RECORD OF PROCEEDINGS

AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: BC-2008-01941

INDEX CODE: 106.00

XXXXXXXXXXXXXXXXXX COUNSEL: NONE

HEARING DESIRED: NO

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APPLICANT REQUESTS THAT:

His Bad Conduct Discharge (BCD) be upgraded.

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APPLICANT CONTENDS THAT:

He is having trouble getting a job, and the discharge characterization is unjust as he had ineffective counsel and had sobered-up for at least one year before his court-martial. He was part of the largest military exercise in that time and received a good recommendation during Operation Bright Star from the Civil Engineering (CE) Commander.

In support of his appeal, the applicant provides a copy of a DD Form 293, *Application for the Review of Discharge or Dismissal from the Armed Forces of the United States*.

Applicant’s complete submission, with attachment, is at Exhibit A.

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STATEMENT OF FACTS:

The applicant enlisted in the Regular Air Force on 23 July 1997 and served as an electrical apprentice until his discharge. Although not used as a basis for discharge, his records indicate that he was administered an Article 15 for, on or about 24 June 1999, dereliction in the performance of his duties by failing to report to his duty section after being released from a project; on or about 14 July 1999, failing to go to his prescribed place of duty; and for, on or about 19 July 1999, failing to obey a general regulation by wrongfully wearing an earring on base. Punishment consisted of a suspended reduction to the grade of airman, 30 days extra duty, and a reprimand.

On 21 June 2000, the applicant plead guilty and was convicted at a general court-martial of underage drinking on divers occasions, wrongfully using marijuana on divers occasions, wrongfully using lysergic acid diethylamide (LSD), and wrongfully using methamphetamines on divers occasions. He was sentenced to a BCD, confinement for five months, forfeiture of all pay and allowances, and a reduction to the grade of airman basic. The sentence was approved by the convening authority on 31 August 2000, and the applicant was discharged with a BCD on 15 November 2001 upon completion of all appellate reviews.

Pursuant to the Board’s request, the Federal Bureau of Investigation (FBI), Clarksburg, WV, provided a copy of an Investigation Report which is at Exhibit C. On 7 November 2008, a copy of the FBI report was forwarded to the applicant for review and comment within 30 days. However, as of this date, no response has been received by this office.

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AIR FORCE EVALUATION:

AFLOA/JAJM recommends denial of the requested relief. Applications must be filed within three years after the alleged error or injustice was discovered or, with due diligence, should have been discovered. The applicant’s BCD had been executed for over six years at the time of his application and the only reason he has offered for why it would be in the interest of justice to consider his application is that he has been having trouble finding a job and he had not committed any illegal conduct for the time period between committing the offenses for which he was convicted and his court-martial. Thus, no basis is provided for concluding that his untimely filing should be excused in the interest of justice and his application should be denied as untimely.

Timeliness aside, the application is also without merit. Title 10, United States Code, (10 USC) limits the Board’s ability to correct records relating to courts-martial to correction of a record to reflect actions taken by reviewing authorities under the UCMJ, and correction of records related to action on the sentence of a court-martial for the purpose of clemency. Aside from these two limited exceptions, the Board is without authority to reverse, set aside, or otherwise expunge a court-martial conviction that occurred on or after 5 May 1950.

While clemency may be granted under 10 USC, section 1552(f)(2), it is not warranted in this case. Prior to accepting the applicant’s guilty plea, the military judge ensured he understood the meaning and effect of this plea and the maximum punishment that could be imposed if his guilty plea was accepted by the court. The military judge explained the elements and definitions of the offenses, and the applicant explained in his own words why he believed he was guilty.

Upon the court’s acceptance of the applicant’s guilty plea, the court received evidence in extenuation and mitigation, as well as aggravation, prior to crafting an appropriate sentence for the crimes committed. A substantial portion of the evidence submitted by the applicant and his defense counsel pertained to his change in behavior from August 1999 and the time of his court-martial. The good recommendation from the CE Commander in Operation Bright Star the applicant cites in his application was one of the character letters admitted prior to sentencing. The military judge considered this letter as well as other evidence presented by the applicant when determining the appropriate sentence for his criminal conduct.

Rules for Courts-Martial state that a BCD is “designed as punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature.” A BCD is more than merely a service characterization, but as defined under the Rules, is a punishment for the crimes committed while a member of the Armed Forces. The applicant’s sentence to a BCD and confinement for five months was well within the legal limits and was an appropriate punishment for the serious offenses committed.

Moreover, the applicant went through a post-trial clemency processing before the convening authority took final action. In his clemency request, the applicant’s counsel asked the convening authority to commute the BCD to an administrative discharge under other than honorable conditions, arguing that he had taken substantial steps in turning his life around prior to the AFOSI investigation and that his duty performance in Operation Bright Star had been exemplary. The convening authority, after considering all the matters submitted in clemency, properly exercised his ultimate authority to approve the sentence as adjudged, and his decision was later upheld by the Air Force Court of Criminal Appeals.

Although the applicant makes a general assertion that his counsel was ineffective, he has not specified how his counsel was ineffective. His justification for upgrading the BCD is essentially the same argument presented by his counsel and considered by the court and convening authority. To overturn this punishment now would require the Board to substitute its judgment for that rendered by the court and the convening authority when the facts and circumstances were fresh.

Clemency in this case would be unfair to those individuals who honorably served their country while in uniform. Congress’ intent in setting up the Veteran’s Benefits Program was to express thanks for veterans’ personal sacrifices, separations from family, facing hostile enemy action and suffering financial hardships. All rights of a veteran under the laws administered by the Secretary of Veterans Affairs are barred when the veteran was discharged or dismissed by reason of the sentence of a general court-martial. Extending the same benefits to someone who committed crimes such as the applicant’s while on active duty would be offensive to all those who served honorably.

The AFLOA/JAJM evaluation is at Exhibit D.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

A complete copy of the evaluation was forwarded to the applicant on 3 October 2008, for review and comment, within 30 days. However, as of this date, no response has been received by this office.

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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 error or injustice. We note this Board is without authority to reverse, set aside, or otherwise expunge a court-martial conviction. Rather, in accordance with Title 10, United States Code, Section 1552(f), actions by this Board are limited to corrections to the record to reflect actions taken by the reviewing officials and action on the sentence of the court-martial for the purpose of clemency. We also find no evidence to indicate the applicant’s service characterization, which had its basis in his conviction by a general court-martial and was a part of the sentence of the military court, was improper or that it exceeded the limitations set forth in the Uniform Code of Military Justice (UCMJ). We have considered the applicant's overall quality of service, the general court-martial conviction that precipitated the discharge, and the seriousness of the offenses for which convicted, i.e., underage drinking and wrongfully using marijuana, methamphetamines, and LSD on divers occasions. We considered upgrading the discharge based on clemency; however, based on the evidence of record, we cannot conclude that clemency is warranted. Moreover, it appears that he has not overcome the behavior traits which caused the discharge based on the report provided by the FBI. In view of the above, we cannot recommend approval based on the current evidence of record.

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THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of 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.

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The following members of the Board considered Docket Number BC-2008-01941 in Executive Session on 27 January 2009, under the provisions of AFI 36-2603:

Mrs. Barbara A. Westgate, Panel Chair

Mr. Steven A. Cantrell, Member

Mr. Anthony P. Reardon, Member

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 1 Aug 08, w/atch.

Exhibit B. Applicant's Available Master Personnel Records.

Exhibit C. USDOJ FBI Report.

Exhibit D. Letter, AFLOA/JAJM, dated 24 Sep 08.

Exhibit E. Letter, SAF/MRBR, dated 3 Oct 08.

Exhibit F. Letter, AFBCMR, dated 7 Nov 08, w/atch.

BARBARA A. WESTGATE

Panel Chair