

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: BC-2012-00184

COUNSEL:

HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

His Bad Conduct Discharge (BCD) be upgraded so he is entitled to receive Department of Veterans Affairs (DVA) benefits.

APPLICANT CONTENDS THAT:

He joined the Air Force after graduating from high school to have a better life and to serve his country.

He received numerous promotions, awards, and medals.

He was a member of the Air Force Boxing team and became the Featherweight Boxing Champion holding this title throughout his Air Force career. He also won the prestigious title of Golden Gloves champion.

In 1992 he was court-martialed and convicted for having a positive urinalysis for cocaine. He received a BCD, and was discharged from the Air Force after honorably serving for 11 years.

Prior to his discharge he was not entered into rehabilitation nor did he receive counseling.

He used drugs as a temporary solution to his personal problems. His father died while he was serving his first remote tour. Six months later his grandmother died. Soon after, his mother was diagnosed with terminal breast cancer, and died in 1995.

Other than this isolated incident of drug use, he was an asset to the Air Force.

In support of his request, the applicant provides a personal statement and his DD Form 214, *Certificate of Release or Discharge from Active Duty*.

His complete submission, with attachments, is at Exhibit A.

STATEMENT OF FACTS:

On 4 Feb 1982, the applicant entered the Regular Air Force.

On 16 May 1991, his commander notified him that he was recommending his separation from the Air Force under the provisions of AFR 39-10, *Administrative Separation of Airmen*. The specific reasons for this action were:

On or about 22 Sep 1990 to on or about 1 Apr 1991, he was derelict in the performance of his duties in that he willfully failed to perform monthly operational maintenance checks, as it was his duty to do, for which he received nonjudicial punishment on 15 Apr 1991;

On or about 16 Oct 1990 to on or about 3 Dec 1990, he did, on diverse occasions, without authority, fail to go at the time prescribed to his appointed place of duty, for which he was counseled on 3 Dec 1990;

On or about 10 Jan 1991, he disrespected a superior commissioned officer, by contemptuously interrupting him while he was talking to him, for which he was reprimanded on 5 Feb 1991;

On or about 4 Mar 1991, he did make and utter check number 163, in the amount of \$150.00, for the purpose of obtaining something of value and did thereafter fail to maintain sufficient funds for payment of such check in full upon its presentment for payment, for which he was reprimanded on 29 Mar 1991;

On or about 11 Mar 1991 and 13 Mar 1991, he did make and utter check numbers 171 and 173, both in the amount of \$150.00, for the purpose of obtaining something of value and did thereafter fail to maintain sufficient funds for payment of such check in full upon its presentment for payment, as evidenced by a dishonored check notification;

On or about 1 and 3 Apr 1991, without authority, he failed to go at the time prescribed to his appointed place of duty, to wit: Disaster Preparedness, for which he received nonjudicial punishment on 15 Apr 1991;

On or about 19 Apr 1991, he was derelict in the performance of his duties in that he negligently failed to properly clean and dry M17A2 masks assigned to his branch, as it was his duty to do, for which he was reprimanded on 22 Apr 1991; and

On or about 20 Apr 1991, without authority, he failed to go at the time prescribed to his appointed place of duty, for which he was reprimanded on 22 Apr 1991.

On 16 May 1991, the applicant acknowledged receipt of the notice of discharge.

On 8 Jul 1991, the Staff Judge Advocate (SJA) reviewed the case and found it legally sufficient.

On 17 Jul 1991, the applicant wrongfully used cocaine.

On 21 Feb 1992, he pled not guilty to one specification of wrongfully using cocaine, in violation of Article 112 (a), Uniform Code of Military Justice (UCMJ). He was convicted by a general court-martial and was sentenced to a BCD, forfeiture of \$500.00 pay per month for 12 months, and reduction to airman basic (E-1).

On 30 Aug 1993, his BCD was executed via General Court-Martial Order Number 7 with an effective date of 17 Sep 1993. He served 11 years, 7 months, and 14 days of active service.

AIR FORCE EVALUATION:

AFLOA/JAJM recommends denial. JAJM states upgrading the applicant's BCD is not appropriate and recommends the Board deny the request as untimely or on the merits. JAJM states that ordinarily, an applicant must file an application within three years after an error or injustice is discovered or, with due diligence, should have been discovered. The applicant's court-martial took place in 1992 and the final action on his discharge was taken in 1993. The application is untimely.

Under 10 U.S.C. § 1552(f), which amended the basic corrections board legislation, the Board's ability to correct records related to courts-martial is limited. Specifically, section 1552(f)(1) permits the correction of a record to reflect actions taken by a reviewing authority under the UCMJ. Additionally, section 1552(f)(2) permits the correction of records related to action on the sentence of courts-martial for the purpose of clemency. Apart from these two limited exceptions, the effect of section 1552(f) is that 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 effective date of the UCMJ).

The applicant offers no allegation of injustice. He simply requests an upgrade to his BCD because he was not offered any rehabilitation and his post-military drug addictions amounted to an excess of 20 years additional punishment. The applicant alleges no error in the processing of the general court-martial conviction against him and his record of trial shows no error in the processing of the court-martial. The applicant pled not guilty at trial; nevertheless, the court adjudged guilt on the specification, beyond a reasonable doubt, based on the evidence presented by the prosecution. During the court-martial, the prosecution introduced a drug testing report that indicated the applicant's urine tested positive for cocaine. Additionally, the court-martial panel heard the testimony of a forensic toxicologist, who explained to the members the drug testing report and the significance of a positive urinalysis. The applicant, who was represented by military counsel, had the opportunity to challenge the drug testing report and cross examine the forensic toxicologist. The court received evidence in aggravation, as well as in extenuation and mitigation, prior to crafting an appropriate sentence for the crimes committed. The court-martial took all of these factors into consideration when imposing the applicant's sentence.

Clemency in this case would be unfair to those individuals who honorably served their country while in uniform. Congress' intent in setting up the Veterans 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 where the veteran was discharged or dismissed by reason of the sentence of a general court-martial. This makes sense if the benefit program is to have any real value. It would be offensive to all those who served honorably to extend the same benefits to someone who committed crimes such as the applicant's while on active duty.

The complete JAJM evaluation is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Counsel reiterated and elaborated on the applicant's initial contentions. He stated the applicant's BCD was harsh. There was an opportunity to salvage his career and teach him the errors of his ways without imposing a penalty that he may never overcome. On the basis of these issues and in all fairness this was an isolated incident and not deserving of such a harsh separation from the military. Counsel refers to the applicant's numerous awards and that he served with distinction for more than 11 years.

Counsel's complete response is at Exhibit E.

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 find no evidence of an error or injustice that occurred in the discharge processing. The applicant's council argues that he was an asset to the Air Force and that his drug use was an isolated incident. However, the evidence of records reflects a history of minor disciplinary infractions. Therefore, based on the available evidence of record, it appears the discharge was consistent with the substantive requirements of the discharge regulation and within the commander's discretionary authority. The applicant has provided no evidence which would lead us to believe the characterization of the service was contrary to the provisions of the governing regulation, unduly harsh, or disproportionate to the offenses committed. In the interest of justice, we considered upgrading the discharge based on clemency; however, we do not find the evidence presented is sufficient to compel us to recommend granting the relief sought on that basis. Therefore, in the absence of evidence to the contrary, we find no basis upon which 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.

The following members of the Board considered AFBCMR Docket Number BC-2012-00184 in Executive Session on 18 Jul 2012, under the provisions of AFI 36-2603:

Panel Chair
Member
Member

The following documentary evidence was considered in AFBCMR BC-2012-00184:

- Exhibit A. DD Form 149, dated 5 Dec 2011, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFLOA/JAJM, dated 23 Apr 2012.
- Exhibit D. Letter, SAF/MRBR, dated 25 Apr 2012.
- Exhibit E. Letter, Counsel, dated 9 May 2012.

Panel Chair