



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC


JUN 11 1998

Office of the Assistant Secretary
AFBCMR 97-01791

MEMORANDUM FOR THE CHIEF OF **STAFF**

Having received and considered the recommendation of the Air Force Board for Correction of Military Records and under the authority of Section 1552, Title 10, United States Code (70A Stat 116), it is directed that:

The pertinent military records of the Department of the Air Force relating to [REDACTED] be corrected to show that, on 21 Feb 97, competent authority mitigated the portion of the nonjudicial punishment imposed under the provisions of Article 15, UCMJ, on 25 Nov 96, pertaining to forfeiture of pay, to provide for forfeiture of \$375.00 per month for two months, rather than \$500.00 for two months.


JOE G. LINEBERGER
Director
Air Force Review Boards Agency

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

JUN 11 1998

IN THE MATTER OF:

DOCKET NUMBER: 97-01791

COUNSEL: NONE

HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

The nonjudicial punishment under Article 15 initiated on 15 Oct 96 and imposed on 25 Nov 96 be set aside and removed from his records, and that all rights, privileges, and benefits taken from him because of the Article 15 be restored.

APPLICANT CONTENDS THAT:

He was innocent of the charged offenses because they were not done intentionally and the evidence used against him was insufficient to establish his guilt.

The mitigated punishment was more severe than his initial punishment and, therefore, was illegal.

In support of his appeal, the applicant provided documentation pertaining to the nonjudicial punishment under Article 15, and other documents associated with the matter under review.

Applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS:

Information extracted from the Personnel Data System (PDS) system indicates that the applicant is currently serving on active duty in the grade of master sergeant.

On 15 Oct 96, the applicant's commander notified him that he was considering whether he should be punished under Article 15, Uniform Code of Military Justice (UCMJ) based on allegations that the applicant did, on or about 6 Jun 96, unlawfully strike J--- B--- on the right leg and hip with his vehicle; did, on or about 6 Jun 96, unlawfully strike K--- B--- on the right leg and hip with his vehicle; and that he did, on or about 7 Jun 96, cause his daughter unjustifiable mental suffering as a result of his

neglect, and put her into a situation where she may have suffered as a result of his neglect. (The last charge was subsequently withdrawn.) The applicant was advised of his rights in the matter. After consulting military legal counsel, the applicant waived his right to demand trial by court-martial and accepted the nonjudicial proceedings under Article 15. He submitted written comments for review and indicated that he did desire to make a personal appearance before the commander. On 25 Nov 96, after considering the matters presented by the applicant, the commander found that the applicant had committed one or more of the offenses alleged and imposed punishment. The applicant received a suspended reduction from master sergeant to technical sergeant until 24 May 97, and was ordered to forfeit \$985.00 per month for two months and was reprimanded. The applicant appealed the punishment. On 21 Feb 97, the appellate authority partially granted the applicant's appeal and mitigated his punishment to a suspended reduction from master sergeant to technical sergeant, forfeitures of \$500.00 per month for two months, 30' days extra duty, 30 days restriction, and a reprimand. On 3 Mar 97, legal authority found that the nonjudicial proceedings under Article 15 were legally sufficient.

AIR FORCE EVALUATION:

The Military Justice Division, AFLSA/JAJM, reviewed this application and indicated that the applicant's initial and less compelling contention is that the evidence used against him was insufficient to establish his guilt. The applicant claimed the witnesses' statements were inconsistent and that he lacked the intent to commit the charged assaults. The evidence relied upon by the applicant's commander to support his decision to punish him under Article 15, UCMJ, consisted of the sworn statements of five witnesses. All five of these witnesses essentially stated that the applicant struck both J--- B--- and K--- B--- with his truck and then drove away. The only evidence which contradicted their version of the facts is the self-serving statement of the applicant and his wife. In his statement, the applicant never said his vehicle did not hit J--- or K---. Instead, the applicant stated he did not see his vehicle strike either woman and if it did, it was unintentional. This is hardly the type of compelling evidence necessary to overcome the sworn testimony of five eyewitnesses. Further, the two truly disinterested parties, Technical Sergeant H--- and T--- H---, confirmed that the applicant's truck struck the two women.

JAJM stated that the applicant also claimed he was innocent because he did not "intend" to strike either individual with his truck. However, intent is not an element of either assault consummated by a battery or aggravated assault. Thus, the applicant's assertion that he lacked the intent to assault either woman is not dispositive. Moreover, the facts of the incident belie the applicant's claim that he did not intend to commit an

assault. Intent can often be proven by circumstantial evidence. The circumstantial evidence in the applicant's case clearly suggested that he was driving his vehicle forward, that he was angry, that he saw both women in front of his truck, and that he continued to drive forward without regard for their safety. Thus, even if intent was not a requisite element of the offense, these circumstances would have been sufficient for the applicant's commander to determine that he intended to commit the resulting assaults.

JAJM indicated that the applicant's next assignment of error, however, was more problematic. Through his defense counsel, the applicant claims that his punishment after his appeal was illegal. The applicant raises two issues: 1) that the appellate authority increased rather than decreased his punishment in violation of the Manual for Courts-Martial (MCM), Part V, paragraph 1f(2); and 2) that the punishment of 30 days' extra duty and 30 days restriction constituted an illegal punishment in violation of the MCM, Part V, paragraph 5d(4). According to JAJM, dealing with the issues in reverse order, they can dispose of the second claim rather quickly. The applicant claimed that his punishment of 30 days of extra duty and 30 days' restriction violated the provision of paragraph 5d(4) because when restriction and extra duties are combined, the combination cannot exceed the maximum imposable for extra duties (or 45 days). The applicant and his defense counsel argued that his punishment of 30 days extra duty and 30 days restriction equated to 60 days punishment, 15 days beyond the 45 day limit. What the applicant and his counsel failed to realize was that the MCM specifically provided that the punishment of extra duty and restriction can run concurrently provided the punishment was completed within 45 days. If the applicant's 30 days of extra duty and 30' days restriction ran consecutively, then the punishment would have totaled 60 days and would have been illegal. However, the applicant's punishment ran concurrently and was completed in 30 days and therefore legal under the MCM.

According to JAJM, the applicant's first issue, that the appellate authority failed to properly mitigate his punishment, was more troubling. MCM, Part V, paragraph 1f(2), provides that "once nonjudicial punishment has been imposed, it may not be increased, upon appeal or otherwise." In his 3 Dec 96 appeal letter, the applicant asked the appellate authority to set aside the entire Article 15, or, in the alternative, reduce his forfeitures to \$300.00 per month for two months due to financial hardship. In response, the appellate authority "mitigated" the punishment from a reduction to the grade of technical sergeant (suspended until 24 May 1997 and thereafter remitted), forfeitures of \$985.00 pay per month for 2 months and a reprimand to a reduction to the grade of technical sergeant (suspended until 24 May 1997 and thereafter remitted), forfeitures of \$500.00 pay per month for 2 months, 30 days extra duty, 30 days' restriction to [REDACTED] AFB, and a reprimand. Thus, in exchange for \$970.00 in forfeitures, the applicant received

30 days of extra duty and 30 days restriction. While there is no rule which prohibits mitigating forfeitures to extra duty and restriction, JAJM believes, based upon the specific facts of this case, that such a marginal "mitigation" violated the spirit of the MCM and arguably increased the applicant's punishment. To correct this error, it would be appropriate for the applicant to receive an additional mitigation of \$500.00 in lost forfeitures.

In conclusion, JAJM indicated the applicant's initial nonjudicial punishment action was properly accomplished and legally sufficient. However, the commander's action on appeal violated the spirit, if not the letter, of the MCM by failing to appropriately mitigate the applicant's punishment. Contrary to the applicant's assertions, this error does not invalidate the entire Article 15. In JAJM's view, the appropriate remedy would be to return an additional \$500.00 in lost forfeitures to the applicant as further mitigation of his original punishment. The other errors raised by the applicant were without merit.

A complete copy of the JAJM evaluation is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

In his response, the applicant contended that he was innocent because he did not strike the two women with his vehicle, intentionally or otherwise. The evidence used against him was insufficient to establish guilt. Besides his wife and himself, there were six, not five, eyewitnesses that saw the entire event. In the sixth eyewitness's statement, never once was there a mention of his truck striking the two women. The advisory opinion neglected to mention the additional affidavits of telephone conversations with the eyewitnesses, where they conveniently didn't see his truck hit the two women. Even the two women could not support each others' statements with an eye witness account of what happened.

According to the applicant, his rights were materially prejudiced during the processing of the Article 15 in several ways. First, when the additional punishment was imposed, he was separated from his family and required to live in the dormitory on base. As a master sergeant, living in the dormitory with airmen and junior noncommissioned officers (NCOs) was humiliating. Extra duty was bad enough because he couldn't spend any time with his two year old daughter who would cry for him almost every night. Being separated from his 10 year old daughter was also hard. But the hardest part of the separation was being put in a 15 X 20 room and not being able to spend time with his wife.

Second, he was relieved of all supervisory responsibility, his security clearance was suspended, and he was removed from his workcenter and given demeaning duties not commensurate to his grade.

Third, he was not informed of all the information used against him, either orally or in writing, and he was not allowed to examine documents or physical evidence relating to the offenses. The information he was referring to pertained to the allegation of child neglect. He had to prepare for the case "blind" because he had no idea what evidence his commander had, or even ~~what~~ the specifics of the charges were. The only thing he was told was he neglected his daughter. He did not have access to the information that brought his commander to the decision to include those charges in the original Article 15. Even repeated Freedom of Information Act requests were unreasonably delayed. He finally did get results, though the information was so incomplete he saw nothing that would indicate the reason his commander included those charges.

In the applicant's view, by failing to appropriately mitigate his punishment and substantially prejudicing his rights, according to the MCM, the entire Article 15 must be revoked.

Applicant's complete response and additional documentary evidence are at Exhibit E.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Sufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. The evidence of record reflects that, after considering all matters presented by the applicant, his commander determined that he had committed one or more of the alleged offenses, and made the decision to impose the nonjudicial punishment under Article 15. The applicant elected to appeal and the punishment was mitigated by the appellate authority. The applicant asserts that he was innocent of the alleged offenses, and that the mitigated punishment was more severe than his initial punishment, and therefore, was illegal. After a careful review of the facts and circumstances of this case, we find no evidence which convinces us that the applicant did not commit the alleged offenses. Therefore, we are not inclined to removed the Article 15 from the applicant's records absent a strong showing the commander who imposed the punishment abused his discretionary authority. However, regarding the mitigated punishment by the appellate authority, we partially agree with AFLSA/JAJM. Although the imposition of the 30 days of extra duty and 30 days' restriction was not illegal, in that they ran concurrently, we too believe the mitigated punishment may have violated the spirit of the MCM.

However, we do not agree with the remedy recommended by AFLSA/JAJM. As previously indicated, we are not sufficiently persuaded of the applicant's incapability. However, since it appears that the applicant has suffered some financial hardship, and we do not want to unduly penalize his family, we are inclined to offer the applicant some relief, not to the extent recommended by JAJM, but rather, by one-half of the sum JAJM proposed. By such action, it is our opinion that the applicant will be afforded proper and fitting relief based on the seriousness of the offenses and the circumstances of this case.

THE BOARD RECOMMENDS THAT:


The pertinent military records of the Department of the Air Force relating to APPLICANT, be corrected to show that, on 21 Feb 97, competent authority mitigated the portion of the nonjudicial punishment imposed under the provisions of Article 15, UCMJ, on 25 Nov 96, pertaining to forfeiture of pay to provide for forfeiture of \$375.00 per month for two months, rather than \$500.00 for two months.

The following members of the Board considered this application in Executive Session on 19 Mar 98, under the provisions of AFI 36-2603:

Mrs. Barbara A. Westgate, Panel Chair
Mr. Gregory H. Petkoff, Member
Mr. Robert W. Zook, Member

All members voted to correct the records, as recommended. The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 11 Jun 97, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, AFLSA/JAJM, dated 11 Jul 97.
Exhibit D. Letter, SAF/MIBR, dated 4 Aug 97.
Exhibit E. Letter, applicant, dated 26 Aug 97, w/atchs.


BARBARA A. WESTGATE
Panel Chair