



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

Docket No: 5640-07
28 October 2008

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

Encl: (1) Case Summary
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former member of the Marine Corps Reserve, filed an application with this Board requesting that his reason for discharge (Misconduct-Commission of a Serious Offense) and RE-4 reenlistment code be changed.

2. The Board, consisting of Mr. [REDACTED], Mr. [REDACTED] and Mr. [REDACTED] reviewed Petitioner's allegations of error and injustice on 3 September 2008 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 consider the application on its merits.

c. Petitioner served in the Marine Corps and Marine Corps Reserve from 21 February 1980 until his discharge. On 1 December 1988 he was promoted to staff sergeant. On 19 May 1989 he reenlisted in the Marine Corps Reserve for six years.

d. On 19 October 1992 Petitioner was convicted by civil authorities of sexual perversion with a minor female which was considered a felony. He was sentenced to six months confinement, probation and counseling, \$200 in restitution and was ordered not

to have any unsupervised contact with minor females.

e. On 6 April 1993 Petitioner was notified of discharge processing by reason of misconduct. On 3 July 1993 an administrative discharge board (ADB) found that he had committed misconduct and recommended discharge under other than honorable conditions. On 15 December 1993, the staff judge advocate (SJA) found the case sufficient in law and fact. However, the SJA noted that the misconduct did not bring discredit upon the Marine Corps and that a staff noncommissioned officer was an ADB member. Accordingly the SJA recommended that a general discharge be approved. After review, the separation authority directed a general discharge by reason of misconduct and Petitioner was so discharged on 19 January 1994.

f. On 1 June 1995, the Superior Court of California directed the termination of probation, the offense was classified as a misdemeanor, the plea of guilty was withdrawn and a plea of not guilty was entered. Further, the case against Petitioner was dismissed and he was released from all penalties and disabilities resulting from the offense of which he was convicted, except as otherwise expressly provided by law. The court order did not relieve the defendant of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, licensure by any state or local agency, and for contracting with the California State Lottery.

g. Petitioner's case was considered by the Naval Discharge Review Board (NDRB) on 7 June 1995. The NDRB noted his excellent military record, the action of the civil court and his post service accomplishments and directed that the general discharge be recharacterized to an honorable discharge.

h. On 23 February 1999, this Board denied his request to change the reason for his discharge. The Board noted that he was not processed for discharge by reason of conviction by civil authorities but for commission of a serious offense and concluded that he was properly discharged for that reason.

i. Petitioner reapplied in 2007 requesting that his reenlistment code be changed. He contends that the charge was false and was made after he jilted a married woman. He points out the action taken by the court to set aside his conviction and the action taken by the NDRB. He states that he is now a college graduate who is employed managing commercial property and married with three children. Since the reenlistment code issue

had not been previously considered, his case was accepted for review.

j. The Board requested and received an advisory opinion from Headquarters Marine Corps on the reenlistment code issue. However, it erroneously states that NDRB had recharacterized the discharge from other than honorable to general instead of from general to honorable. Given the nature of his offense, and the fact that he has a general discharge by reason of misconduct it is recommended that the reenlistment code not be changed.

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants favorable action. Given the action taken by the California court and his excellent record before and after the incident at issue, the Board concludes that the record should be corrected to show that he was not discharged on 19 January 2004 but continued to be a member of the Marine Corps Reserve until he was honorably discharged on 18 May 2005 at the end of his six year enlistment. Since he was not participating in the reserve program he is not entitled to drill points, pay, or allowances.

Concerning the reenlistment code, the Board concludes that the RE-4 reenlistment code should now be changed to show that he was assigned an RE-3C reenlistment code. This code will alert recruiters that there is an issue which must be resolved but will not preclude consideration for reenlistment.

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 reasons for the changes in the record.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was not discharged on 19 January 2004 but continued to serve in the Marine Corps Reserve in an inactive status until he was honorably discharged on 18 May 2005.

b. That Petitioner's naval record be further corrected to show that on 18 May 2005 he was assigned an RE-3C reenlistment code.

c. That this Report of Proceedings be filed in Petitioner's naval record.

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

Brian J. George
BRIAN J. GEORGE
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.

W. Dean Pfeiffer
W. DEAN PFEIFFER

Reviewed and approved:

Robert T. Call
11-4-08

Robert T. Call
Assistant General Counsel
(Manpower and Reserve Affairs)