



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

TJR  
Docket No: 2366-02  
4 October 2002

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) 10 U.S.C. 1552  
(b) SECNAVINST 1910.4B

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 Navy, filed enclosure (1) with this Board requesting that his discharge be upgraded.

2. The Board, consisting of Messrs. Brezna, Kastner, and Pauling, reviewed Petitioner's allegations of error and injustice on 1 October 2002 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 Navy on 2 April 1952. During the period from 3 April 1953 to 30 June 1954 he received nonjudicial punishment (NJP) on two occasions for absence from his appointed place of duty and disobedience; and was convicted by a summary court-martial and a special court-martial of a 23 day period of unauthorized absence (UA), missing the movement of his ship, disrespect, breach of peace, and being out of uniform.

d. On 17 May 1955, during an investigation by the Office of Naval Intelligence, Petitioner admitted to participating in a homosexual act on the night of 7 May 1955, near an athletic field, while under the influence of alcohol. On 13 June 1955, during a psychiatric examination, Petitioner stressed that even though he had participated in a homosexual act, he was a passive and uneager partner.

e. On 27 June 1955 Petitioner was processed for an administrative separation based on his misconduct as evidenced by three NJPs and two court-martial convictions, and his voluntary statement in which he admitted commission of a homosexual act while intoxicated. The commanding officer stated in the recommendation, in part, as follows:

I believe that he is in no way a true or confirmed homosexual, and that such traits are not even strongly latent in his personality. I believe that he did not solicit his partner but was rather victimized by a confirmed homosexual while drinking. I believe that he has had no previous homosexual relationships and I see no reason why we should expect him to have any in the future.

f. On 19 July 1955 the Chief of Naval Personnel (CNP) directed an undesirable discharge by reason of unfitness as evidenced by Petitioner's homosexual act. On 4 August 1955 Petitioner was so discharged.

g. Reference (b) sets forth the Department of the Navy's current policies, standards, and procedures for administratively separating enlisted service members. With regard to homosexuality, reference (b) declares such behavior to be incompatible with Naval Service. It provides Navy and Marine Corps officials with the authority to involuntarily separate those service members who commit a homosexual act or acts. If separated, the service member's discharge and character of service must be based on his or her total performance of duty and conduct. Reference (b) expressly prohibits the issuance of a discharge under conditions other than honorable unless the homosexual act is committed under one of the following circumstances:

- (1) By using force, coercion, or intimidation;
- (2) with a person under 16 years of age;
- (3) with a subordinate in circumstances that violate customary naval superior-subordinate relationships;
- (4) openly in public view;

(5) for compensation;

(6) aboard a naval vessel or aircraft; or

(7) in another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

The record fails to clearly reflect the presence of the foregoing aggravating factors.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board now finds the existence of an injustice warranting corrective action.

Based on Petitioner's overall record of service and current Department of the Navy policy as established in reference (b) and its radical departure from the policy which was in effect on the date of Petitioner's discharge, the Board concludes that it would be in the interest of justice to retroactively apply the standards of reference (b) to Petitioner's case.

Using the standards of reference (b), the Board finds that relief in the form of recharacterization is appropriate. Although the homosexual act occurred near an athletic field and might have been deemed to have occurred in openly in public view, the Board is aware that the other individual initiated the homosexual activity and Petitioner apparently was not an enthusiastic participant. Additionally, the act occurred at night.

Based on the foregoing, and since Petitioner received NJP on two occasions, and was convicted by two courts-martial, the Board concludes that recharacterization to a general discharge is appropriate.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was issued a general discharge on 4 August 1955 vice the undesirable discharge actually issued on that date.

b. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

c. That, upon request, the Veterans Administration be informed that Petitioner's application was received by the Board on 14 March 2002.

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 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