



Work-Product

## UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

### ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2014-02690

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: YES

### APPLICANT'S REQUEST

The Board reconsider his request to upgrade his discharge to honorable and have his separation code, narrative reason for separation, and reenlistment eligibility (RE) code changed to reflect Secretarial Authority.

### RESUME OF THE CASE

The applicant is a former Air Force captain (O-3) who was dismissed from the service due to a conviction by court-martial. His separation code and corresponding narrative reason for separation is JJD, *Conviction by Court-Martial (Other than Desertion)*, and a "Not applicable" RE code.

On 16 Apr 15, the Board considered and denied his request for a discharge upgrade to honorable, finding the applicant had provided insufficient evidence of an error or injustice to justify waiving the untimeliness of the application.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letter and Record of Proceedings at Exhibit F.

On 26 Sep 22, the applicant requested reconsideration of his request for a discharge upgrade and to have his separation code, narrative reason for separation, and RE code changed to reflect Secretarial Authority. He again contends, through counsel, he was tried by a general court-martial, accused of disobeying a lawful command to perform his duties to see and treat dental patients. He was found guilty and dismissed from the Air Force. He was unfairly punished and his dismissal was excessive due to the relatively minor nature of the alleged offense, the mitigating circumstances surrounding the misconduct, and his admirable post-service conduct. He served honorably for years prior to the alleged misconduct and felt the dental clinic commander lacked the appropriate regard for patient well-being and set parameters that led to substandard conditions in the clinic. He tried to address these concerns through the proper channels. The Surgeon General did conduct an investigation which concluded the clinic was one of the worst the investigating officer had ever seen and attributed the shortcomings to the dental commander's incompetence. Following the investigation, little changed and he was ordered to treat patients without speaking to them. He objected to this order which is the basis for the court-martial charge brought against him. His refusal to follow the order was based out of his concern for the well-being of his patients and should have significantly mitigated the offense.

Controlled by: SAF/MRB  
CUI Categories: Work-Product  
Limited Dissemination Control: N/A  
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In support of his reconsideration request, the applicant submitted the following new evidence: (1) a personal statement/declaration; (2) post-service awards and achievements; and (3) a character reference letter.

The applicant's complete submission is at Exhibit G.

### **STATEMENT OF FACTS**

Dated 6 Dec 78, a letter from the Base Dental Surgeon regarding the investigation of the dental clinic indicated the clinic morale was horrible, the Preventive Dentistry Program was substandard, and the deterioration of the equipment was very evident which impaired patient care.

Dated 24 Jan 79, a congressional letter indicated the authorities in the Office of the Surgeon General advised the dental surgeon assigned to [Air Force Base] investigated all of the allegations in the applicant's letter and found in some instances his allegations were substantiated with corrective action being taken, now or in the future. It was determined to be in the best interest of the dental clinic to reassign the applicant.

For more information, see the excerpt of the applicant's record at Exhibit H and the advisory at Exhibit K.

### **POST-SERVICE INFORMATION**

On 22 Mar 23, the Board sent the applicant a request for post-service information and advised the applicant he was required to provide a Federal Bureau of Investigation (FBI) Identity History Summary Check, which would indicate whether or not he had an arrest record. In the alternative, the applicant could provide proof of employment in which background checks are part of the hiring process (Exhibit I). The applicant replied on 31 Mar 23 and provided an FBI report. According to the report, the applicant has had no arrests since discharge.

The applicant's complete response is at Exhibit J.

### **APPLICABLE AUTHORITY/GUIDANCE**

Air Force Instruction (AFI) 36-2606, *Reenlistment and Extension of Enlistment in the United States Air Force*. RE codes determine whether or not an enlisted Airmen may reenlist, or enlist in a military service at a later time.

According to DD Form 214, *Certificate of Release or Discharge from Active Duty*, Total Force Personnel Service Delivery Guide, an Airman's RE code is annotated in block 27 of the DD Form 214. Officers do not receive an RE code; therefore, NA [Not Applicable] will be entered in block 27.

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness (USD P&R) issued supplemental guidance to military corrections boards in determining whether relief is warranted based on equity, injustice, or clemency. These standards authorize the board to grant relief in order to ensure fundamental fairness. Clemency refers to relief specifically granted from a criminal sentence and is a part of the broad authority Boards have to ensure fundamental fairness. This guidance applies to more than clemency from sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. Each case will be

assessed on its own merits. The relative weight of each principle and whether the principle supports relief in a particular case, are within the sound discretion of each Board. In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, the Board should refer to the supplemental guidance, paragraphs 6 and 7.

On 22 Mar 23, the Board staff provided the applicant a copy of the clemency guidance (Exhibit I).

Department of the Air Force Instruction (DAFI) 36-3211, *Military Separations*, describes the authorized service characterizations.

**Honorable.** The quality of the airman's service generally has met Air Force standards of acceptable conduct and performance of duty or when a member's service is otherwise so meritorious that any other characterization would be inappropriate.

**Under Honorable Conditions (General).** If an airman's service has been honest and faithful, this characterization is warranted when significant negative aspects of the airman's conduct or performance of duty outweigh positive aspects of the airman's military record.

**Under Other than Honorable Conditions.** When basing the reason for separation on a pattern of behavior or one or more acts or omissions that constitute a significant departure from the conduct expected of airmen. The member must have an opportunity for a hearing by an administrative discharge board or request discharge in lieu of trial by court-martial. Examples of such behavior, acts, or omissions include, but are not limited to:

- The use of force or violence to produce serious bodily injury or death.
- Abuse of a special position of trust.
- Disregard by a superior of customary superior - subordinate relationships.
- Acts or omissions that endanger the security of the United States.
- Acts or omissions that endanger the health and welfare of other members of the Air Force.
- Deliberate acts or omissions that seriously endanger the health and safety of other persons.
- Rape, sexual assault, aggravated sexual contact, abusive sexual contact, rape of a child, sexual assault of a child, sexual abuse of a child, forcible sodomy and attempts to commit these offenses.

## AIR FORCE EVALUATION

AF/JAJI recommends denying the application. As a preliminary matter, AF/JAJI informs the Board since this application pertains to a court-martial, board action can only be on the basis of clemency and not on the basis of an error or injustice. The Board's authority stems from Title 10, United States Code, Section 1552. Pursuant to Section 1552 (f), the Board cannot correct court-martial records unless the correction is one of two types of action: (1) correction of a record to reflect an action taken by review authorities under "chapter 47 of this title" (i.e., the UCMJ); or (2) action on the sentence of a court-martial for purposes of clemency. Hence, Board corrections can merely reflect actions regarding a court-martial that were already taken by review authorities under the UCMJ (such as convening authority clemency, or appellate corrections); or the Board can take action only on the sentence, but even then, only on the basis of clemency (not any alleged error or injustice).

The applicant's counsel contends the applicant disobeyed orders to treat patients because of principled reasons "he felt the dental clinic commander lacked the appropriate regard for patient

well-being and set conditions that led to substandard conditions in the clinic.” Although they do not opine on the merits of the court-martial conviction since that is outside the scope of their review, they do analyze the applicant’s contentions this was a “minor” offense, and his misconduct was the result of ethical obligations owed to patients to which they disagree. A thorough review of the record shows that what may have begun as concerns over patient care and facility conditions devolved into a personal conflict between the applicant and his chain of command. The applicant repeatedly disobeyed his commander’s orders, eventually culminating in the events of 28 Mar 79. The applicant’s repeated misconduct in the face of multiple direct orders cuts against the characterization this was a minor offense. Furthermore, the record fails to show his refusal to treat his patients stemmed from the execution of his duty. They defer to the factfinder in sentencing, and to the convening authority, who were best suited to weigh the clinic conditions and command climate at the time. Accordingly, the applicant had no legal justification for his misconduct.

The complete advisory opinion is at Exhibit K.

### **APPLICANT’S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 20 Jun 23 for comment (Exhibit L), and the applicant replied on 20 Jun 23. In his response, the applicant contends through counsel, the advisory opinion does not comment on the applicant’s potential relief based on clemency. It adds nothing to the understanding of this case and is nothing more than a biased, conclusory opinion. In the application, significant clemency issues are outlined which would favor granting the applicant’s request based on clemency; therefore, the applicant is entitled to relief.

The applicant’s complete response is at Exhibit M.

### **FINDINGS AND CONCLUSION**

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board concludes the applicant is the victim of an error or injustice. While the Board notes the recommendation of AF/JAJI against correcting the record, the Board finds a preponderance of the evidence substantiates the applicant’s contentions in part. Notwithstanding, the Board finds no evidence the sentence of the military court was improper or that it exceeded the limitations set forth in the Uniform Code of Military Justice. However, based on the passage of time, the overall quality of the applicant’s service, the non-violent nature of the offense committed, the punishment's disproportionate nature, the applicant's good-faith reasons for refusal to treat substantiated by a Command Directed Investigation, and the applicant’s post-service conduct, the Board concludes relief is warranted on grounds of clemency. However, for the remainder of the applicant’s request, the evidence presented did not demonstrate an error or injustice, and the Board therefore finds no basis to recommend granting that portion of the applicant’s request. Even though the applicant’s post-service conduct was sufficient to warrant an upgrade to general, the Board does not find the documentation sufficient to conclude they should upgrade the applicant’s discharge to honorable. In this respect, the supporting statement from the applicant’s work colleague and his other post-service achievements indicate his successful post-service transition since his separation. However, this statement and achievements do not provide his impact in the community and if the impact is so admirable the Board could conclude an honorable upgrade of his discharge would not constitute an injustice to those who have earned this characterization of service. In addition, according to AFI 36-2606, officers do not receive RE codes. Therefore, the Board recommends correcting the applicant’s records as indicated below.

4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board’s understanding of the issues involved.

**RECOMMENDATION**

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show DD Form 214, *Certificate of Release or Discharge from Active Duty*, issued in conjunction with his 2 Mar 81 discharge, be amended to reflect he was discharged under the provisions of AFI 36-3207, with a general (under honorable conditions) character of service and a separation code and corresponding narrative reason for separation of JFF, *Secretarial Authority*.

However, regarding the remainder of the applicant’s request, the Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the application will only be reconsidered upon receipt of relevant evidence not already considered by the Board.

**CERTIFICATION**

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2014-02690 in Executive Session on 20 Jul 23 and 7 Aug 23:

- Work-Product Panel Chair
- Work-Product Panel Member
- Work-Product Panel Member

All members voted to correct the record. The panel considered the following:

- Exhibit F: Record of Proceedings, w/ Exhibits A-E, dated 16 Apr 15.
- Exhibit G: Application, DD Form 149, w/atchs, dated 26 Sep 22.
- Exhibit H: Documentary Evidence, including relevant excerpts from official records.
- Exhibit I: Letter, SAF/MRBC, w/atchs (Post-Service Request and Clemency Guidance), dated 22 Mar 23.
- Exhibit J: FBI Report, dated, 31 Mar 23.
- Exhibit K: Advisory Opinion, AF/JAJI, dated 15 Jun 23.
- Exhibit L: Notification of Advisory, SAF/MRBC to Applicant, dated 20 Jun 23.
- Exhibit M: Applicant’s Response, w/atchs, dated 20 Jun 23.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

9/13/2023

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Board Operations Manager, AFBCMR  
Signed by: Work-Product