



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

TAL
Docket No: 3822-11
5 May 2011

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

Subj: REVIEW NAVAL RECORD OF [REDACTED]
[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 Marine Corps, filed enclosure (1) with this Board requesting that his record be corrected to show a characterization of his service rather than a void enlistment, and that all of his rights be restored.

2. The Board, consisting of Mr. Bourgeois, Mr. Gattis and Ms. Trucco, reviewed Petitioner's allegations of error and injustice on 27 April 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. 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 on 12 April 1976 at age 17 for four years. At the time of enlistment, he had not completed 10 years of formal education.

d. Petitioner alleged that he told his recruiter that he had only completed the ninth grade of school and that his recruiter told him not to worry about it. His recruiter told him his name was Kim Hudson Kloe, which was incorrect; and that when he went to take the Armed Services Vocational Aptitude Battery (ASVAB) test, his recruiter told him he had already taken it. It is evident, when comparing the signature on the ASVAB worksheet and the signature of Petitioner on other documents, they differ substantially.

e. On 15 March 1978, Petitioner was separated with a void enlistment and assigned an RE-4 reenlistment code.

f. 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.

g. 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.

h. 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 advisory opinions of the JAG as outlined in references (b) through (d). In view of Petitioner's record with no disciplinary infractions and conduct score of 4.1, the Board concludes that an honorable discharge 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 an honorable discharge on 15 March 1978 vice the separation by reason of a void enlistment actually issued on that day.

b. That no further relief be granted.

c. That a copy of this 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 29 March 2011.

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
Executive Director