



**DEPARTMENT OF THE NAVY**  
BOARD FOR CORRECTION OF NAVAL RECORDS  
701 S. COURTHOUSE ROAD, SUITE 1001  
ARLINGTON, VA 22204-2490

JDR  
Docket No: 4545-14  
12 May 2015

From: Chairman, Board for Correction of Naval Records  
To: Commandant of the Marine Corps (MMRP)

Subj: REVIEW NAVAL RECORD OF [REDACTED] USMC,  
XXX-XX-[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 25JAN80

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 [REDACTED] reviewed Petitioner's allegations of error and injustice on 24 April 2015, 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 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, began a period of active duty on 17 January 1974, and served without disciplinary incident for about 13 months.

d. On 4 March 1975, he received nonjudicial punishment (NJP) for a six day period of unauthorized absence (UA). On 22 December 1975, he was convicted by summary court-martial (SCM) of 31 days of UA. On 9 January 1976, he received NJP for a two day period of UA.

e. During the period from 5 to 21 April 1976, Petitioner was in a UA status for a period of three days and failed to go to his appointed place of duty on seven occasions. As a result, he was referred to trial by court-martial. However, on 21 June 1976, the charge was dismissed on motion due to a lack of jurisdiction because Petitioner's enlistment was void. The reason for this action was that his enlistment was fraudulently procured with the assistance of a recruiter, specifically, he and the recruiter concealed pre-service civil criminal activities.

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 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 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 relief in the form of recharacterization of his service is warranted.

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 disciplinary record and periods of UA, the Board concludes that a general discharge by reason of misconduct is the type warranted by the service record.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

#### RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that on 31 August 1976, he was issued a "general" discharge by reason of misconduct.

b. That a copy of this report of proceedings be filed in Petitioner's naval record.

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c. That, upon request, the Department of Veterans Affairs be informed that Petitioner's application was received by the Board on 5 March 2014.

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.



T. J. REED  
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.



ROBERT J. O'NEILL  
Executive director