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

CRS
Docket No: 3891-99
22 December 1999

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) Uniform Code of Military Justice
(c) SECNAVINST 1910.4B

Encl: (1) DD Form 149 w/attachments
(2) Case Summary
(3) JAG ltr JAG 131.1:TDK:cse Ser 13/5631 of 18 Jan 79
JAG ltr JAG 131.1:TDS:cse Ser 13/5273 of 25 Jul 80
JAG ltr JAG 131.1:TDS:cse Ser 13/5274 of 25 Jul 80
(4) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the United States Navy, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected to show an honorable discharge rather than the void enlistment issued on 20 March 1979.

2. The Board, consisting of Ms. Hardbower, Mr. Flood, and Mr. Cali, reviewed Petitioner's allegations of error and injustice on 14 December 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 Navy on 8 December 1977 at age 17. The record reflects that on 4 August 1978 he received nonjudicial punishment for an unauthorized absence of 35 days.

d. On 8 January 1979 the commanding officer recommended void enlistment based on recruiter misconduct, specifically, the recruiter apparently persuaded Petitioner to claim that he completed 11 years of formal education. Petitioner was separated with a void enlistment on 20 March 1979.

e. Pursuant to the Court of Military Appeals decisions in United States v. Russo, 23 C.M.A. 511, 50 C.M.R. 650, 1 M.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, as indicated in the advisory opinions at enclosure (3), the Judge Advocate General (JAG) has opined that these individuals were members of the armed forces for all other purposes and 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 advisory opinions, 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 service record.

f. In most cases of this nature which have been previously considered by the Board, the records have shown that in order to avoid trial by court-martial, the individual claimed that he fraudulently enlisted with the help of his recruiter. This claim resulted in separation with a void enlistment. Even if such an individual committed serious misconduct, the Board has routinely recommended the substitution of a general discharge for the void enlistment in accordance with the guidance of the JAG opinions at enclosure (3). Such recommendations have been approved.

g. Reference (b) was changed in 1979 to essentially state in most instances, 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.

h. Reference (c) states that an individual may be separated by reason of best interest of the service if separation is appropriate but no other reason set forth in the reference covers the situation at hand.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants favorable action. In view of Petitioner's situation, the Board concludes that a general discharge by reason of best interest of the service is the type of discharge 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 he was issued a general discharge by reason of best interest of the service on 20 March 1979 vice the separation by reason of a void enlistment 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 June 1999.

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