

AUG 14 1998

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 97-03246

COUNSEL: None

HEARING DESIRED: No

Applicant requests his bad conduct discharge be changed to general (under honorable conditions). Applicant's submission is at Exhibit A.

The appropriate Air Force office evaluated applicant's request and provided an advisory opinion to the Board recommending the application be denied (Exhibit C). The advisory opinion was forwarded to the applicant for review and response (Exhibit D). As of this date, no response has been received by this office.

After careful consideration of applicant's request and the available evidence of record, we find insufficient evidence of error or injustice to warrant corrective action. The facts and opinions stated in the advisory opinion appear to be based on the evidence of record and have not been rebutted by applicant. Absent persuasive evidence applicant was denied rights to which entitled, appropriate regulations were not followed, or appropriate standards were not applied, we find no basis to disturb the existing record.

Accordingly, applicant's request is denied.

The Board staff is directed to inform applicant of this decision. Applicant should also be informed that this decision is final and will only be reconsidered upon the presentation of new relevant evidence which was not reasonably available at the time the application was filed.

Members of the Board Mr. Michael P. Higgins, Dr. Gerald B. Kauvar, and Mr. Allen Beckett considered this application on 28 July 1998 in accordance with the provisions of Air Force Instruction 36-2603, and the governing statute, 10, U.S.C. 1552.


MICHAEL P. HIGGINS
Panel Chair

Exhibits:

- A. Applicant's DD Form 149
- B. Available Master Personnel Records
- C. Advisory Opinion
- D. AFBCMR Ltr Forwarding Advisory Opinion



DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL SERVICES AGENCY (AFLSA)

6 Mar 98

MEMORANDUM FOR AFBCMR

FROM: AFLSA/JAJM (Major Miller)
112 Luke Avenue, Room 343
Bolling Air Force Base, DC 20332-8000

SUBJECT: Correction of Military Records of [REDACTED]

Applicant's request: The applicant requested that his bad conduct discharge (BCD) be upgraded to general under honorable conditions. The applicant's request was *not* timely submitted within the three-year limitation provided by 10 U.S.C. 1552(b).

Facts of military justice action: The applicant was tried by special court-martial convened at [REDACTED] Air Force Base, [REDACTED] on 17-18 Sept 1974. He was charged with two specifications under Article 92, for drawing and aiming a revolver at the head of a senior non-commissioned officer (NCO) and failure to obey a lawful order. He was also charged under Article 128, UCMJ, for assaulting two NCO superiors. The applicant pled not guilty to all charges and was found guilty of all counts except the failure to obey order specification. The GCM convening authority disapproved the finding of guilty for one of the two assault charges. The applicant was sentenced to a BCD and was reduced in rank to airman basic.

Applicant's Contentions: The applicant believes the Board of Correction of Military Records (hereinafter "Board") should review his request because "[a]fter living with this punishment for 23 years while at the same time draft evaders are living free under Presidential pardon, I feel I do deserve consideration for review." He feels that the court members did not know they could adjudge a lesser discharge than a bad conduct discharge. His support for this contention is that "[t]his is evident by the clemency recommendations made at the time of sentencing."

Discussion: There are two issues in this application. The first is whether the Board should waive the three-year statute of limitations. If the Board does waive the requirement, the second issue is whether the Board should upgrade the applicant's discharge.

Applicant's requesting correction of their military records have three years to do so from the date "the error or injustice was discovered, or, with due diligence, should have been discovered by the applicant." AFR 3 1-1. The applicant had three years to submit a timely application, starting on 18 Sept 1974, the date of the court-martial order which executed his BCD. Title 10, United States Code, Section 1552 provides that the Board can waive the three-year requirement if it is in the interest of justice. The applicant states that it is in the interest of justice to waive the statute of limitations because he "did not know there was a three year limit to

apply for a review.” **There is nothing** in the case file that justifies the extraordinary action of waiving the statute of limitations.

Even if the Board decides to waive the three-year requirement, under **10 U.S.C. § 1552(f)**, (which amended the basic corrections board legislation), its ability to correct records related to court-martials is limited. Specifically, Section 1552(f)(1) permits the “correction of a record to reflect actions taken by reviewing authorities **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 which occurred on or after **5 May 1950** (the effective date of the UCMJ).

The facts of **this** case do not warrant **an** upgrade of the applicant’s discharge. The case file accurately reflects **the** action taken **by** reviewing authorities **so** correction of clerical or administrative **errors as** contemplated under 10 U.S.C. § 1552(f)(1) is unnecessary. Clemency under **Section** 1552(f) is not appropriate because **the** applicant **has submitted** no evidence that **his** court-martial **was** improperly convened or conducted. Under **Rules for Courts-Martial (RCM) 201(f)(2)(B)(I)**: “Upon **a finding** of guilty, special courts-martial may adjudge, . . . **any** punishment **authorized** under **RCM** 1003, except . . . dishonorable discharge.” The only other kind of discharge (other **than** dishonorable) addressed under RCM 1003 is a bad conduct discharge. **See** RCM 1003(b)(9)(c).

The applicant seems to be confused **by** the judge’s statement to members **as** follows:

that although **you** have no **authority** to adjudge a **suspension** of a punitive discharge, if it is a part of **your** sentence, **you may** recommend such suspension in a subsequent clemency request. However, **you must** keep in mind in deliberations on the sentence, such recommendations will in no **way be** binding on the convening authority or higher authority. Therefore[,] before **you** adjudge a punitive discharge[,] **you** must be satisfied **that** it is appropriate punishment even if the convening authority or higher authority refuses to adopt **your** recommendation for **suspension**.
(Record of Trial at p. 201)

Just because the members had authority in a clemency situation **to** recommend suspension of the BCD, it does not follow that they had **authority to** sentence the applicant to a lesser discharge. The only “lesser” discharge a special court-martial may adjudge is no discharge. Special courts-martial cannot adjudge discharge under other **than** honorable **conditions, under** honorable conditions (general), or general discharges. **These** three types of discharges **are** governed **by** administrative discharge procedures.

The Appellate Military Judge **and** Chief Appellate Military Judge did not recommend clemency because recommendations were “generally unfavorable, **and** while **the GCM** considered a **commutation** or **suspension**, it was decided to let the sentence stand.” The United

States Air Force Court of Military Review approved the findings of guilty and the sentence on 5 Mar 1975.

In sum, the applicant's BCD should not be disturbed since his underlying misconduct supports such a discharge. The court-martial conviction and sentence were supported in both law and fact.

Recommendation: After a review of the available records, I conclude that administrative relief by this office is not possible or appropriate. Since the application was untimely filed, I recommend that the Board interpose the statute of limitations.



LOREN S. PERLSTEIN
Associate Chief, Military Justice Division
Air Force Legal Services Agency