RECORD OF PROCEEDINGS

AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: BC-2009-01267

INDEX CODE: 106.00

XXXXXXX 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:

It has been 25 years and he is looking for a second chance and wants to better his life.

In support of his appeal, the applicant provides a copy of his DD Form 214, *Certificate of Release or Discharge from Active Duty*.

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

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STATEMENT OF FACTS:

The applicant entered the Regular Air Force on 22 February 1980 and served as a jet engine mechanic until being discharged. On 1 July 1982, he was tried at a General Court-Martial on one charge and specification of desertion; one charge and eight specifications of selling, transferring, and using cocaine; and possessing and using marijuana. At trial, the applicant pled not guilty to desertion but guilty to the lesser included offense of absent without leave, and not guilty to selling cocaine but guilty to the remaining drug related specifications. He was sentenced to a BCD, confinement for four years (later reduced to three years pursuant to pretrial agreement), and forfeiture of $367.00 per month for four years (later reduced to three years pursuant to pretrial agreement). Upon completion of the appellate review process, he was discharged on 9 January 1984 in the grade of airman basic (AB – E-1) with a BCD service characterization.

The Applicant’s Airman Performance Report (APR) profile follows:

PERIOD ENDING EVALUATION

18 Nov 1980 9

18 Nov 1981 8

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 10 July 2009, a copy of the FBI report and a request for post-service information 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 as the application is untimely and there is no basis for upgrading the BCD. Ordinarily, applications must be filed within three years after the alleged error or injustice was discovered or, with due diligence, should have been discovered, and more than 26 years have passed since the applicant’s trial. The only basis he has provided for upgrading his BCD is his desire for a second chance and a better life, and this provides no basis for concluding his untimely filing should be excused in the interests of justice; therefore, the 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 Uniform Code of Military Justice (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. The applicant’s approved sentence was well within the legal limits and was an appropriate punishment for the offenses he committed. Further demonstrating the appropriateness of a BCD in these circumstances, the Rules for Court-Martial distinguish between a dishonorable discharge, which should be reserved for “offenses usually recognized in civilian jurisdictions as felonies, or offenses of a military nature requiring severe punishment,” and a BCD, which “is less severe than a dishonorable discharge and is designed as punishment for bad-conduct rather than as punishment for serious offenses of either a civilian or military nature.”

To accept the applicant’s contention that his BCD should be upgraded would require the Board to overlook his General Court-Martial conviction for transferring and using cocaine, possessing and using marijuana, and absence without leave. Furthermore, it would require the Board to substitute its judgment for that rendered by the court and the convening authority over 26 years ago when the facts and circumstances were fresh. A BCD was a proper sentence and properly characterizes the applicant’s service.

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 22 May 2009, 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 that 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 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 UCMJ. We have considered applicant's overall quality of service, the General Court-Martial conviction that precipitated the discharge, and the seriousness of the offenses of which convicted, i.e., transferring and using cocaine, possessing and using marijuana, and absence without leave. Based on the evidence of record, we cannot conclude that clemency is warranted. 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 the evidence presented did not demonstrate the existence of material error or injustice; the application was denied without a personal appearance; and 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-2009-01267 in Executive Session on 17 September 2009, under the provisions of AFI 36-2603:

Mrs. Charlene M. Bradley, Panel Chair

Mr. Steven A. Cantrell, Member

Mr. Alan A. Blomgren, Member

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 23 Mar 09, w/atch.

Exhibit B. Applicant's Available Master Personnel Records.

Exhibit C. USDOJ FBI Report.

Exhibit D. Letter, AFLOA/JAJM, dated 8 May 09.

Exhibit E. Letter, SAF/MRBR, dated 22 May 09.

Exhibit F. Letter, AFBCMR, dated 10 Jul 09, w/atch.

CHARLENE M. BRADLEY

Panel Chair