

ADDENDUM TO
RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 91-01962

JAN 06 1999

COUNSEL: [REDACTED]

HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

It appears the applicant is requesting that:

(1) The Article 15, UCMJ, initiated on 15 March 1971, be set aside.

(2) The SF Form 88, Report of Medical Examination, dated 16 August 1971, be corrected to reflect items 18, 21, 22, 23, 24, 25, 28, 30, 31, 36, 37 and 40 as abnormal, that his blood pressure was not normal, and his eyes were not normal, and that he be given a combined disability rating.

(3) The Separation Discharge Number (SDN) of 265, issued in conjunction with his 20 August 1971 administrative discharge, be changed to reflect a disability separation under the provisions of AFM 35-4, with disability severance pay/compensation.

RESUME OF CASE:

On 24 October 1991, the AFBCMR considered and rejected as untimely an application submitted by applicant requesting corrective action to reflect that he received disability severance pay and/or lump sum adjustment or separation pay from the Armed Forces (Exhibits A through F).

Applicant provided additional documentation and requested reconsideration of his appeal. On 23 January 1992, after reviewing his submission, the determination was made that his request did not meet the criteria for reconsideration (Exhibit G).

On 6 December 1994, applicant submitted another request for reconsideration, which was essentially the same request previously considered by the Board. Consequently, his request for reconsideration was again denied on 24 October 1995 (Exhibit H).

On 20 August 1996, applicant again requested reconsideration of his appeal and submitted duplicates of all of the correspondences provided with his previous submissions. His request for reconsideration was denied on 18 July 1997 (Exhibit I). -

By letters dated 7 August 1997, 26 October 1997, 9 December 1997, and 16 February 1998, applicant requested reconsideration of his appeal. He provided copies of documentation submitted with his prior submissions, which included documentation pertaining to the contested Article 15 action, his administrative discharge, the contested SF Form 88, and extracts from his Department of Veterans Affairs (DVA) records. (Exhibit J)

APPLICANT CONTENDS THAT:

The disciplinary punishment was unjust and fraudulent.

His SDN did not have a definition in 1971.

The SF Form 88 is incorrect because he was treated for hypertension in the military; therefore, his blood pressure cannot be normal. He wears glasses, so his eyes are not normal. After his SF Form 88 is corrected, he should be given a combined [disability] rating and his SDN changed to reflect a disability separation under the provisions of AFM 35-4, with monthly compensation.

STATEMENT OF FACTS:

On 10 October 1967, applicant enlisted in the Regular Air Force for a period of four years. His highest grade held was sergeant (E-4). He was reduced in grade from sergeant to airman first class as a result of punishment imposed under the provisions of Article 15, UCMJ, for careless discharge of a weapon. The record contains seven Airman Performance Reports (APRs) reflecting overall evaluations of (oldest to latest): 7, 6, 9, 7, 8, 4, and 4.

On 15 March 1971, the group commander notified applicant of his intent to impose punishment pursuant to the Uniform Code of Military Justice (UCMJ), Article 15, for carelessness in discharging a .38 caliber revolver in the Security Control Center Room on or about 24 February 1971. Applicant acknowledged receipt of the notification and indicated that trial by court-martial was not demanded. He offered no matters in mitigation, extenuation, or defense. On 22 March 1971, the commander imposed punishment consisting of reduction in grade from sergeant to airman first class and forfeitures of \$100 per month for two months. Applicant appealed this action; his appeal was denied.

On 18 August 1971, the squadron commander initiated administrative discharge action against the applicant under the provisions of AFM 39-12, Section A, paragraph 2-4b, for unsuitability. The specific reason for the proposed action was that applicant had a character and behavior disorder best diagnosed as a psychopathic personality, moderate. The commander recommended a general discharge because of

applicant's disciplinary record and his refusal to accept rehabilitation. Applicant acknowledged receipt of the discharge notification on 18 August 1971.

A duly appointed Evaluation Officer interviewed the applicant and advised him of his rights under the provisions of AFM 39-12 and his right to submit a statement in his own behalf. After reviewing the applicant's records and interviewing him on two occasions, he recommended that the applicant be separated from the Air Force as soon as possible with an honorable discharge. He did not recommend rehabilitation for the applicant. On 19 August 1971, applicant submitted his personal statement for consideration. On 20 August 1971, the Staff Judge Advocate found the case file sufficient to warrant applicant's separation under the provisions of AFM 39-12. He did not recommend probation or rehabilitation. On the same date, the discharge authority approved an honorable discharge.

A Report of Medical Examination, dated 16 August 1971, reflects applicant had no psychosis, psychoneurosis, neurosis, or any other mental or physical condition requiring processing in accordance with AFM 35-4. He was found qualified for separation.

On 20 August 1971, he was honorably discharged under the provisions AFM 39-12, in the grade of airman first class (E-3), with separation designation number (SDN) 265 (unsuitability - character and behavior disorders - individual evaluation). He was credited with 3 years, 10 months, and 9 days of active duty service.

ADDITIONAL AIR FORCE EVALUATION:

The Associate Chief, Military Justice Division, AFLSA/JAJM, reviewed this application and concluded that there are no legal errors requiring corrective action regarding the nonjudicial punishment and administrative relief is not possible by their office.

JAJM stated that the applicant contends he discovered the injustice (of the Article 15) in December 1996 but does not explain what the significance of this date is or offer an explanation as to why now, almost 27 years after punishment was imposed, it is in the interest of justice that the AFBCMR consider his application. There is nothing in the applicant's record that would justify the extraordinary action of waiving the statute of limitations. Even if the Board decides to waive the three year statute of limitations, the facts of this case do not warrant a set aside of the applicant's Article 15. Since the applicant has not offered any evidence to show that his nonjudicial punishment was unsupported in fact or shown other evidence of irregularity, JAJM concludes that it was properly accomplished and that the applicant was afforded all the rights granted by statute.

JAJM recommended that the Board deny the applicant's request: (1) on the basis that it is untimely; (2) on the merits; and (3) because it does not meet the criteria for reconsideration. The complete evaluation is at Exhibit K.

The Separations Branch, AFPC/DPPRS, stated that the Air Force Separation Discharge Number (SDN) History File indicates the definition of SDN 265 in 1971 (the code received by the applicant) as "Unsuitability - Character and Behavior Disorder per AFM 39-12, Chapter 2, Section A." (Exhibit L)

The BCMR Medical Consultant reviewed this application and opined that the applicant's request for a change in his records to reflect a medical disability should be denied. His comments, in part, follow.

The BCMR Medical Consultant stated that the advisory opinion of 13 June 1991 (Exhibit C) remains valid as the proper input to the Board regarding applicant's medical status at the time of his administrative discharge in 1971. He had been found, in 1971, to have a Psychopathic Personality Disorder, an unsuiting but not unfitting condition which was used to effect his separation. As a personality disorder is not a condition that falls under the umbrella of the disability evaluation system (DES), the applicant was not eligible for disability compensation at the time of his discharge nor is he now, 27 years later, eligible for such consideration. The other conditions mentioned in the applicant's letter dated 26 October 1997 (hypertension, visual abnormalities), again, were not unfitting conditions, and were therefore not considered under the DES. They may be conditions that the Department of Veterans Affairs might consider compensation for if they can be found to be service-connected or aggravated.

The complete evaluation is at Exhibit M.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

Applicant reiterated his contentions that because of his disabilities he should not have been demoted; that his SDN should be corrected to reflect his disability; and, that since he received an honorable discharge, there is no legal reason not to compensate him for his disabilities.

In addition to documents previously submitted, applicant provided a 17 May 1990 mental health report and a 13 February 1991 neuropsychiatry Agent Orange examination report.

Applicant's response, with attachments, is at Exhibit O.

THE BOARD CONCLUDES THAT:

1. In earlier findings in this case pertaining to applicant's request for a disability separation and compensation, the Board determined that the application was not timely filed and that it would not be in the interest of justice to excuse the failure to timely file. After reviewing the evidence previously considered and the applicant's recent submissions, we have determined that it would be in the interest of justice to waive the failure to timely file and to resolve this case on its merits.

2. After careful consideration of the applicant's most recent submission, as well as his previous submissions, we find insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice warranting corrective action.

a. Applicant's contentions that the contested Article 15 punishment was unjust and fraudulent are duly noted. However, we do not find these arguments sufficiently persuasive to override the rationale expressed by the Military Justice Division (AFLSA/JAJM). The commander had the discretionary authority to impose nonjudicial punishment under Article 15, UCMJ, when he concluded that reliable evidence existed to indicate an offense was committed. When offered the Article 15, applicant had an opportunity to demand trial by court-martial thereby requiring the prosecution to establish his guilt beyond a reasonable doubt. However, he chose not to pursue this avenue and accepted the Article 15 instead. The applicant has not provided any evidence that would persuade us that the commander abused his discretionary authority in imposing the Article 15 punishment or that the punishment was unjust. Having found the Article 15 action to be valid, we therefore conclude that there is no basis upon which to recommend favorable action on applicant's requests that the Article 15 be set aside, his rank of sergeant (E-4) be restored, and the forfeitures be returned.

b. Applicant contends that his SF Form 88, Report of Medical Examination, dated 16 August 1971, should be corrected to reflect "abnormal" in several areas, that he should be given a combined rating for his disabilities, and that his administrative discharge should be changed to reflect a discharge for disability under the provisions of AFM 35-4. However, after careful review of the applicant's complete submissions, including the subsequent medical opinions and records submitted with his appeals, we found no evidence that his physical fitness to perform his duties at the time of his separation was questionable. The regulation governing disabilities defines unfitness as the inability of a member to perform the duties of his/her office and grade in such a manner as to reasonably fulfill the purpose of his/her employment on active duty. Such a determination would have been required before the applicant could be eligible for physical disability processing. The mere presence of physical defects or conditions does not justify a finding of unfitness. At the time of his separation, the applicant was considered medically qualified for separation.

Additionally, a review of the applicant's performance reports reflects that, until his separation, he performed his duties in a satisfactory manner. Based on the foregoing, and in the absence of evidence showing that the applicant was medically unfit for continued service within the meaning of AFM 35-4, which implements the law, or that he was improperly evaluated at the time of his separation, we find no basis to disturb the existing record.

c. Inasmuch as we found no basis to change the applicant's records to reflect a discharge for disability, his assigned SDN of 265 is correct, as it accurately reflects his administrative discharge under the provisions of AFM 39-12.

THE BOARD DETERMINES THAT:

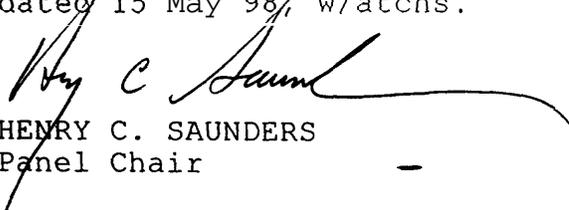
The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 10 December 1998, under the provisions of AFI 36-2603:

Mr. Henry C. Saunders, Panel Chair
Ms. Sophie A. Clark, Member
Ms. Ann L. Heidig, Member

The following additional documentary evidence was considered:

- Exhibit G. Letters from Applicant, dated 17 Oct, 2 Nov and 16 Dec 91, w/atchs; AFBCMR Letter, dated 23 Jan 92.
- Exhibit H. DD Form 149, dated 6 Dec 94, w/atchs, and Letter from Applicant, dated 3 Jul 95; AFBCMR Letter, dated 24 Oct 95.
- Exhibit I. DD Form 149, dated 24 Oct 96, and Letter from Applicant, dated 25 Jun 97, w/atchs; AFBCMR Letter, dated 18 Jul 97.
- Exhibit J. Letters from Applicant, dated 7 Aug, 26 Oct 97, and 9 Dec 97, and 16 Feb 98, w/atchs.
- Exhibit K. Letter, AFLSA/JAJM, dated 6 Mar 98.
- Exhibit L. Letter, AFPC/DPPRS, dated 31 Mar 98.
- Exhibit M. Letter, BCOMR Medical Consultant, dated 7 Apr 98.
- Exhibit N. Letter, SAF/MIBR, dated 27 Apr 98.
- Exhibit O. Letter, Applicant, dated 15 May 98, w/atchs.


HENRY C. SAUNDERS
Panel Chair

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 91-01962

COUNSEL: None

HEARING DESIRED: No

OCT 24 1991

APPLICANT REQUESTS THAT:

Corrective action be taken to reflect that he received disability severance pay, and/or lump sum readjustment or separation pay from the Armed Forces.

APPLICANT CONTENDS THAT:

The reasons the applicant believes the records to be in error or unjust and the evidence submitted in support of the appeal are at Exhibit A.

STATEMENT OF FACTS:

The relevant facts pertaining to this application, extracted from the applicant's military records, are contained in the letters prepared by the appropriate offices of the Air Staff. Accordingly, there is no need to recite these facts in this Record of Proceedings.

AIR STAFF EVALUATION :

AFMPC/DPMMR and AFMPC/DPMAD reviewed this application and recommended denial. Complete copies of the evaluations are at Exhibits C and D, respectively.

APPLICANT'S REVIEW OF AIR STAFF EVALUATION:

The applicant reviewed the advisory opinions and furnished his responses which are attached at Exhibit F.

FINDINGS AND CONCLUSIONS OF THE BOARD:

1. The application was **not** filed within **three years after the** alleged error or injustice was discovered, or reasonably could have **been** discovered, as required by Section 1552, Title 10, United States Code (10 USC 1552), and Air Force Regulation 31-3. Although the applicant asserts a date of discovery which would, if correct, make the application timely, the essential facts which gave rise to the application were known to applicant long before the asserted date of discovery. Knowledge of those facts constituted the date of discovery and the beginning of the three-year period for filing. Thus the application is untimely.

2. Paragraph b of 10 USC 1552 permits us, in our discretion, to excuse untimely filing in the interest of justice. We have carefully reviewed applicant's submission and the entire record, and we do not find a sufficient basis to excuse the untimely filing of this application. The applicant has not shown a plausible reason for delay in filing, and we are not persuaded that the recor'd raises issues of error or injustice which require resolution on the merits at this time. Accordingly, we conclude that it would not be in the interest of justice to excuse the untimely filing of this application.

DECISION OF THE BOARD:

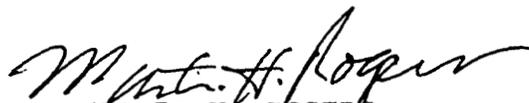
The application was not timely filed and it would not be in the interest of justice to waive the untimeliness. It is the decision of the Board, therefore, to reject the application as untimely.

The following members of the Board considered this application in accordance with the provisions of paragraph 9, AFR 31-3, dated 31 May 1985:

Mr. Martin H. Rogers, Panel Chairman
Ms. L. Julie Copenhaver, Member
Mr. C. Bruce Braswell, Member

The following documentary evidence was considered :

- Exhibit A. DD Form 149, dated 23 Jan 91, w/atchs.
- Exhibit B. Applicant's Available Master Personnel Records.
- Exhibit C. Letter, AFMPC/DPMMMR, dated 13 Jun 91.
- Exhibit D. Letter, AFMPC/DPMAD, dated 8 Jul 91.
- Exhibit E. Letter, AFBCMR, dated 9 Aug 91.
- Exhibit F. Letters, Applicant, dated 16 and 20 Aug 91, w/atchs.


MARTIN H. ROGERS
Panel Chairman