

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 98-00604

COUNSEL: [REDACTED]

HEARING DESIRED:

NOV 13 1998

Applicant requests that his discharge be upgraded to a general or an honorable. Applicant's submission is at Exhibit A.

The appropriate Air Force office evaluated applicant's request and provided an advisory opinion to the Board recommending the application be denied (Exhibit C). The advisory opinion was forwarded to the applicant for review and response (Exhibit D). As of this date, no response has been received by this office.

After careful consideration of applicant's request and the available evidence of record, we find insufficient evidence of error or injustice to warrant corrective action. The facts and opinions stated in the advisory opinion appear to be based on the evidence of record and have not been rebutted by applicant. Absent persuasive evidence applicant was denied rights to which entitled, appropriate regulations were not followed, or appropriate standards were not applied, we find no basis to disturb the existing record.

Accordingly, applicant's request is denied.

The applicant's case is adequately documented and it has not been shown that a personal appearance with or without counsel will materially add to our understanding of the issue(s) involved. Therefore, the request for a hearing is not favorably considered.

The Board staff is directed to inform applicant of this decision. Applicant should also be informed that this decision is final and will only be reconsidered upon the presentation of new relevant evidence which was not reasonably available at the time the application was filed.

Members of the Board Mr. Robert D. Stuart, Mr. Henry Romo, Jr., and Mr. Richard A. Peterson considered this application on 15 October 1998, in accordance with the provisions of Air Force Instruction 36-2603 and the governing statute, 10 U.S.C. 1552.



ROBERT D. STUART
Panel Chair

Exhibits:

- A. Applicant's DD Form 149
- B. Available Master Personnel Records
- C. Advisory Opinion
- D. AFBCMR Ltr Forwarding Advisory Opinion



DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL SERVICES AGENCY (AFLSA)

24 Jun 98

MEMORANDUM FOR AFBCMR

FROM: AFLSA/JAJM (Lt Col Billett)
112 Luke Avenue, Room 343
Bolling AFB DC 20332-8000

SUBJECT: Correction of Military Records of [REDACTED]

Applicant's request: In an application dated 19 Feb 98, applicant asks that his punitive discharge (received as a result of general court-martial action) be upgraded to either a general or an honorable discharge. On the application he lists the type of discharge he received as "OTH" meaning other than honorable. The available records clearly indicate that applicant received a dishonorable discharge from the general court and that portion of his sentence was upheld on appeal and ultimately executed by the convening authority. However, the DD Form 214 submitted with the application package states "under other than honorable conditions" in the block indicating character of service. The court-martial was held on 27 and 28 Feb 58. All post-trial review and final approval of the dishonorable discharge were accomplished on 16 Sep 58. Thus, the application was not timely filed within the three year limitation period provided by 10 U.S.C. 1552(b). Applicant acknowledges his failure to meet this time requirement on the application form. He states that the Board should find it in the interest of justice to consider the application because of his advanced age and his lack of knowledge as to his right to make application earlier.

Facts of military justice action: On 27 and 28 Feb 58 a general court-martial convened at Tokyo International Airport. One charge and underlying specification alleged that applicant wrongfully used morphine on 19 Aug 57 in violation of Article 134, UCMJ. An additional charge and specification under Article 134 alleged that applicant wrongfully used morphine on 22 Dec 57. Applicant pled guilty to the first charge and specification and chose to contest the second. After hearing evidence the court, consisting of officer members, found applicant guilty of the second charge and specification. After the presentation of appropriate matters relating to sentencing, the court sentenced applicant to "six months at hard labor, to be dishonorably discharged from the service and to forfeit all pay and allowances." The court-martial was called back into session on 4 March 58 to address an ambiguity in the sentence as announced on 28 Feb 58. It was established on the record that the sentence actually arrived at by the court was confinement at hard labor for six months, to be dishonorably discharged from the service and to forfeit all pay and allowances. This "corrected" sentence was formally announced on the record by the court president.

The case subsequently went through the appellate process. The initial approval of the sentence by the convening authority involved a reduction from total forfeitures to forfeiture of

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\$71.00 per month for six months. Specific assignments of error were made to the Air Force Board of Review, one of which concerned the sentence modification scenario described above. The Board of review granted some relief to applicant but did not disturb that portion of the sentence adjudging a dishonorable discharge. Applicant was informed of his right to submit a petition for a grant of review to the United States Court of Military Appeals but did not do so. On 16 Sep 58 the convening authority executed only so much of applicant's sentence as included a dishonorable discharge and hard labor for three months.

Applicant's contentions: Applicant makes no specific claim of error or injustice in his case other than to state "I was not given right of due process." He refers only to the record of the case when asked to submit evidence in support of the application.

Other matters: Applicant originally enlisted in the Air Force in June 1951. He successfully completed a tour of duty on 19 Jun 55 and eventually reenlisted on 16 Aug 55 after a short break in service. At the time of the general court-martial applicant had one prior conviction by special court-martial for two specifications (under Article 134) of assault upon another airman.

Discussion: Several procedural irregularities took place in this case, both before and during the court-martial. An issue was raised both at trial and appeal as to the appropriateness of an instruction to court members given by the law officer on the question of voluntariness of urine specimens obtained from applicant at the time of his apprehension. The Board of review found merit in applicant's argument and provided him relief in the form of a dismissal of the second charge and specification (the one litigated at trial). Applicant also argued on appeal that the court-martial was not legally constituted at the time of the 4 Mar 58 "proceedings for correction" of the sentence. After reviewing the facts and circumstances, the Board of Review found prejudicial error to applicant's substantial rights and reassessed applicant's sentence, finding the discharge and hard labor for three months appropriate. Additionally, applicant argued on appeal that the law officer gave an erroneous sentencing instruction. The Board of Review found no need for corrective action on this point as the error committed by the law officer actually worked to applicant's benefit.

The errors discussed above were all vigorously litigated on applicant's behalf, both at trial and at the appellate level. The record of trial and allied papers reveal no other irregularities affecting the substantial rights of applicant other than those already mentioned. It appears, therefore that applicant was afforded adequate due process during both the trial and post-trial phases of his court-martial. Inasmuch as the Air Force Board of Review granted him all appropriate relief in 1958, and there is no evidence offered by applicant of any extraordinary circumstances taking place since then, there is no basis for applicant's current request for correction of the character of his discharge.

Recommendation: After a review of the available records, I conclude that administrative relief by this office is not possible. Applicant was afforded due process by the

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military justice system and the current character of his discharge is appropriate considering the offense for which he stood convicted and his service record. Accordingly, I recommend that the Board interpose the statute of limitations and deny the requested relief.



LOREN S. PEIUSTEIN
Associate Chief, Military Justice Division
Air Force Legal Services Agency

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