AUGUST 22, 2008

AIR FORCE BOARD FOR CORRECTION OF
MILITARY RECORDS (AFBCMR)
1535 COMMAND DRIVE
EE WING, 3rd FLOOR
ANDREWS AFB, MD 20762-7002

RE: 9902562 BCMR CASE 04

RE: MOTION, CLEAR & UNMISTAKABLE ERROR

BCMR MEMBERS,

Some years ago, the undersigned, Edwin H. Crosby III brought a claim before this BOARD. Staff Judge Advocate one R. Philip Deavel, Col. USAF, in his letter of 28 October 1999 stated, " However, in our view, in order to meet the burden of proof in this case, he should be required to attach a certified copy of the transcript to his application for consideration by the AFBCMR ". Moreover, he stated "…he has failed to present relevant evidence ".

It has come to veteran Crosby's attention that the 536 page transcript is now missing from veterans VA CLAIMS FILE FOLDER. U.S. Department of Veterans Affairs is/was the custodian of this legal transcript submitted to U.S. Court of Veterans

Appeals.

It has been an established legal principal that the intentional destruction of or the

failure to produce documents or physical evidence RELEVANT to the proof of an issue

in a legal proceeding supports an inference that the evidence would have been

unfavorable to the party responsible for its destruction or non-production. HENDRICKS

v. GREAT PLAINS SUPPLY CO. 609 N.W. 2d 486, 491 (Iowa 2000) The alteration,

non-production, or destruction of evidence is commonly referred to as SPOLIATION.

The evidentiary value of the inference is taken from the common sense observation that a

party who destroys a document with knowledge that it is relevant to litigation is likely to

have been threatened by the document. BEIL v. LAKEWOOD ENG'G & MFG. CO.,

15F.3d 546 (6th Cir 1994) (when a party to an action has notice that an item is relevant

to the lawsuit and proceeds to destroy the item, " common sense " dictates an inference

that the party destroying the item is likely to have been threatened by the evidence) ; 2

FISHMAN Section 13:12, at 490. (see Attached Spoliation of Evidence)

Pursuant to Section 20.1404(b) (2002), the motion alleging clear and unmistakable

error in a prior Board decision must set forth clearly and specifically the alleged clear and

unmistakable error, or errors, of fact or law in the Board decision, the legal or factual

basis for such allegations, and why the result would have been different but for the

alleged error.

In ROTH v. UNITED STATES, 378 F3d 1371, 1381 (Fed. Cir. 2004) the Court

said, " The Secretary is obligated not only to properly determine the nature of any error

or injustice, but also to take such corrective action as will appropriately and fully

erase

such error or compensate such injustice.....when a correction board fails to correct an

injustice clearly presented in the record before it, it is acting in violation of its mandate ".

FINDINGS OF FACT:

(1) veteran Crosby brought a claim before AFBCMR regarding a false & stigmatizing coded number placed upon his DD-214 upon discharge. This was done in SECRET, without notice or right to a hearing. Over the years, two (2) U.S. Federal Court Orders were issued to correct this sordid matter. USAF failed to obey said court orders.

(2) During the last argument veteran Crosby submitted a very detailed F.O.I.P.A. Request to USAF to prove it did in fact correct ALL records as well as, places where the infamous SPN code was disseminated. The reply dated, 07 JUN 2000, was they had NO record of the information you requested. (see EXHIBIT 5 attached) Therefore, admitting Failure to Obey Federal Court Orders, and proving Fraud Upon the Court.

(3) During the trial in CROSBY v. U.S.A.F., 449 U.S. 866, 66 L.Ed. 84, the Air Force admits SDN-265 to be a " clerical error ". Then tells Federal Judge Edmund Port, oh, he should have had SDN-46A, unsuitability, Apathy. A highly decorated combat veteran apathic ? What they did not tell Judge Port, or veteran Crosby was, according to the COMPTROLLER GENERAL OF THE UNITED STATES, old REPORT NO: B164031(2), new REPORT NO: 094041, dated AUG 11, 1972, page

19, the USAF was using SDN-46A to discharge soldiers for DRUG ABUSE, and veteran Crosby now gets the ole " triple whammy ", without Due Process of Law. Moreover, this same REPORT says SDN-265 was also used to discharge soldiers for Drug Abuse. More of the same denial of Due Process of Law.

(4) In CASEY v. U.S. 8 Cl. Ct. 234, 241 (1985) the Court said, For the following reasons, this Court agrees with the plaintiff that his discharge included stigmatizing information and that elementary considerations of due process required a hearing prior to plaintiff's discharge. A " stigma " may attach to a servicemember's discharge either from the characterization of the discharge or from the reasons recorded for the discharge, if such reasons present a " derogatory connotation to the public at large ". BIRT v. UNITED STATES, supra, 180 Ct.Cl. at 914. Our primary concern in these cases is to prevent the Armed Forces from imposing a penalty on a discharged serviceman without affording him some basic constitutional protection, the essence of which is notice and a hearing. As we said in CLACKUM v. UNITED STATES, 148 Ct.Cl. 404, 296 F.2d 226 (1960) we will not permit the imposition of a stigma " without respect for even the most elementary notions of due process of law *** ". (148 Ct.Cl. at 408, 296 F2d at 228). In BIRT v. U.S. supra we said: " So long as an administrative discharge *242 is not used as a summary guise for punitive action, *** the military remains within legally proper bounds when it chooses to grant an Honorable Discharge for the Government's convenience *** ". (180 Ct.Cl. at 913-914)

(5) No notice was given to veteran Crosby of the assignment of SDN-265, nor was it explained in Court in 1978 that SDN-46A was also used to discharge USAF

servicemembers for drug abuse. No Due Process at anytime.

(6) The BOARD in considering veteran Crosby's claim in 1999, ignored legal precedent by not finding that veteran had NO due process hearing regarding the assignment of a false & stigmatizing coded number (separation designator number) . The Board had all the evidence present that an injustice was clearly presented, clearly in the record, yet, failed to carry out its mandate, and follow legal precedent.

(7) In the BOARDS Record of Proceedings dated JAN 23, 2001, page 6, THE BOARD DETERMINES THAT: The applicant….did not demonstrate the existence of probable material error or injustice; …..will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application ".

(8) That payment for 37 years of injustice caused by USAF's failure to comply with court orders, and to have granted some basic Constitutional protection, should be forthcoming to veteran Crosby, i.e. loss of civilian wages.

(9) SPOLIATION, with the destruction of the legal transcript (536 pages) it is clearly impossible to present the RELEVANT evidence the BOARD demanded in 1999. That the U.S. Department of Veterans Affairs was the custodian of said transcript. Case law has established that proceedings which might have been altered by the spoliation may be interpreted under a spoliation inference. Courts have also drawn an inference that destroyed materials are RELEVANT. Attached to this Motion, please locate document from DEPARTMENT OF VETERANS AFFAIRS, REGIONAL OFFICE, 1220 SW THIRD AVENUE, PORTLAND, OREGON, 97204 , marked as EXHIBIT " A ", and dated December 21, 2004. Said letter states; " After an extensive search of your claims file, there is not a 536 page hearing transcript. I am sorry I could not provide you with a more favorable response ".

(10) According to the law, U.S. Code, Title 18, Part I, Chapter 73, Section 1509, Obstruction of court orders, it states; Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, shall be fined under this title or imprisoned not more than one year, or both. Clearly, by virtue of USAF letter submitted to you dated 2000, USAF had NO proof whatsoever they corrected any record for the past 20 years. Failure to obey Federal Court Orders is crime under law.

(11) Attached, please locate copy of letter from " IN THE UNITED STATES COURT OF VETERANS APPEALS " date RECEIVED November 22, 1999, dated October 27, 1998 below next to signature of Michael A. Leonard, Deputy Assistant General Counsel. CROSBY v. TOGO D. WEST, Vet. App. No: 97-2239. This is the CERTIFICATION OF THE RECORD ON APPEAL, and states; " ...hereby certifies that the record on appeal annexed hereto constitutes a true and accurate copy of the decision of the Board of Veterans' Appeals, and all documents, records and papers agreed or ordered to be a part of the record on appeal ". Enclosed, marked as EXHIBIT " B ". Take notice of the RECEIVED box upper right hand corner dated Nov 22 1999, and the word BY.

(12) Attached, please locate DD-214, CROSBY, EDWIN HUGH III, with signature Edwin Horace Crosby III, with VA CLAIM NO: 27153944 recorded at the top. This document is marked as EXHIBIT " C ". Take notice of the RECEIVED box mid-page dated Nov 22 1999, and the word BY. It's a match to document marked Exhibit " B ", would you agree ?

(13) Every page of the destroyed/missing legal transcript mentioned in No: 9 above was marked with that RECEIVED box, veteran Crosby removed that page as evidence and kept same. This DD-214 was the one present on page 63 of the transcript, and NOWHERE does it say, Destroy, Delete, VOID. What correction to

any DD-214 was forthcoming by USAF Personnel ? There were more than 8 or more copies of DD-214 made, USAF produced one (1) with the word VOID. It would appear their magic wand broke after that, as dissemination of this document, and the attached stigmatizing SDN code, continue unabated to this day.

(14) Arbitrary, capricious, and contrary to law. The USAF Board for Correction of Military Records in light of all the evidence, the USAF's admittance in Federal Court that SDN-265 was assigned without notice, and was false, the Board has failed to correct an error, and pay for an injustice.

(15) Veteran Crosby tried again to have this BOARD reconsider its original decision in 2005. By letter dated Jun 22 2005, signed by one Mack M. Burton, Executive Director, Air Force BCMR. The finding, " Favorable action on your request in not possible ".

(16) By letter dated 28 April 2000, said letter makes reference to my very detailed F.O.I.P.A. REQUEST for PROOF the USAF did in fact obey two (2) Federal Court Orders, of which, they should have produced to the BOARD proving they in fact did correct veteran Crosby's records as ordered. You referred said letter to Air Force Personnel Center, Randolph AFB, TX. You failed to produce the USAF's evidence at your BOARD investigation of this matter of correction of records. (see EXHIBIT " D " attached)

STATEMENT OF CASE

In the litigation CASEY v. U.S. 8 Cl.Ct. 234, Judge Yock in his verbatim opinion stated; " Finally, a word should be said regarding the defendant's argument

that coded designators on DD-214's are not stigmatizing, since the codes are private information known only within the Department of defense and are not known or understood by the general public at large. While this may generally be true, the critical problem with this defense is that the important segments of society, i.e., prospective employers, do know and understand the importance of separation codes. Hence, a stigma *243 results. This is especially true of large potential employers. Even if the codes are" for official use only ", one has the distinct impression that the codes are widely disseminated. In any event, in view of the huge number of people in this country that have at one time or another in their life been associated with the armed forces of this country, this Court cannot give credence to the defendant's argument. The truth of the matter is that military separation codes are known, understood and available to the part of society that count – i.e., prospective employers. Thus, discharges that include stigmatizing and derogatory information must only be given to servicemen who have been afforded elementary due process rights. END QUOTE.

By the evidence of record in AFBCMR case NO: 9902562, the CROSBY matter, proof beyond a reasonable doubt exists that SDN-265 was given to veteran Crosby without his knowledge, that said SDN-265 is/was false & stigmatizing, disseminated to the private sector to the detriment of veteran Crosby. Moreover, said coded number was never corrected, and has surfaced numerous time including New York State Department of Labor Officials denying veteran Crosby the right to take a Civil Service Exam in 1983. This led to appearance before U.S. Federal Grand Jury, April 1983. Again, in 1999, with the U.S. Department of Veterans Affairs, Board of Veterans Appeals 536 page transcript submitted to the U.S. Court of Veterans Appeals, complete with original DD-214 appearing on page 63 of a now spoliated legal transcript.

As previously stated on page two (2) of this Motion, " when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate ". All evidence has been presented in the record, correct the injustice according to legal precedent.

In KEEF v. U.S., 185 Ct.Cl. 454 the Federal Constitution does not permit the imposition of a stigma on a serviceman in the connection with his discharge from military service without affording him due process in the nature of notice and hearing. Since veteran Crosby was never notified regarding SDN-265, and by regulation was not to be told, no notice or hearing was forthcoming at time of discharge, for that matter, 37 years of no due process of law.

Veteran Crosby pursuant to Section 20.1404(b) (2002), believes the motion alleging clear and unmistakable error in a prior Board decision has clearly and specifically pointed out the alleged clear and unmistakable error, or errors, of fact or law in the Boards decision. By legal precedent, veteran should have been afforded a due process hearing. Spoliated evidence by USAF or Department of Veterans Affairs Personnel regarding the 536 page transcript this BOARD insisted on having in its possession to render a decision is kaput !!

Veteran Crosby is owed monies for an injustice, for lost wages as a licensed FAA aircraft mechanic, a very lucrative paying job. According to veteran Crosby's DD-214, in what appears to be block 23b, it says " Related Civilian Occupation and D.O.T. number ", Airplane Mechanic. (number hard to see) This required a Federal License, veteran Crosby was denied the right to take the test due to SDN-265.

It is requested that this BOARD correct the record (if possible), pay for an injustice, and carry out its mandate.

EDWIN H. CROSBY III

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