

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: BC-2003-03941

COUNSEL: NONE

HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

His retired rank of senior airman (SrA) be upgraded to technical (TSgt) and he be compensated for his period of confinement.

APPLICANT CONTENDS THAT:

He had only one incident with the law in his life. He retired after 24 years of honorable service. His unlawful 267-day confinement violated his pretrial agreement. He was denied his Fifth Amendment rights because he was not afforded a certified judge. An appellate court found the sentence unlawful and set it aside. The case was dismissed but his TSgt grade was not restored. This is unjust and should be remedied. His performance reports show he served satisfactorily in that grade. He could not make an application until the time for advancement on the retired list came in 2001.

In support of his appeal, the applicant provides a personal statement; copies of extracts from his master personnel record and the record of trial (ROT).

The applicant's complete submission, with attachments, is at Exhibit A.

STATEMENT OF FACTS:

On 27 Oct 71, the applicant enlisted in the Regular Air Force, and was progressively promoted to the grade of TSgt with a Date of Rank (DOR) of 1 Sep 88. His performance reports for the periods 31 Oct 80 through 17 Oct 90 reflect, with four exceptions the highest overall ratings. During the period in question, he was assigned to the Mission Support Squadron (MSSQ), as the assistant chief of the Records Management Section.

On or about 1 Jun 91, the applicant was approved for retirement effective 1 Nov 91.

On 29 Aug 91, the applicant was arrested by civil authorities and confined in the local civil jail pending a court hearing and on 30 Aug 91, he was released.

The following charges were preferred on the applicant:

Charge I: The applicant committed the offense of carnal knowledge, on or about 6 Aug 91, and pled not guilty.

Charge II: He committed sodomy with a child under the age of 16 years, on or about 6 Aug 91, and pled not guilty.

Charge III: He committed an indecent act upon the body of a female under the age of 16 years, not his wife, with intent to gratify his sexual desires, on or about 6 Aug 91, and pled not guilty.

Additional charge: The applicant raped a female under the age of 16 years, on or about 6 Aug 91 and pled not guilty.

On 4 Sep 91, the applicant's retirement order was rescinded and he was placed on administrative hold.

On 31 Mar 92, a pretrial agreement withdrew Charges I and II and the additional charge and contained a sentence cap of a bad conduct discharge (BCD), confinement as adjudged, reduction to the grade of airman basic and no forfeiture. Any reduction below SrA, any confinement, and execution of the BCD was suspended contingent upon restitution to the victim, participation in a sexual offender counseling program, and commission of no new offenses.

On 1 Apr 92, in a general court-martial, the applicant was tried and pled guilty to Charge III. The adjudged sentence was a BCD, confinement for three years, and reduction to the grade of airman basic, and only so much of the sentence as provided for a BCD, three years of confinement, and reduction to the grade of airman basic was approved. However, execution of the sentence extending to the confinement was suspended for five years, at which time, unless the suspension was sooner vacated, would be remitted without further action; and execution of the sentence extending to the BCD and reduction below the grade of SrA was suspended until the occurrence of the events as agreed in the pretrial agreement: (1) completion of a program of alcohol abuse rehabilitation; (2) at his own expense, he complete a program of sexual offender treatment approved by the convening authority's staff judge advocate (SJA), and (3) he pay restitution to the

victim in the sum of \$3,000.00, at which time, unless sooner vacated, would be remitted without further action.

The convening authority deviated from the pretrial agreement, on 14 May 92, and approved a BCD, three years confinement, and a reduction to the grade of airman basic, but suspended the confinement for five years without conditions. The execution of the BCD and reduction below the grade of SrA was also suspended until the occurrence of the requirements of completing the alcohol rehabilitation program, the sex offender treatment program, and the payment of restitution. Also, on 14 May 92, he was advised that he was being placed on appellate leave status, pending completion of appellate review.

The appellate review was completed, on 12 Jan 93, when the United States Court of Military Appeals (COMA) denied his review.

On 19 Feb 93, the special court-martial (SCM) convening authority recalled the applicant from appellate leave status for the purposes of conducting an Article 72 hearing to consider vacating his suspended sentence.

The hearing was held, the applicant was represented by both military and civilian defense counsels and the SCM convening authority recommended the suspended sentence be vacated; the suspension of the BCD and the three year confinement was vacated and ordered executed, on 21 Jun 93.

The applicant's counsel petitioned to the Air Force Court of Military Review (AFCMR) for a deferment of the confinement pending an appellate review; however, the request was denied.

The COMA, on further consideration, noted that based on the convening authority's court-martial order, confinement had been suspended without conditions and therefore, the confinement was unlawful and void. The COMA did not address the characterization of the discharge or the applicant's grade. However, the COMA indicated any decision to vacate the suspension had to be based on some future failure by the applicant to comply with the terms of the suspension, until 13 May 97.

As a result, the applicant was released from confinement on 17 Mar 94. The General Court-Martial Order No. 9, dated 21 Jun 93, was set aside. In addition, they found the following; 1) no convening authority may apply the conditions on suspension to the confinement element of the adjudged sentence; 2) the period of suspension of the punitive discharge and reduction in grade, during which the applicant was required to participate satisfactorily in an acceptable sex offender

rehabilitation program, was limited to five years; 3) involuntary appellate leave was to be applied to the applicant so long as the sentence included a suspended punitive discharge; 4) any decision to vacate the suspension was based on some future failure by the applicant to comply with the terms of the suspension, until 13 May 97.

The applicant, as an inducement for his retirement package to be approved, agreed to waive his rights to be advanced on the retired list pursuant to Title 10, USC, Section 8964. The Secretary of the Air Force Personnel Council (SAFPC) accepted his retirement application and found that he did not serve satisfactorily in any grade higher than SrA within the meaning of Title 10, USC, Section 8964.

The applicant was relieved from active duty, on 30 Sep 95, in the grade of SrA. He was credited with 23 years, 11 months, and 3 days of active service, excluding one day of lost time.

In a response to the applicant, the Defense Finance and Accounting Service (DFAS) advised the applicant that he may be entitled to additional pay pending completion of a final computation of pay and allowances. Subsequently, he was advised that his records were corrected to reflect only one day of lost time and that his retired pay had been correctly computed. In addition, their record reflect the applicant was due additional pay and allowances based on his overturned confinement, appellate review and BCD and that his payment would be made directly to him.

THE AIR FORCE EVALUATION:

AFLSA/JAJM now (AFLOA/JAJM) recommends denial, noting, that although the COMA ordered the applicant released and ruled regarding the pretrial agreement, the COMA did not address the applicant adjudged grade of SrA. If the applicant contends, the entire pretrial agreement was to be thrown out, what remains is the adjudged sentence in which he would have been reduced to airman basic. He affirmatively waived his right to request an upgrade of his rank pursuant to Title 10, USC, Section 8964. Given the nature of the offenses and the waiver of his right to request an upgrade of his rank, no clemency is warranted.

The complete JAJM evaluation is at Exhibit C.

AFPC/DPPRRP (now DPSOR) recommends denial, noting the applicant was reduced in rank from TSgt to SrA and he applied for retirement in that grade. He waived his right's to advancement to the highest grade held while on active duty and, prior to his

retirement, SAFPC determined he would not be advanced to any grade higher than SrA when his active, plus service on the retired list, totaled 30 years.

The complete DPPRRP evaluation is at Exhibit D.

APPLICANT'S REVIEW OF THE AIR FORCE EVALUATION:

On 4 Apr 04, the applicant requested his application be administratively closed, see attachment at Exhibit F.

By letter, dated 20 Sep 10, which we received 20 Oct 11, the applicant requested his case be reopened; he notes that he has been retired since Oct 95. He believes his performance reports provides proof that he served in the grade of staff sergeant (SSgt) and TSgt in an outstanding manner. He notes that his performance reports reflect overall ratings of "9" on eight reports and overall ratings of 8 on the remaining four. He request to be restored to the grade of SSgt with any back pay.

In support of his appeal, the applicant provides extracts from his master personnel record, including copies of General Court-Martial Order No 16, dated 1 Nov 95 and his enlisted performance reports rendered for the periods 31 Oct 80 through 17 Oct 90.

The applicant's complete response, with attachments, is at Exhibit G.

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 recommendation 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. In addition, when considering the egregiousness of the charge surrounding the applicant's court-martial and subsequent discharge, the pre-trial agreements, the COMA ruling and the agreement made with SAFPC to waive his advancement on the

retired list pursuant to Title 10, USC, Section 8964 to secure his retirement, we conclude that relief beyond that already afforded to the applicant is not warranted. Additionally, while the applicant asserts that his performance reports validate his satisfactory service in the grade of SSgt and TSgt, in our view, the egregious nature of the offenses he was found guilty of by court martial clearly overcome the service documented in these reports. Therefore, in the absence of evidence to the contrary, we find no basis to recommend granting the relief sought in this application.

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.

The following members of the Board considered AFBCMR Docket Number BC-2003-03941 in Executive Session on 15 November 2012, under the provisions of AFI 36-2603:

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 19 Nov 03, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFLSA/JAJM, dated 24 Feb 04.
- Exhibit D. Letter, AFPC/DPPRRP, dated 2 Mar 04.
- Exhibit E. Letter, SAF/MRBR, dated 12 Mar 04.
- Exhibit F. Letter, AFBCMR, dated 19 Apr 04, w/atch.
- Exhibit G. Letter, Applicant, dated 20 Sep 10.

Panel Chair