

RECORD OF PROCEEDINGS  
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: BC-2012-01954

COUNSEL: NONE

HEARING DESIRED: NOT INDICATED

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APPLICANT REQUESTS THAT:

1. The nonjudicial punishment he received on 25 Jul 74, be set aside.
2. His grade of sergeant (Sgt) be restored with the associated back pay.

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APPLICANT CONTENDS THAT:

His Article 15 was unjust, because while on leave from Japan to Colorado, he was subsequently diagnosed with infectious hepatitis and was hospitalized. His medical provider advised that he could not travel, so he requested that someone inform his command; however, this was not done and he was charged with being absent without leave (AWOL) and given an Article 15.

Since there is no basis for the Article 15, his date of rank (DOR) to the grade of Sgt with associated back pay should be restored.

In support of his appeal, the applicant provides a personal statement.

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

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STATEMENT OF FACTS:

On 25 Jul 74, the applicant was offered nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ). He was an aircraft maintenance specialist assigned to Kadena Air Base, Japan. He was charged with one specification of absence without authority in violation of Article 86, UCMJ. The applicant was afforded the opportunity to consult with defense counsel, accepted the Article 15 and waived his right to demand

trial by court-martial. He elected not to present written matters and did not make a personal appearance before the commander. On 25 July 1974, the commander decided that the applicant had committed the offense alleged. The commander imposed punishment consisting of a reduction to the rank of airman first class. On 13 Aug 74, the applicant appealed the commander's decision and sought to have the Article 15 set aside. However, his appeal was denied. On 11 Oct 74, the Article 15 action was reviewed and determined to be legally sufficient.

The applicant was discharged, on 3 Jan 75, with service characterized as honorable, in the grade of airman first class (A1C/E-3). He was credited with 3 years, 5 months and 21 days of active service.

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THE AIR FORCE EVALUATION:

AFLOA/JAJM recommends denial, stating, in part, the application is untimely and, therefore, should be denied. Additionally, the applicant has not shown a clear error or injustice which would require the requested relief be granted.

Nonjudicial punishment is authorized by Article 15, Uniform Code of Military Justice (UCMJ), Title 10 U.S.C., Section 815, and governed by the Manual for Courts-Martial (Part V) and AFI 51-202, *Nonjudicial Punishment*. This procedure permits commanders to dispose of certain offenses without trial by court-martial unless the service member objects. Service members first must be notified by their commanders of the nature of the charged offenses, the evidence supporting the offenses, and the commander's intent to impose the punishment. The member may consult with a defense counsel to determine whether to accept the nonjudicial punishment or demand trial by court-martial. Accepting the proceedings is simply a choice of forum; it is not an admission of guilt.

Nonjudicial punishment is also not, when imposed, a criminal conviction. A member accepting Article 15 proceedings may submit written matters to, and have a hearing with, the commander imposing the punishment. The member may have a spokesperson at the hearing, may request that witnesses appear and testify, and may present evidence. The commander must consider any information offered by the member and must be convinced by reliable evidence that the member committed the offenses before imposing punishment. Members who wish to contest their commander's determination or the severity of the punishment imposed may appeal to the next higher commander. The appeal authority may deny the appeal altogether if the appeal

authority agrees with the action taken or may remove or modify the Article 15 if he or she disagrees in whole or in part with the action. That said, a commander considering a case for disposition under Article 15 exercises largely unfettered discretion in evaluating the case, both as to whether punishment is warranted and, if so, the nature and extent of punishment. The exercise of that discretion should generally not be reversed or otherwise changed on appeal or by the Board absent good cause.

The MCM and AFI 51-202 provide for certain relief from nonjudicial punishment, specifically, mitigation, remission, suspension, and set aside. A set aside of an Article 15 is the removal of the punishment from the record and the restoration of the service member's rights, privileges, pay, or property affected by the punishment. Setting aside an Article 15 action restores the member to the position held before imposition of the punishment, as if the action had never been initiated. Set aside of punishment should not routinely be granted. Rather, set aside is to be used strictly in the rare and unusual case where a genuine question about the service member's guilt arises or where the best interests of the Air Force would be served.

The applicant alleges injustice in that the commander failed to accept his excuse for his failure to return from his stateside leave within the authorized time. The applicant, however, does not allege error in how the Article 15 was processed. A review of the applicant's record indicates that the applicant's rights were observed throughout the process of the Article 15. The commander, at the time of the Article 15, had the best opportunity to evaluate the evidence in the case. With that perspective, the commander exercised the discretion that the applicant granted him when the applicant accepted the Article 15 and found nonjudicial punishment appropriate in this case. Moreover, the commander's decision was scrutinized by the applicant's exercise of his right to appeal. The appellate authority was similarly unpersuaded by the applicant's argument in his defense. The legal review process showed that the commander did not act arbitrarily or capriciously in making his decision.

The applicant does not make a compelling argument that the Board should overturn the commander's original nonjudicial punishment decision on the basis of injustice. The commander's ultimate decision on the Article 15 action is firmly based on the evidence of the case and the punishment decision was well within the limits of the commander's authority and discretion.

The complete JAJM evaluation is at Exhibit C.

AFPC/DPSOE defers their recommendation and notes that AFLOA/JAJM has reviewed this case, found no error or injustice, and recommends denial of applicant's request to set aside the Article 15.

They note the applicant entered active duty, on 22 Jun 71, as an airman basic (AB). He was promoted to grade of airman (Amn), on 4 Aug 71; to the grade of airman first class (A1C), on 1 Feb 72, and to the grade of Sgt on 1 Apr 74. He received an Article 15, on 25 Jul 74, for being absent without leave. His punishment consisted of a reduction to the rank of A1C. The applicant was honorably discharged on 3 Jan 75 in the rank of A1C after serving 3 years, 5 months, and 21 days on active duty.

The complete DPSOE evaluation is at Exhibit D.

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APPLICANT'S REVIEW OF THE AIR FORCE EVALUATION:

Copies of the Air Force evaluations were forwarded to the applicant on 8 Aug 12 for review and comment within 30 days. As of this date, no response has been received by this office (Exhibit E).

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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. The applicant's case has undergone an exhaustive review by the Air Force office of primary responsibility and AFLOA/JAJM; however, other than his own assertions, the applicant has not presented any evidence that the commander abused his discretionary authority in imposing the nonjudicial punishment. Therefore, we agree with the opinions and recommendations of the Air Force OPRs and adopt their rationale as the basis for our decision the applicant has failed to sustain his burden that he has suffered either an error or an injustice. In the absence of evidence to the contrary, we find no basis to recommend granting the relief sought.

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 AFBCMR Docket Number BC-2012-01954 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 1 May 12, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFLOA/JAJM, dated 26 Jun 12.
- Exhibit D. Letter, AFPC/DPSOE, dated 20 Jul 12.
- Exhibit E. Letter, SAF/MRBR, dated 8 Aug 12.

Panel Chair

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