

## **ADDENDUM TO RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2014-04129

XXXXXXXXXXXX

**COUNSEL:** XXXXXXXXXXXX

**HEARING REQUESTED:** NOT INDICATED

### **APPLICANT'S REQUEST**

The Board reconsider his request to upgrade his dishonorable discharge to a general (under honorable conditions) discharge, or in the alternative, upgrade to an under other than honorable conditions (UOTHC) discharge.

### **RESUME OF THE CASE**

The applicant is a former Air Force airman basic (E-1).

On 4 Jun 15, the Board considered and denied his request to upgrade his dishonorable discharge to a general (under honorable conditions) discharge finding the applicant had provided insufficient evidence of an error or injustice to justify relief. It was further noted the Board is without authority to reverse, set-aside, or otherwise expunge a court-martial conviction. Rather, in accordance with Title 10, United States Code § 1552(f) [10 USC § 1552(f)], actions by the Board are limited to corrections to the record to reflect actions taken by the reviewing officials and action on the sentence of the court-martial for the purpose of clemency. The Board found no error with the applicant's service characterization and considered the overall quality of service, the seriousness of the offenses for which the applicant was convicted, character references, and evidence submitted in support of the applicant's request for relief; however, the Board did not find sufficient basis upon which to favorably consider the application or that clemency was warranted.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the Air Force Board for Correction of Military Records (AFBCMR) Letter and Record of Proceedings at Exhibit F.

On 16 Mar 24, the applicant requested, via counsel, reconsideration of his request to upgrade his dishonorable discharge to a general (under honorable conditions) discharge, or in the alternative, upgrade to an UOTHC discharge. Counsel contends the applicant's dishonorable discharge stems from his conviction on 15 May 12 of one specification each of possessing and distributing visual depictions of minors engaging in sexually explicit conduct. He was found in violation of Article 134 of the Uniform Code of Military Justice (UCMJ). Rather than electing to bring his case to trial, the applicant pled guilty to the charges brought against him. Consequently, he was sentenced by court-martial to a dishonorable discharge, confinement for 25 months, to be reduced to the grade of airman basic (E-1), and the forfeitures of all pay and allowances. In accordance with his pretrial agreement, the convening authority approved only 24 months of confinement and the remaining sentence as adjudged.

Per counsel, the applicant appealed this decision to the Air Force Court of Appeals, which affirmed the findings in whole on 5 Nov 13. The applicant's legal appeal was based on issues such as ineffective assistance of counsel provided to him and lack of a fact-finding hearing to determine whether trial counsel failed to provide effective assistance of counsel. After the

applicant's legal appeals were exhausted, he chose to apply to the AFBCMR for a discharge upgrade in 2014. The applicant's request for relief was based on new forensic computer evidence provided by an independent expert and a legal argument that he was subjected to improper interrogation techniques while under investigation by Air Force personnel. The AFBCMR denied his request for relief on 6 Jun 15.

According to counsel, the applicant's family remains troubled by the interrogation techniques and forensic computer evidence that led to his conviction; however, the applicant's current request is not related to these reasons. Rather than new evidence, required for reconsideration by this Board, the applicant is basing his request on new policy recommendations issued by the Department of Defense to Boards for Correction of Military Records; in particular, the new guidelines issued by Under Secretary Wilkie in a 2018 memorandum which was not available when this Board rendered its 2015 decision.

Additionally, counsel contended since the applicant's appeal to the AFBCMR in 2014, legal scholarship and case law have evolved regarding the severity of sentences issued for the possession and distribution of illegal sexual images, particularly first-time offenders that unknowingly or casually accessed these materials. Counsel provided examples and references in support of this contention.

Counsel further contended although the circumstances that led to the applicant's conviction and incarceration were serious, he now readily acknowledges his past guilt. While the applicant has raised issues regarding the circumstances that surrounded his conviction in the past, he takes full responsibility for his past behavior. More than a decade has passed since the applicant's conviction, and the applicant has worked strenuously to become a productive member of society, to remain a source of support for his family and friends, and to establish himself as an upright citizen within his community. Following the applicant's release from incarceration, he has not committed any criminal acts. Instead, he has worked diligently to regain the trust of his community and to establish himself as a reliable and industrious professional. Counsel cited the applicant's post-service job history in support.

According to counsel, while still a young man, the applicant made the regretful decision to download and explore illegal content, shared through peer-to-peer networks. While the applicant pled guilty to possessing and distributing illegal sexual media, he was a first-time offender. Arguably, his decision to explore this media, however grave, was relatively modest compared to the many cases that appear before the federal courts today. The applicant has repeatedly stated his intention at the time, and ever since, has never been to hurt any person. The applicant deeply regrets his past actions, but he believes they do not define his character, the type of man his parents raised him to be, or the working professional and citizen he is today. As a part of this application, the applicant included several character letters that speak to his reputation, as well as evidence of his rehabilitation and reintegration into his community. These letters speak to his role as a loving brother, as a supportive friend, and as a productive member of society. Counsel recites excerpts from the character letters in support of this contention.

Counsel concluded the applicant's conviction is undoubtedly serious, constituting a breach of the public's trust, which had no justification whatsoever, and the applicant wishes to underscore his deep and ongoing regret for his past actions. Nevertheless, the offenses were the actions of a much younger man. The applicant is not the man who entered the Air Force over a decade ago; nor is he the same man who chose to break the law. Instead, he has earnestly worked to earn back the trust of those he hurt and to contribute to his community in a manner he believes he is best able.

In support of the applicant's reconsideration request, counsel submitted post-service character references. In addition, counsel requested clemency consideration under the Under Secretary of

Defense for Personnel and Readiness (USD P&R) memorandum, Subject: Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determination, dated 25 Jul 18 (Wilkie Memo), in support of the applicant's request for relief.

The applicant's complete submission is at Exhibit G.

## **POST-SERVICE INFORMATION**

On 2 Aug 24, 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 J). The applicant replied on 30 Aug 24 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 K.

## **APPLICABLE AUTHORITY/GUIDANCE**

On 25 Jul 18, the Under Secretary of Defense issued supplemental guidance (Wilkie Memo) 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 2 Aug 24, the Board staff provided the applicant a copy of the clemency guidance (Exhibit J).

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 Department of the 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.

**General (Under Honorable Conditions).** 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 member's military record.

**Under Other than Honorable Conditions.** This characterization is used 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 members. 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 DAF.  
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 abuse of a child, sexual harassment, and attempts to commit these offenses.

## **FINDINGS AND CONCLUSION**

1. The application was timely filed. Given the requirement for passage of time, all discharge upgrade requests under fundamental fairness or clemency are technically untimely. However, it would be illogical to deny a discharge upgrade application as untimely, since the Board typically looks for over 15 years of good conduct post-service. Therefore, the Board declines to assert the three-year limitation period established by 10 USC § 1552(b).
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board remains unconvinced the evidence presented demonstrates an error or injustice. Furthermore, the Board applied clemency guidance, in accordance with the Wilkie Memo, to the evidence submitted by the applicant; however, it is not sufficient to overturn the previous Board's decision. The Board finds no evidence the sentence of the military court was improper or that it exceeded the limitations set forth in the UCMJ. The Board also considered the passage of time, the overall quality of the applicant's service, the seriousness of the offenses committed, and the applicant's post-service character references; however, the Board finds no basis for clemency in the case. Therefore, the Board recommends against correcting the applicant's records.
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 Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

## **CERTIFICATION**

The following quorum of the Board, as defined in DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2014-04129 in Executive Session on 18 Jun 25:

, Panel Chair  
, Panel Member  
, Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit F: Record of Proceedings, w/ Exhibits A-E, dated 12 Jun 15.  
Exhibit G: Application, DD Form 149, w/atchs, dated 16 Mar 24.  
Exhibit H: Documentary evidence, including relevant excerpts from official records.  
Exhibit I: Letter, SAF/MRBC (No New Evidence), Undated

Exhibit J: Letter, SAF/MRBC, w/atchs (Post-Service Request and Clemency Guidance), dated 2 Aug 24.

Exhibit K: Counsel's Response, Undated.

Exhibit K: FBI Report, dated 19 Aug 24.

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.

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Board Operations Manager, AFBCMR