RECORD OF PROCEEDINGS

AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: BC-2010-04506

XXXXXXX COUNSEL: NONE

HEARING DESIRED: NO

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APPLICANT REQUESTS THAT:

The record of his arrest and subsequent court-martial conviction, as reflected in a FBI Investigative Report, be removed.

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APPLICANT CONTENDS THAT:

He successfully completed drug rehabilitation and eventually earned an honorable discharge. He was told that his arrest and subsequent court-martial conviction would be expunged from his record when he completed drug rehabilitation. His record should have been expunged accordingly.

In support of his request, the applicant provides copies of his DD Form 303AF, *Certificate in Lieu of Lost Discharge*, an FBI Investigative Report, and correspondence related to the matter under review.

The applicant’s complete submission, with attachments, is at Exhibit A.

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STATEMENT OF FACTS:

The relevant facts pertaining to the applicant’s discharge, extracted from his military personnel records, are contained in the letter prepared by the Air Force office of primary responsibility which is at Exhibit C. Accordingly, there is no need to recite these facts in this Record of Proceedings.

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AIR FORCE EVALUATION:

AFLOA/JAJM recommends denial, indicating the Board is without authority to either set aside the finding of guilty in the applicant’s case or eliminate the record of his arrest. The applicant was an airman first class when he was tried by a general court-martial in Jul 77. He was charged with two specifications of sleeping on post, in violation of Article 113 of the Uniform Code of Military Justice (UCMJ); and one specification of wrongful use of marijuana and three specifications of wrongful transfer of marijuana, all in violation of Article 134 of the UCMJ. The judge found him guilty of all charges and specifications, with the exception of one specification of Article 113. He was sentenced to a bad conduct discharge (BCD), 10 months confinement, forfeiture of $249.00 pay per month for 12 months, and a reduction to the grade of airman basic. However, while convening authority subsequently approved the findings of guilty with regard to the violations of Article 134, the finding of guilty for the charge and second specification of the Article 113 violation was not approved and approved only so much of the sentence as provided for the BCD, six months of confinement, forfeiture of $249.00 pay per month for six months and a reduction to the grade of airman basic. On 9 Dec 77, the Air Force Court of Military Review affirmed the findings and sentence. However, on 9 Feb 78, the execution of that portion of the applicant’s sentence related to the BCD was suspended for six months, after which, the BCD was remitted without further action. As such, the applicant continued to serve until his honorable discharge in Aug 79. Clemency is also not warranted in this case. There is no evidence in the record of trial, or in the applicant’s military record, of any agreement the charges against the applicant were to be expunged if he completed drug treatment. In fact, the fact the applicant had his BCD remitted represents a significant act of clemency. While he still has a federal conviction on his record, he was spared the negative consequences of a BCD on top of that. As such, no further clemency is warranted or appropriate.

A complete copy of the AFLOA/JAJM evaluation is at Exhibit C.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant indicates there are inaccuracies in the AFLOA/JAJM evaluation related to his contentions and argues the reviewer must not have conducted a reasonable search for evidence of an error beyond that of the record of trial. Further, he was not “spared” the negative consequences of a BCD, but earned an honorable discharge by completing his tour of duty. He asks that the Board take action on his behalf under its authority under 10 USC 1552 (f)(1) and (2) and correct his record as he has requested.

A complete copy of the applicant’s response is at Exhibit E.

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FINDINGS AND CONCLUSIONS OF THE BOARD:

After careful consideration of the applicant’s request and the available evidence of record, we find the application untimely. The applicant did not file within three years after the alleged error or injustice was discovered as required by Title 10, United States Code, Section 1552 and Air Force Instruction 36-2603. The applicant has not shown a plausible reason for the delay in filing, and we are not persuaded the record raises issues of error or injustice which require resolution on the merits. Thus, we cannot conclude it would be in the interest of justice to excuse the applicant’s failure to file in a timely manner.

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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.

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The following members of the Board considered AFBCMR Docket Number BC-2010-04506 in Executive Session on 14 Jul 11, under the provisions of AFI 36-2603:

The following documentary evidence was considered:

Exhibit A.  DD Form 149, dated 23 Oct 10, w/atchs.

Exhibit B.  Applicant's Master Personnel Records.

Exhibit C.  Letter, AFLOA/JAJM, 13 Apr 11.

Exhibit D.  Letter, SAF/MRBR, dated 22 Apr 11.

Exhibit E.  Letter, Applicant, dated 10 May 11.