RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: [redacted]

DOCKET NUMBER: 96-00185

COUNSEL: None

DEC 7 1998

HEARING DESIRED: No

APPLICANT REQUESTS THAT:

The findings and sentence of his court-martial be dismissed, he be awarded pay and allowances, his discharge be upgraded to honorable, he be retroactively promoted, he be permitted to retire, and that his records be expunged.

APPLICANT CONTENDS THAT:

The presumption of regularity that might normally permit one to assume that the service acted correctly in characterizing his service as less than honorable does not apply in his case. The discharge, stoppage of pay and allowances, denial of retirement, command procedures, and confinement were all improper.

A copy of applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS:

Although he pled not guilty, applicant was found guilty by general court-martial of raping and committing oral sodomy and indecent acts on his two daughters on diverse occasions. Some of the specifications indicate the victims were under the age of 16 at the time of the offense. On 29 August 1992 he was sentenced to a dishonorable discharge, confinement for 10 years, and reduction to airman basic. He was discharged from the Air Force on 29 September 1995.

He was serving his [redacted] entence at the US Disciplinary Barracks at and had a minimum release date of 14 August 998, the Air Force Clemency and Parole Board (SAFPC) denied his request for parole; however, with accumulated good time, he was released before his minimum release date on 22 June 1998.

The remaining relevant facts pertaining to this application, extracted from the applicant's military records, are contained in the letters prepared by the appropriate offices of the Air Force. Accordingly, there is no need to recite these facts in this Record of Proceedings.

AIR FORCE EVALUATION:

The Chief, Relief and Inquiries Branch, AFLSA/JAJM, reviewed the appeal and recommended that applicant's requests be denied. Applicant claims he was incorrectly incarcerated at the conclusion of his trial; however, he cited an outdated version of Title 10, USC, Section **871 (1968)** ***to*** support his position and thus misstates the **law.** He claims his pay was illegally terminated on 30 September 1992. His enlistment expired on 30 September 1992 rendering him ineligible for pay and allowances. Once a military member is in military confinement and his term of service has expired, it cannot be extended. As for the punishment he received, the maximum punishment authorized for the offenses of which he was convicted included a dishonorable discharge, confinement for life, total forfeitures of all pay and allowances, a reduction to E-1, and a fine. On appeal the US Air Force Court of Military Review upheld applicant's sentence after dismissing two (2) specifications. The fact that he lost his retirement benefits as a result of his dishonorable discharge does not amount to an unconstitutionally excessive punishment. Moreover, military courts have routinely held that loss of retirement benefits as a result of a punitive discharge does not violate the Eighth Amendment.

A copy of the complete evaluation is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Applicant reviewed the Air Force evaluation and provided a response, wherein he expounds on the pay and incarceration issues, citing statutes and regulations he believes entitle him to active duty pay while being held for trial and until his appeals were completed and his sentence was approved and ordered executed. He further argues that the retirement order was illegally rescinded in February 1992. He also raises a jurisdictional issue, contending that the complaints filed against him were "purely of a civil nature, with no military service connection," and that he is now being illegally confined as a civilian.

A copy of his complete rebuttal, with attachments, is at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION:

The Associate Chief, Military Justice Division, AFLSA/JAJM, provided additional remarks pertinent to the issues applicant raised in his rebuttal. The basic rule at the time of applicant's court-martial was that in a case with no adjudged forfeitures, such as the applicant's, pay continued for a military member in confinement until his previously established (prior to court-martial) term of service or enlistment expired or until his punitive discharge was executed, whichever occurred first. The rescinding of the retirement order in February 1992 was entirely proper. His assertions concerning a lack of military court jurisdiction over him are wholly without merit. There was no necessity that the alleged crimes take place on a military installation or a place under military control. Applicant's counsel had the opportunity to raise any and all jurisdictional issues during trial and the military appellate courts found no insufficiency of jurisdiction. Applicant's request for relief is not warranted.

A copy of the complete additional evaluation is at F.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

Applicant reviewed the additional evaluation and contends the denial of retirement, pay, and his confinement violated three constitutional provisions, 14 statutes, one Executive Order, and five regulations. The [advisory] has not provided any evidence to contradict the validity of this application, which should therefore be granted.

A copy of applicant's complete rebuttal, with attachment, is at Exhibit H.

ADDITIONAL AIR FORCE EVALUATION:

The Deputy Chief, General Law Division, HQ USAF/JAG, reviewed this appeal and states that applicant's claim that he was entitled to retire and could not be deprived of that right was raised in his criminal appeal and rejected based on long-standing precedent. Eligibility must be distinguished from entitlement. An enlisted member must have 20 years active service to be eligible for retirement under Title 10, USC, Section 8914, but approval of such voluntary retirement is at the decision of the Secretary. (Although issued in 1997, Cedillo v. US concerns statutory language unchanged since 1956.) A different rule, Section 8917, governs enlisted members with over 30 years of active service. "May" is a discretionary term; "shall" is mandatory. Accordingly, applicant did not have a vested right to retire and the Air Force was within its statutory authority to

retire and the Air Force was within its statutory authority to disapprove his retirement application. As to the regulatory provision concerning finality of the retirement order, the applicant misconstrues the term "executed." His retirement order was published on 20 July 1991, but it was never executed, an event which could not legally have occurred until 1 June 1992 and did not occur because the order was first rescinded. Thus, rescinding the order in February 1992 did not violate AFR 35-7. As to this issue, the application should be denied; no opinion is expressed on the remainder of the application.

A copy of the complete additional evaluation is at Exhibit I.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

A complete copy of the additional evaluation was forwarded to the applicant on 5 August 1998 for review and comment within 30 days. As of this date, no response has been received by this office.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.

2. The application was timely filed.

3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. After a thorough review of the evidence of record and applicant's submission, we are not persuaded that the requested relief should be granted. Applicant's contentions are duly noted; however, we do not find these assertions, in and by themselves, sufficiently persuasive to override the rationale provided by the Air Force. We therefore agree with the recommendations of the Air Force and adopt the rationale expressed as the basis for our decision that the applicant has failed to sustain his burden that he has suffered either an error or an injustice. In view of the above and absent persuasive evidence to the contrary, we find no compelling basis to recommend granting the relief sought.

THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal

appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 23 June 1998 and 16 October 1998 under the provisions of AFI 36-2603:

Mr. Wayne R. Gracie, Panel Chair
Mr. Jackson A. Hauslein, Member
Mr. Allen Beckett, Member

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 18 Jan 96, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, AFLSA/JAJM, dated 22 Apr 97.
Exhibit D. Letter, AFBCMR, dated 19 May 97.
Exhibit E. Applicant's response, dated 28 May 97, w/atchs.
Exhibit F. Letter, AFLSA/JAJM, dated 20 Nov 97, w/atch.
Exhibit G. Letter, AFBCMR, dated 11 Mar 98.
Exhibit H. Letter, Applicant, dated 1 Apr 98, w/atch.
Exhibit I. Letter, HQ USAF/JAG, dated 15 Jul 98.
Exhibit J. Letter, AFBCMR, dated 5 Aug 98.

Wayne R. Gracie

WAYNE R. GRACIE
Panel Chair