

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NO: 97-03263

AUG 14 1998

COUNSEL: None

HEARING DESIRED: Yes

Applicant requests that evidence of his court-martial be removed from his records. 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). The applicant's response requesting a hearing is attached at Exhibit E.

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 adequately 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 applicant's case is adequately documented and it has not been shown that a personal appearance with or without counsel will materially add to our understanding of the issue(s) involved. Therefore, the request for a hearing is not favorably considered.

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 Ms. Martha Maust, Mr. Richard A. Peterson and Mr. Patrick R. Wheeler considered this application 4 August 1998 in accordance with the provisions of Air Force Instruction 36-2603 and the governing statute, 10 U.S.C. 1552.


MARTHA MAUST
Panel Chair

Exhibits:

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



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

3 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 evidence of his court-martial be removed from his records. 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 general court-martial (GCM) convened at [REDACTED] Air Base, [REDACTED] on 25 November 1947. While in prison on other charges (the applicant was a prisoner on several occasions at the United States Disciplinary Barracks, under at least two names), he was charged with one count of stealing \$221.00 and one count of battery, in Violation of Articles of War 93 and 96, respectively. The applicant pled not guilty to all counts. The applicant was found guilty of all charges. He was sentenced to a dishonorable discharge, forfeiture of all pay and allowances, and confinement for four years. On 24 Dec 1947, the Department of the Army, War Department, Board of Review examined the record of trial and found it to be legally sufficient to support the evidence. However, it believed that two years of confinement would be more appropriate than the court's sentence of four years and thus, remitted two years of the imposed confinement.

Applicant's Contentions: The applicant believes the Board of Correction of Military Records (hereinafter "Board") should review his request because he is "not guilty of the crime[s] charged."; He claims that "[I]n 1956, [REDACTED] of the [Adjutant General's] office recommended that this charge be dismissed and an honorable discharge be given." He also claims (and the Board has confirmed) that the applicant's military personnel records were apparently lost or destroyed in the fire at the National Personnel Records Center (NPRC) in St. Louis, Missouri in 1973. (An exhaustive search of cases by the Board failed to disclose evidence that the Board upgraded the applicant's discharge. NPRC reconstructed the applicant's military personnel records to the best of its ability and found no record of an upgrade of discharge. The record of trial was reconstructed.)

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.

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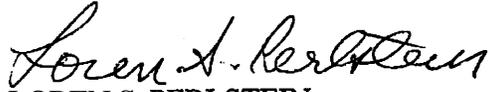
Applicant's requesting correction of their military records have **three years** to do so from **the** date "the **error** or injustice was discovered, or, **with** due diligence, should have been discovered by the applicant." (AFR 31-1). The applicant had three years to submit a timely application, **starting** on 12 December 1948, the date **his** BCD was executed. 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 is "a past exhaled **ruler of the Elks** - someone **has gotten a** copy of the court[-]martial papers and are [sic] attempting to have [him] removed from the order." 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 **UCMJI**]." 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). Since the subject court-martial conviction occurred before **5 May 1950**, **the Board** does have authority to expunge it.

The facts of **this** case do not **warrant** upgrading the applicant's discharge or expunging **the** court-martial conviction from the applicant's records. 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.

While it is commendable that **the** applicant **has** apparently turned **his** life around **and** become "an exhaled ruler of the Elks," one can logically infer that the court-martial punishment helped, at least in part, to motivate **him to** do so. Furthermore, the imposed punishment remains today, **as** it was **at** the time it **was** executed, **a** completely accurate characterization of the applicant's misconduct. The **court-martial** conviction and sentence were supported in both law **and** fact. His inferred rehabilitation does not erase **the fact that** court **members and** the applicant's commanders, **after** careful consideration, determined he deserved **a** dishonorable discharge. Restoring his discharge to honorable or **expunging** the court-martial from his records would diminish **the** value of **the** discharge structure and court-martial process for **Air** Force personnel, who **unlike** the applicant, served honorably. Therefore, his application should be denied for being without merit.

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