

Opinion No. 43-4231

February 12, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Scott H. Mabry, Assistant District Attorney, Albuquerque, New Mexico

We are in receipt of your letter of February 4, 1943, in which you relate the following situation: Mr. Perl Charles was appointed Midshipman in the United States Navy on July 31, 1918, and attended Annapolis until January 28, 1922, when he resigned. You ask our opinion as to whether or not Mr. Charles is an honorably discharged sailor, within the meaning of Sections 76-111, 76-112 and 76-113 of the 1941 Compilation.

Taking up first the question as to whether or not Mr. Charles was a sailor within the definition contained in Section 76-111, your attention is called to Title 34, Section 1031 of the U.S.C.A., which provides that:

"The students in the Naval Academy shall be styled Midshipman."

In construing this provision, the Court, in the case of *Weller vs. United States*, 41 Court of Claims Reports 324, was called upon to determine whether or not a Midshipman was an officer in the United States Navy under a Federal Statute providing that no officer shall be dismissed from the naval service except by order of the President or sentence of a general Court Martial. There the Court said:

"That students in the Naval Academy are and always have been in the naval service of the United States in some capacity, has never been doubted. Also decided in *Cook vs. United States* (128 U.S. 254) that they are officers of the United States within the meaning of the provisions of the Act of March 3, 1883, respecting the longevity pay of officers and enlisted men in the Army and Navy."

See also *United States vs. Baker*, 8 Supreme Court 1022, 125 U.S. 646, wherein the Court held that a person while a Midshipman in a Naval Academy was in the actual service of the Navy, and so entitled to credit upon his grade of ensign for all his services from the date of appointment as Midshipman.

In view of the foregoing, it is my opinion that a person attending the United States Naval Academy at Annapolis during the time the United States, is at War is a member of the armed forces of the United States within the contemplation of Section 76-111 supra.

As to whether or not Mr. Charles was honorably discharged is a question of fact which must be determined in the light of the particular circumstances surrounding his discharge.

Section 76-112 of the 1941 Compilation provides that:

"Excepting a dishonorable discharge, or one for misconduct, any discharge, including furloughs to the reserve, or order relieving a member of a reserve corps from active duty, shall constitute an honorable discharge for the purpose of this Act."

While I find no provision in the Federal Laws providing for the resignation by a naval officer or enlisted man, I find several sections recognizing the possibility of resignation, as, for instance, Title 34, Section 597 of the U.S.C.A., which provided:

"The Secretary of the Navy is authorized and required to issue certificates of discharge, or orders of acceptance of resignation upon application and proof of identity in the true name of such person. * * *"

Thus, whether or not Mr. Charles was, in fact, honorably discharged under our statute, will depend upon whether or not the certificate of discharge or order of acceptance of resignation was a dishonorable discharge or one for misconduct. Unless such discharge was dishonorable or for misconduct, it is my opinion that Mr. Charles was honorably discharged within the meaning of the statute above quoted.

Trusting that the foregoing sufficiently answers your inquiry, I am

By ROBERT W. WARD,

Asst. Atty. General