

JUN 25 1988

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 97-01079

[REDACTED]
[REDACTED] . NONE

HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

The Court-Martial and conviction be removed from his records; and, the grade of staff sergeant he earned be restored and reflected on his WD AGO Form [REDACTED] Enlisted Record and Report of Separation, dated 6 November 1945.

APPLICANT CONTENDS THAT:

The court-martial, in and of itself, was a "Kangaroo Court." He had no defense and the entire incident was arranged by the Captain because of his racial attitude. Applicant states this was a case of racial discrimination by a jealous officer.

In support of his request, applicant submits a copy of a letter he forwarded to Congressman Peter J. Visclosky.

Applicant's submission is attached at Exhibit A.

STATEMENT OF FACTS:

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

AIR FORCE EVALUATION:

The Associate Chief, Military Justice Division, AFLSA/JAJM, states that since records of applicant's court-martial are unavailable, very little is known about the court-martial action. Applicant states that in May of 1945 he was assigned to the motor pool at [REDACTED]. On one particular Sunday morning, a soldier other than applicant took a truck from the motor pool and damaged it. Applicant, who lived off base, knew nothing of

the incident until Monday morning when he reported for duty. At that time his commanding officer, with whom applicant had experienced conflicts since being assigned to [REDACTED] in March 1944, informed him that he was being charged with negligence for the damaging of the vehicle and that he would be court-martialed.

According to applicant, as he reported for duty the next day his commanding officer called him into a conference room where several other officers were seated. His commander then read the charges against him. Applicant was then asked to leave the room. He was then later recalled before the officers. They reportedly took a vote and, according to applicant, "I was court-martialed." No other information is available concerning these events other than this statement by the applicant.

The available records indicate that many of applicant's service records were likely destroyed in the St. Louis National Personnel Records Center fire of 12 July 1973. Nearly all of the available records are applicant's service medical records. One separation document does indicate that applicant was separated from the service for the convenience of the government on 6 November 1945. He was separated with an honorable discharge at the rank of private first class.

There is a presumption of regularity that is afforded all judicial actions, including military court-martials in time of war. The presumption operates to place the burden upon any party challenging the legality of the action to come forward with evidence of error or irregularity. In this case, the only evidence concerning the nature of the court-martial comes from the applicant, who is reciting his recollection of the nature of the proceedings from a distance in time of some fifty-two years. It is possible that some type of summary procedure may have been used since the alleged court-martial took place in time of war. However, the court-martial was held within the United States and it is inconceivable that it could have proceeded as applicant describes. His description leaves out such fundamental components as the entry of pleas and the taking of evidence in the presence of the accused. Absent reliable evidence, applicant's description of his court-martial proceeding simply cannot be afforded any indicia reliability or accuracy. There is no evidence brought forth by applicant to warrant the overturning of his court-martial conviction. There are no legal errors requiring corrective action. They recommend the request be denied.

A copy of the Air Force evaluation is attached at Exhibit C.

The Chief, Inquiries/BCMR Section, Airman Promotion Branch, AFPC/DPPPWB, states that the applicant's discharge certificate reflects that he entered military service on 25 July 1941 and was discharged on 6 November 1945 in the grade of Private First Class (PFC). This certificate also indicates the highest grade he held while on active duty was staff sergeant.

While the applicant indicates that he was promoted to staff sergeant in 1942, there is no documentation in his records to reflect the exact date he assumed this grade. There is documentation in his medical file dated 28 January 1943 which lists his grade as staff sergeant. If the AFBCMR were to grant the applicant's request, there is no documentation available to show what his date of rank would be for the staff sergeant grade as indicated above. They, AFPC/DPPWB, recommend the Board interpose the statute of limitations and deny the applicant's request. However, if the Board elects to review the case, it should be denied based on the lack of supporting documentation.

A copy of the Air Force evaluation is attached at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Copies of the Air Force evaluations were forwarded to the applicant on 2 September 1997 for review and response 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 not timely filed; however, it is in the interest of justice to excuse the failure to timely file.
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 alleged court-martial and conviction should be removed or, that the grade of staff sergeant he earned should be restored. His contentions are duly noted; however, we do not find these uncorroborated assertions, in and by themselves, sufficiently persuasive to override the rationale provided by the Air Force. As stated by AFLSA/JAJM, there is a presumption of regularity that is afforded all judicial actions, including military court-martials in time of war. The presumption operates to place the burden upon any party challenging the legality of the action to come forward with evidence of error or irregularity. Due to the fact that applicant's records were likely destroyed in the fire at the National Personnel Records Center in 1973, there is no evidence of court-marital action other than the information applicant asserts. Also, while the applicant states that he was promoted to staff sergeant in 1942, the only evidence to corroborate this fact is documentation in his medical file. However, there is no

evidence available to show what his date of rank would be for the staff sergeant grade. We therefore agree with the recommendations of the Air Force and adopt their 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. Therefore, based on the available evidence of record, we find no basis upon which to favorably consider this application.

4. The documentation provided with this case was sufficient to give the Board a clear understanding of the issues involved and a personal appearance, with or without counsel, would not have materially added to that understanding. Therefore, the request for a hearing is not favorably considered.

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 13 May 1998, under the provisions of AFI 36-2603.

Mr. Vaughn E. Schlunz, Panel Chair
Mr. Kenneth L. Reinertson, Member
Mr. Michael P. Higgins, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 11 Mar 97, w/atchs.
- Exhibit B. Applicant's Available Master Personnel Records.
- Exhibit C. Letter, AFLSA/JAJM, dated 28 Jul 97.
- Exhibit D. Letter, AFPC/DPPPWB, dated 18 Aug 97.
- Exhibit E. Letter, AFBCMR, dated 2 Sep 97.


VAUGHN E. SCHLUNZ
Panel Chair