



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

TJR
Docket No: 2432-02
9 October 2002

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 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 Marine Corps, filed enclosure (1) with this Board requesting that his discharge be upgraded.

2. The Board, consisting of Mr. McBride, Ms. McCormick, and Mr. McPartlin, reviewed Petitioner's allegations of error and injustice on 8 October 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 Reserve on 22 August 1956 at the age of 17, and immediately began a period of extended active duty.

d. Petitioner served without incident until 24 April 1958, when he admitted to participating in two homosexual acts with civilians. His admission of homosexual activity was confirmed by a statement from one of his homosexual partners.

e. On 14 May 1958 Petitioner requested discharged in lieu of court-martial for the good of the service for his participation in homosexual acts.

f. On 1 July 1958 the discharge authority directed an undesirable discharge by reason of unfitness as evidenced by Petitioner's homosexual acts. On 1 August 1958 he was so discharged.

g. At the time of his discharge, Petitioner's average mark in conduct was 3.8. A conduct average of 4.0 was required for a fully honorable discharge. Accordingly, had Petitioner been discharged under more favorable circumstances, he would have received a general discharge instead of an honorable discharge.

h. 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.

The record fails to clearly reflect the presence of any of the foregoing aggravating factors.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board now finds the existence of an injustice warranting corrective action.

Based on 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 the date of Petitioner's discharge, the Board concludes that it would be in the interest of justice to retroactively apply the standards of reference (b) to Petitioner's case. In this regard, the Board finds that relief in the form of recharacterization is appropriate. Since Petitioner's average mark in conduct was insufficient for an honorable discharge, the Board concluded that a general discharge is appropriate.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was issued a general discharge on 1 August 1958 vice the other than honorable 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 14 March 2002.

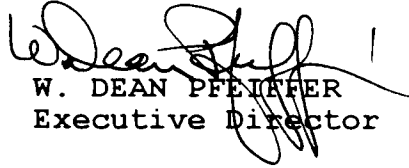
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

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.


W. DEAN PFEIFFER
Executive Director