



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

TRG
Docket No: 3546-03
24 July 2003

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) Title 10 U.S.C. 1552
(b) Uniform Code of Military Justice

Encl: (1) Case Summary
(2) JAG letters of 18 Jan 79 and 25 Jul 80
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlistment member in the Navy, filed an application with this Board requesting that his record be corrected to show an honorable discharge rather than a void enlistment.

2. The Board, consisting of Mr. [REDACTED], Mr. [REDACTED], and Mr. [REDACTED] reviewed Petitioner's allegations of error and injustice on 29 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 Petitioner's application 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 Navy on 24 November 1976 at age 17. He then served in a satisfactory manner until 11 May 1978. On that date, he received nonjudicial punishment for use of marijuana.

d. On 10 August 1978 the Chief of Naval Personnel informed Petitioner's command that he was not eligible for enlistment due to failure to meet the minimum the screen score. He was given the option of retention (if recommended) or separation from the

Navy. If separation was elected, the letter states that he was to be released from naval jurisdiction and informed that his enlistment was void. It was directed that the file copies indicate the following statement was to be entered: "This enlistment void in accordance with the decision of the U. S. Court of Military Appeals in the case of U.S. v. RUSSO, 23 USCMA 511, 50 CMR 651." Petitioner elected separation and his enlistment was voided. He was separated from the Navy on 13 September 1978.

e. Pursuant to the Court of Military Appeals Decision in United States v. Russo, 1 M.J. 134 (C.M.A. 1975) and United States v. Catlow, 23 C.M.A. 142, 48 C.M.R. 758 (C.M.A. 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 the advisory opinions at enclosure (2), the Judge Advocate General (JAG) has opined that since the individuals concerned were members of the armed forces for all other purposes, they should be separated in accordance with the Department of Defense Directive concerning administrative discharges, which provided binding guidance on enlisted administrative separation. That directive did not allow administrative separation or release from active duty without discharge or credit for actual time served. Elsewhere in the advisory opinions, JAG discusses the ramifications of backdating erroneous discharged and the possibility of issuing corrected discharged 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, whichever was warranted by the service record.

f. In most cases of this nature that have been previously considered by the Board, the records have shown that during a court-martial, the individual claimed that he fraudulently enlisted with the help of his recruiter. This claim resulted in separation with a void enlistment. Even if such an individual committed serious misconduct, the Board has routinely recommended the substitution of a general discharge for the void enlistment in accordance with the guidance of the JAG opinions at enclosure (2), and such recommendations have been approved. Since there was no disciplinary action pending in this case and he was given the opportunity for retention, it is unclear why a void enlistment was issued.

g. Reference (b) was changed in 1979 to essentially state that in most instances, 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. In this regard, the Board is aware that Petitioner apparently had no disciplinary action pending and was given the option of electing retention or separation because of a problem with his enlistment. Whether or not the recruiter participated in a fraud cannot be ascertained from the record. Therefore, it appears that using the Catlow-Russo line of cases to void his enlistment was erroneous. Since Petitioner only has one NJP and marks that warranted an honorable characterization of service, the Board concludes that Petitioner's service should now be characterized as honorable. Since no disciplinary action was pending, the Board further concludes that the reason for discharge should be changed to erroneous enlistment.

The Board further concludes that this Report of Proceedings should be filed in Petitioner's naval record so that all future reviewers will understand the reason for the change in his record.

RECOMMENDATION:

- a. That Petitioner's naval record be corrected to show that on 13 September 1978 he was issued an honorable discharge by reason of erroneous enlistment vice the void enlistment now of record.
- b. That this Report of Proceedings be filed in Petitioner's naval record.
- c. That the Department of Veterans Affairs be informed upon request that Petitioner's application was received by the Board on 7 April 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.

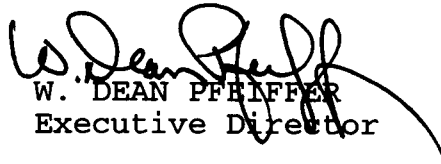
ROBERT D. ZSALMAN
Recorder



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