



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

CRS
Docket No: 1162-96
14 April 1999

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED],
[REDACTED]

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachments
(2) Case Summary
(3) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the United States Marine Corps, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected to show that he was not discharged by reason of best interest of the service on 11 May 1984. Further, he requests back pay to the expiration of active obligated service.

2. The Board, consisting of Mr. Morgan, Mr. Tew, and Mr. Leeman, reviewed Petitioner's allegations of error and injustice on 7 April 1999 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 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 4 December 1979 for four years at age 19. Until the civil conviction which resulted in administrative separation, he served well and without any disciplinary infractions.

d. It appears that on 17 September 1982 Petitioner was

apprehended by civil authorities and placed in pre-trial confinement. On 5 December 1982 he was convicted of rape and first degree sexual offenses and sentenced to life in prison. On 22 January 1984 his appeal was denied.

e. On 15 March 1984 an administrative discharge board recommended that Petitioner be separated with an other than honorable discharge by reason of misconduct due to a civil conviction. After review by the discharge authority, the recommendation for separation was approved and he was discharged with an other than honorable discharge on 11 May 1984. On the Certificate of Release or Discharge from Active Duty (DD Form 214) issued on that date, Petitioner was charged with lost time from 17 September 1982 until the date of discharge.

f. On 21 May 1991 the U.S. Court of Appeals for the Fourth Circuit reversed the decision of the United States District Court for the Eastern District of North Carolina, and granted Petitioner's application for a writ of habeas corpus. In this regard, the court concluded that at trial, the state failed to disclose evidence favorable to the defense despite specific requests for such material, Brady v. Maryland, 373 U.S. 83(1963). The state elected not to retry Petitioner and, in July 1991, he was released from prison after serving nine years.

g. On 29 August 1995 the Naval Discharge Review Board upgraded Petitioner's discharge to honorable and changed the reason for discharge to best interest of the service.

h. An advisory opinion furnished by the Assistant Staff Judge Advocate for Military Law, Headquarters Marine Corps, dated 8 February 1999 stated, in effect, that Petitioner was improperly separated prior to final action of his appeal. The opinion recommended that his address be changed to his current address and that his reenlistment code be changed. Further, the opinion recommended that any lost time be excused as unavoidable and that his record show that he served until the end of his enlistment and subsequent discharge from the U.S. Marine Corps Reserve.

i. On 16 March 1999 Headquarters Marine Corps issued a new DD Form 214 that showed his current address, assigned a reenlistment code of RE-1A, and removed the period of time lost.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants favorable action. Since Petitioner's conviction has now effectively been overturned, there was no basis for his discharge on 11 May 1984. Therefore, the Board agrees, in part, with the advisory opinion. The Board does not agree with the opinion that Petitioner was improperly discharged prior to his exhausting all appeals.

Petitioner's appeal of his civil conviction was denied on 27 January 1984 and there is no evidence of record of any further pending appeals at that time.

In view of the foregoing, the Board concludes that the record should be corrected to show he was never arrested or convicted by civil authorities. Since Petitioner enlisted on 4 December 1979 for four years, the record should be corrected to show that he served on active duty from that date until 3 December 1983, at which time he was honorably released from active duty and transferred to the Marine Corps Reserve. The record should also show that he served in that component until 3 December 1985, at which time he was discharged upon completion of his six-year military obligation.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing all documentation concerning his arrest and conviction by civil authorities. This should include a correction to show that he was present for duty at all times and had no time lost during his enlistment.

b. That Petitioner's naval record be further corrected to show that he served on active duty without interruption from 4 December 1979 until he was honorably released from active duty on December 1983. The record should then show that he was honorably discharged at the end of his six-year military obligation, on or about 3 December 1985, vice the discharge now of record on 11 May 1984.

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

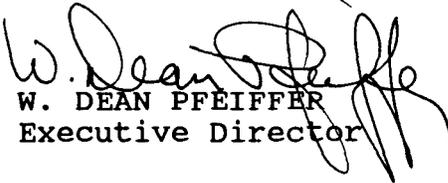
d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

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


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