RECORD OF PROCEEDINGS

AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: BC-2008-02496

 INDEX CODE: 129.04, 133.03

 XXXXXXXXXXXXXXXXXX COUNSEL: NONE

 HEARING DESIRED: NO

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APPLICANT REQUESTS THAT:

The Board reinstate his highest grade held of master sergeant (E-7) as his retired grade.

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APPLICANT CONTENDS THAT:

He was unnecessarily punished when he was demoted and forced to serve three months confinement. He is in a financial bind as his wife’s illness (pseudo tumor) prevents her from working. He also has a daughter with a learning disability, and it is a burden for him to try and pay his bills by himself. He is willing to return to active duty or serve in the Reserves as an E-7 to complete the two years he needs to hold this rank.

In support of his appeal, he has provided copies of a personal statement; a letter from the Social Security Administration pertaining to his wife’s disability; and a letter from a Disability Benefits Law firm pertaining to his wife’s Social Security Disability Claim and attorney fees.

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

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STATEMENT OF FACTS:

The applicant retired from the Regular Air Force on 30 June 2003 in the grade of senior airman (E-4) due to maximum service. Prior to this, he served in the grade of master sergeant (E-7) from 1 March 2001 until being reduced to his current grade by a special court-martial.

On 15 May 2002, the applicant was tried by a special court-martial and, in accordance with his pleas, was convicted of several offenses related to an unprofessional relationship he had with a senior airman in his chain of command. The offenses included: sending offensive materials to the senior airman through government e-mail; disobeying his commander’s order to not have contact with the senior airman; dereliction of duty for engaging in the unprofessional relationship; making a false official statement concerning the situation; and communicating indecent language to the senior airman. He was sentenced to be reduced to the grade of senior airman and three months confinement. The sentence was approved and executed on 30 June 2002.

On 26 February 2003, the Secretary of the Air Force Personnel Council (SAFPC) determined the applicant did not serve satisfactorily in his highest grade held of master sergeant (E-7) within the meaning of Section 8964, Title 10, United States Code. However, they found that he did serve satisfactorily in the grade of technical sergeant (E-6), and directed his advancement to that grade on the Retired List effective the date he completes all required service.

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AIR FORCE EVALUATION:

AFLOA/JAJM recommends denial as the application is untimely and there is no evidence of clear error or injustice.

Applications must be filed within three years after the alleged error or injustice was discovered or, with due diligence, should have been discovered. The application is dated 25 June 2008 and his retirement date was 30 June 2003, thereby making this application 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.

The applicant has not provided any evidence that the court-martial conviction or sentence were the result of error or injustice. Instead, he argues the punishment he received was “unnecessary” and his current dire financial straits weigh in favor of some clemency. While clemency may be granted under 10 USC, Section 1552(f)(2), clemency is not warranted. Air Force Instruction 36-2603, paragraph 4.1, states “The applicant has the burden of providing sufficient evidence of probable material error or injustice.” The applicant’s only justification for restoration of his previous grade is the fact that he is currently having financial problems, and this does not constitute an error or injustice with regard to his court-martial sentence.

The applicant’s present unfortunate circumstances do not excuse or erase his past criminal conduct. He was a senior noncommissioned officer (NCO) at the time of his trial and, by virtue of his grade, was expected to exceed the standards and expectations the military places on NCOs and airmen. Senior NCOs are role models in the enlisted force structure “epitomizing excellence, professionalism, and competence.” The applicant utterly failed in his duties when he chose to engage in an unprofessional relationship with an airman in his chain of command, disobey his commander’s order, and lie about it. An argument for clemency now, even based on difficult financial circumstances, ignores the fact that by virtue of his status, he was expected to live to high standards and be a role model for junior members of the enlisted force.

Furthermore, a military court weighed the evidence presented at trial to craft a sentence appropriate to address both the applicant and his criminal conduct. The court clearly weighed the long-term impact of the punishment on the applicant. It opted against imposing a punitive discharge (authorized in this case based on the offenses) which ultimately allowed him to retire with full benefits, albeit at a reduced grade. To overturn this punishment now would require the Board to substitute its judgment for that rendered by the court and the convening authority over six years ago when the facts and circumstances were fresh.

The AFLOA/JAJM evaluation is at Exhibit C.

AFPC/DPSOR recommends denial of the applicant’s request to be reinstated to the grade of master sergeant, be retired in that grade, or be advanced to that grade on the Retired List.

The applicant held the grade of senior airman on the date of his retirement; therefore, his proper retired grade is senior airman as determined by 10 USC, Section 8961(b), which states “Unless entitled to a higher retired grade under some other provision of law, a Regular or Reserve of the Air Force…who retires other than for physical disability, retires in the regular or reserve grade that he holds on the date of his retirement.”

When an enlisted member is demoted and retires in a grade lower than the highest grade held on active duty, 10 USC, Section 8964, allows for the member to be advanced to the highest grade held satisfactorily, as determined by the Secretary of the Air Force, when time on active duty and time on the Retired List totals 30 years. On 26 February 2003, SAFPC determined the applicant did not serve satisfactorily in his highest grade held of master sergeant, and directed he be advanced to the grade of technical sergeant on the Retired List when his time on active duty and time on the Retired List totals 30 years. The applicant will be advanced to the grade of technical sergeant on the Retired List effective 10 June 2013.

The AFPC/DPSOR evaluation, with attachments, is at Exhibit D.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Complete copies of the evaluations were forwarded to the applicant on 24 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 took notice of the applicant's complete submission in judging the merits of the case; however, we agree with the opinions and recommendations of the Air Force offices of primary responsibility and adopt their rationale as the basis for our conclusion that the applicant has not been the victim of an error or injustice. The Board further notes that prior to the applicant’s retirement, SAFPC determined that he did not serve satisfactorily in his highest grade held of master sergeant and directed that he be advanced to the grade of technical sergeant on the Retired List when his time on active duty and time on the Retired List totals 30 years. Therefore, in the absence of evidence to the contrary, we find no compelling basis to recommend granting the relief sought in this application.

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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-2008-02496 in Executive Session on 16 December 2008, under the provisions of AFI 36-2603:

 Ms. Charlene M. Bradley, Panel Chair

 Mr. Alan A. Blomgren, Member

 Mr. Elwood C. Lewis, III, Member

The following documentary evidence was considered:

 Exhibit A. DD Form 149, dated 25 Jun 08, w/atchs.

 Exhibit B. Applicant’s Available Master Personnel Records.

 Exhibit C. Letter, AFLOA/JAJM, dated 8 Sep 08.

 Exhibit D. Letter, AFPC/DPSOR, dated 19 Sep 08.

 Exhibit E. Letter, SAF/MRBR, dated 24 Oct 08.

 CHARLENE M. BRADLEY

 Panel Chair