsistencies in this case, such as the commanding officer (CO) recommending a general discharge under less than honorable conditions; sending Petitioner to the Drug and Alcohol Abuse Control Officer for evaluation and citing him as having potential, but at the same time recommending his discharge; placing him on a surveillance program and suspending a portion of the NJP; all of which indicated that the CO actually wanted to retain Petitioner. Further, The NDRB believed that the commanding general's direction that the ADB be conducted expeditiously was detrimental to Petitioner's right to a fair hearing and resulted in an unstudied or hasty decision by the ADB. The NDRB found Petitioner to be credible and candid in his testimony and believed the circumstances described by Petitioner had occurred. The NDRB concluded that the characterization and the basis for Petitioner's discharge should

be changed to show he was separated with general discharge under honorable conditions by reason of best interests of the service.

i. Petitioner now states he was to be represented by a captain at the ADB, but he never showed up due to some unforeseen commitments. He claims that the ADB replaced the absent officer with a second lieutenant, who had no time to prepare for the case and was overwhelmed and intimidated by the ADB and the recorder. Petitioner supports his application with documentation to show that since his discharge from the Marine Corps, he returned to college, received his degree and pursued a career the business field with a national bank, where he was instrumental in setting up special collection procedures to assist military members stationed overseas with credit card accounts. During his more than five years with the bank, he received numerous certificates of recognition, commendation, and appreciation for his customer assistance and community service. In September 1996, he joined the Wilmington Police Department and has been cited for his professionalism and assistance in the return of a stolen automobile, his apprehension of an armed suspect and recovery of stolen electronics equipment and stolen handguns, and saving of the life of an unconscious person while administering CPR until paramedics arrived. His supervising captain and inspector submit letters to the Board attesting to his professionalism, dedication and community volunteer involvement. His captain states that Petitioner was chosen as a sector specialist for his willingness to get the job done and works with the community to solve many problems that exist in the district. He is currently a candidate for promotion corporal and is being considered for a position on the department's crisis management hostage negotiating team. Counsel for Petitioner asserts that Petitioner was denied due process during his ADB due to his command's operational commitment, and questions the command's competency in this case given the inconsistencies noted by the NDRB.

i. Regulations provide that individuals discharged by reason of best interest of the service receive the type of discharge warranted by the service record. Character of service is based, in part, on conduct and proficiency averages which are computed from marks assigned during periodic evaluations. At the time of Petitioner's transfer his conduct and proficiency averages were 3.9 and 4.5, respectively. After his reduction in rank, he received additional marks of 2.0 in conduct and 3.9 in proficiency. This lowered his conduct and proficiency averages to 3.6 and 4.4, respectively. A minimum average mark of 4.0 in

conduct was required for a fully honorable characterization at the time of his discharge.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial favorable action. The Board notes the NDRB findings and its action to recharacterize Petitioner's service to a general discharge and change the reason for discharge to best interests of the service. The Board also notes the absence of the ADB proceedings and other evidence that would have been considered. The Board believes, as did the NDRB, that the commanding general's direction that Petitioner's case be expeditiously conducted because of operational commitments may have been prejudicial and denied him due process, especially since there was a change in counsel and the new lawyer apparently had little or no time to prepare for his client's case. However, absent the record of proceedings and the evidence that Petitioner submitted two urinalyses on the same day with different results, the Board finds no compelling basis for removing the derogatory documentation surrounding his discharge from the record or changing the reason for discharge to expiration of enlistment.

However, the Board notes that despite being discharged under other than honorable conditions, Petitioner returned to college, earned a degree, and has made significant post-service achievements in which he has been cited for his professionalism and community service both in a business environment and as a police officer. The Board notes that such post-service achievements are somewhat rare and believes that they far outweigh Petitioner's service misconduct. Although his marks do not warrant a fully honorable discharge, the Board now concludes that it would be appropriate and just to recharacterize his general discharge for fully honorable as an exception to policy.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was honorably discharged on 6 March 1985 by reason Secretary of the Navy Plenary Authority vice the general discharge issued on that date.

b. That no further relief be granted.

c. That a copy of the Report of Proceedings be filed in Petitioner's naval record.

d. That, upon request, the Department of Veterans Affairs be informed that Petitioner's application was received by the Board on 30 March 2000.

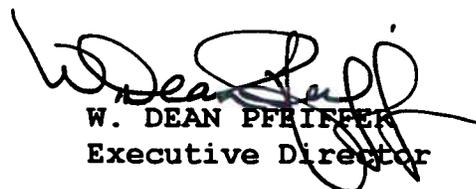
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

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