

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 97-03646

COUNSEL: None

FEB 5 1999

HEARING DESIRED: Yes

Applicant requests that his bad conduct discharge (BCD) be upgraded to honorable; that his full rank be restored; that his conviction be overturned; and, that he be compensated for all lost wages and allowances to include the Voluntary Separation Incentive (VSI) program. 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). Applicant's response to the advisory opinion is at Exhibit E.

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 adequately 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 issues 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. Michael P. Higgins, Mr. Richard A. Peterson, and Mr. Patrick R. Wheeler considered this application on 2 February 1999 in accordance with the provisions of Air Force Instruction 36-2603, and the governing statute, 10, U.S.C., 1552.


MICHAEL P. HIGGINS
Panel Chair

Exhibits:

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



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

17 AUG 1998

MEMORANDUM FOR AFBCMR

FROM: AFLSA/JAJM (Maj Hogan)
112 Luke Avenue, Room 343
Bolling AFB, DC 20332-8000

SUBJECT: Correction of Military Records of [REDACTED]
[REDACTED]

Applicant's request: In an application dated 12 November 1997, [REDACTED] L. [REDACTED], the applicant, requests that his bad conduct discharge (BCD) from the Air Force be upgraded to honorable, that his full rank be restored, that his conviction be overturned, and that he be compensated for all lost wages and allowances to include the VSI program. The applicant was court-martialed on 20 March 1996 and was sentenced to a BCD, eight months confinement, total forfeitures and reduction to Airman Basic. The applicant's case and sentence was affirmed on appeal. The applicant's bad conduct discharge went into effect on 5 August 1997. The application was submitted within the three-year limitation provided by 10 U.S.C. 1552(b).

Facts of military justice action: On 20 March 1996, the applicant plead and was found guilty at a general court-martial at [REDACTED]. The applicant was convicted of five specifications under Article 134 of the UCMJ. All the specifications involved the applicant's dishonorable failure to pay just debts. All debts were incurred while the applicant was assigned to a joint NATO assignment in [REDACTED]. The applicant had rented a house from [REDACTED], an elderly Norwegian national. The applicant, without [REDACTED] permission, used a telephone account in [REDACTED] name. He incurred approximately \$1412.90 in telephone and collection charges. The collection agency contacted [REDACTED] since the bill was in her name. [REDACTED] son, [REDACTED], spoke with the applicant and the applicant agreed to pay off the phone bill. After making a few small payments, the applicant stopped making payments on the phone bill. [REDACTED] had to pay the applicant's telephone bill in order to avoid legal action. The applicant left for his new assignment to [REDACTED] without making any additional payments to [REDACTED]. The applicant never made restitution to [REDACTED] after leaving [REDACTED]. The applicant left several other unpaid creditors in [REDACTED]. He defaulted on a loan in the amount of \$4227.65 with [REDACTED]. He owed [REDACTED], his electric company in [REDACTED] \$446.55. The applicant owed \$1487.59 to [REDACTED] (a telephone company). The applicant also owed [REDACTED] Hotel \$232.71 for telephone charges made while residing there. Prior to the court-martial, the applicant acknowledged these were his legitimate debts and said he would arrange to pay them. However, he made no effort to pay these debts over a period of a year and a half.

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During his court-martial, the applicant was properly advised of all of his rights. They included his right to plead innocent, his choice of forum (members or military judge), and his right to be represented by defense counsel. The applicant chose to be represented by his defense counsel, C██████████. After being advised of his rights, the applicant plead and was found guilty of all-of the charges. He was sentenced to a BCD, 8 mos confinement, total forfeitures and reduction to the grade of airman basic. The United States Air Force Court of Criminal Appeals affirmed the trial court's decision on 3 Jan 97. On 3 July 1997, the Court of Appeals for the Armed Forces denied the applicant's petition for a grant of review.

Applicant's contentions: The applicant claims he was denied due process. He alleges in February 1995 he went to the first Area Defense Counsel's office and the ADC, ██████████. ██████████ refused to speak with him about his case. The applicant alleges he attempted to get legal counsel once again in October 1995 and that ██████████ would not see him but told him he was going to be court-martialed. ██████████ contacted the applicant one month later in November 1995 and asked if he had defense counsel. The applicant told her he had been trying for several months to seek the advice of defense counsel. ██████████ informed him someone in ██████████ would be appointed to represent him. ██████████ was appointed his defense counsel in December 1995.

The applicant claims that he had only 45 days to prepare his case while the Government had 13 months to prepare. The applicant says he met with his defense counsel only 4-5 times prior to trial. He claims his defense counsel, ██████████, neglected to inform him that by pleading guilty you are not allowed to contest the alleged charges. The applicant complains that his defense counsel neglected to introduce to the court pay statements that he alleges may have reduced his sentence since it showed that he was unable to satisfy the debts in question because of wage garnishments. The applicant now alleges that his actions were not dishonorable since he had no funds available to pay these debts. He also alleges that he was illegally held past of his date of separation which was 2 December 1995 since he had not been formally charged of any crimes and until February 1996. The applicant attached a copy of a letter to ██████████ of ██████████ stating that he believed he was being unlawfully punished prior to trial.

Discussion: The record of trial makes it clear that the applicant dishonorably failed to pay the five debts as alleged in the charge and five specifications. It appears from the Stipulation of Fact that the applicant left ██████████ with no serious intention of repaying his landlady or any of his other ██████████ creditors. During the guilty plea inquiry, the applicant admitted to owing all these debts and that he dishonorably failed to repay these debts. In addition, the applicant admits in his letter to ██████████ that he had further financial problems once he was reassigned to ██████████. His car was re-possessed, he bounced a couple checks at AAFES, billeting and the Commissary. The applicant now claims the failure to pay his debts were not dishonorable since he had no money to repay the debts since his wages were being garnished by other creditors. The applicant had sole control over his financial situation. His debts were legitimate and he alone was responsible for making payments on these debts. The

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fact that the applicant had other creditors to pay is not a legitimate defense for failing to pay the debts he left behind in [REDACTED]

A review of the applicant's record of trial clearly shows that the applicant has not suffered any material error or injustice in his case. The applicant's court-martial was properly convened and had jurisdiction over the applicant and the offenses tried. The decision of the court and sentence was ultimately affirmed by the Air Force Court of Criminal Appeals. The applicant plead and was found guilty by the military judge. A bad conduct discharge is an appropriate punishment for the offenses the applicant has committed. It should be noted that none of the issues the applicant raises in this appeal were raised during his court-martial or during the appellate process.

The applicant was provided a defense counsel to represent him during the court-martial. It would appear that the defense counsel advised the applicant to plead guilty because the evidence against him was overwhelming. In addition, the applicant entered into a pre-trial agreement in order to achieve a favorable sentence limit. During trial, the military judge methodically questioned the applicant regarding his willingness to plead guilty as well as his willingness to enter into a pre-trial agreement. The applicant testified under oath at court that he was entering into the pretrial agreement and pleading guilty on his own volition. During the court-martial, the applicant was informed that by pleading guilty he was waiving his right to a trial where the government would have to prove his guilt beyond a reasonable doubt. The applicant acknowledged on the record that he understood and that he still wanted to plead guilty.

The applicant alleges that his enlistment expired on 2 December **1995** and that he was wrongfully kept on active duty since he was not formally charged until **1996**. The applicant was aware that he was placed on administrative hold since he was under investigation. Active-duty military personnel can be placed on administrative hold if they are under investigation until the investigation and any recommended disposition is complete. This procedure is routine for military members who are under investigation. It should be noted that the applicant's record of trial and the Stipulation of Fact entered into during his trial state that the applicant extended his enlistment until 2 August **1996**. As such, his enlistment did not expire on 2 December **1995**.

A BCD is an appropriate punishment in the applicant's case. He had over \$7800 in unpaid debts upon leaving [REDACTED] and made no attempt to repay these debts. The applicant admitted his guilt during his court-martial but now appears to refuse to accept responsibility for his crimes. He has provided no compelling justification for granting the relief requested.

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Recommendation: After reviewing the available records, I conclude that administrative relief by this office is not warranted. The applicant has failed to provide a sufficient basis for granting his request. I recommend that the Board deny this application based on its merits.



"LOREN S. PERLSTEIN

Associate Chief, Military Justice Division
Air Force Legal Services Agency

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