

SECOND ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2015-01650

XXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

The Board reconsider his request to upgrade his under other than honorable conditions (UOTHC) discharge to a general (under honorable conditions) discharge.

RESUME OF THE CASE

The applicant is a former Air Force airman second class (E-3).

On 8 Mar 16, the Board considered and denied his request to upgrade his UOTHC discharge to a general (under honorable conditions) discharge finding the applicant had provided insufficient evidence of an error or injustice to justify relief. The applicant provided no evidence that the characterization of service was contrary to the provisions of the governing regulation, unduly harsh, or disproportionate to the offense committed. His contention regarding the disposition of a fellow airman's discharge for the same offense was not supported with documented proof. The Board was going to consider his request based on clemency; however, the applicant provided no information regarding his post-service activities. Additionally, the prior request was not timely submitted.

On 20 Aug 16 the applicant submitted an application for reconsideration requesting an upgrade of his discharge from UOTHC to general (under honorable conditions). In support of his request, he provided a Federal Bureau of Investigation (FBI) report, dated 19 May 16 and a copy of his fellow airman's DD Form 214, *Report of Separation from Active Duty*, reflecting a general (under honorable conditions) discharge.

On 22 Jun 17, the Board denied his request, again finding there was insufficient evidence to support an upgrade in his service characterization and the applicant had not overcome the rationale expressed in their previous decision. The Board considered the FBI report provided by the applicant that indicated he had no post-service criminal history; however, did not find it sufficient to conclude his post-service activities warranted granting the relief sought.

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 I.

On 29 Apr 20, the applicant requested reconsideration of his request to upgrade his UOTHC discharge to a general (under honorable conditions) discharge. He again contends he admittedly made a bad decision when he participated in the burglary in Jun 64 that led to his Nov 64 discharge, and he has regretted it every day since. When he [and the other airmen charged] went before the [discharge] board, they were told they were being placed on a one-year probation, and he was happy to be given a second chance. Our country is great because it believes everyone deserves a second chance. But that second chance was denied by the commander before they could serve their probation and they would be discharged as less than honorable. Needless to say, he was devastated he would [not] be able to prove himself worthy and complete his time in service to our

country. After his return home, he was even more determined to prove he was a good, hard-working, honorable citizen and the decision to discharge him was wrong. He went to work and was employed full-time for the next 49 years, retiring in 2013, and working part-time since. He married in 1967, and he and his wife raised two hard-working children and celebrated their 54th anniversary. He was President of an athletic club and coached sports for 10 years. As noted in his FBI report, aside from the 1964 incident, his record is spotless. He believes he had proven to be honorable and worthy of receiving an upgrade to his discharge, as was given to his fellow airman, who participated in the same crime and was discharged the same day. He is asking for nothing more than was given his fellow airman. In support of his reconsideration request, the applicant submitted the following new evidence: (1) a character reference from his spouse; and (2) a character reference from his brother-in-law (unsigned).

The applicant's complete submission is at Exhibit J.

APPLICABLE AUTHORITY/GUIDANCE

On 25 Jul 18, the Under Secretary of Defense issued supplemental guidance (Wilke 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.

The entire guidance can be found at Exhibit L.

AIR FORCE EVALUATION

AF/JAJI recommends denying the application. There is insufficient evidence to demonstrate a material error or injustice.

During the relevant timeframe, the applicant was an airman second class on active duty. He was discharged from the Air Force on 4 Nov 64, with his DD Form 214 listing his character of service as UOTHC. In 1964, he was convicted of grand larceny for stealing tires from a service station that were valued at more than \$100.00. Three other airmen were also convicted for participating in the larceny. The applicant received a suspended sentence of 90 days confinement. The Air Force convened an administrative discharge board to consider whether he should be discharged. At the conclusion, the board recommended an "undesirable discharge." However, it was also recommended the undesirable discharge be suspended and the applicant be placed on probation for one year to offer him the opportunity to be rehabilitated. The recommendation for rehabilitation was disapproved on 22 Oct 64, and the applicant was discharged from the Air Force.

The applicant applied for correction to his records a second time and provided supplemental matters to be considered, to include character letters and documents showing one of the other airmen had his service characterization upgraded to under honorable conditions. The applicant's request does not involve an error in his military records, but further emphasizes the injustice he believes occurred.

Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 3.4.4, provides “[t]he applicant has the burden of providing evidence in support of their allegation(s) of an error or injustice.” As this is not a *de novo* review, our scope is limited to determining whether there was an error to the detriment of applicant. We find no error and defer to the factfinder. However, deference to the factfinder is not blind deference, as findings of fact can be evaluated for arbitrariness and capriciousness. Nevertheless, in the context of correcting military records, an “unusually deferential application of the ‘arbitrary or capricious’ standard” is applied. *Roberts v. United States*, 408 U.S. App. D.C. 211, 217 (2014).

Under this deferential standard, we find the factfinders were in the best position to evaluate the information available to them to support an administrative discharge and the service characterization. Far from being arbitrary or capricious, the factfinders’ conclusions and recommendations were based on evidence presented at the administrative discharge board proceedings.

The complete advisory opinion is at Exhibit M.

APPLICANT’S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 25 Sep 23 for comment (Exhibit N) but has received no response.

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 remains unconvinced the evidence presented demonstrates an error or injustice. The Board concurs with the rationale and recommendation of AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant’s contentions. The information available at the time of the administrative discharge board supported the service characterization. Furthermore, the Board applied clemency guidance to the new evidence submitted by the applicant; however, it is not sufficient to overturn the previous Board’s decision. Therefore, the Board recommends against correcting the applicant’s records.

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 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-2015-01650 in Executive Session on 5 Dec 23:

, Panel Chair
, Panel Member
, Panel Member

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

- Exhibit I: Record of Proceedings, w/ Exhibits A-H, dated 2 Oct 17.
- Exhibit J: Application, DD Form 149, w/atchs, dated 29 Apr 20.
- Exhibit K: Documentary evidence, including relevant excerpts from official records.
- Exhibit L: Letter, SAF/MRBC (Clemency Guidance), w/atchs, dated 21 Dec 20.
- Exhibit M: Advisory Opinion, AF/JAJI, dated 14 Sep 23.
- Exhibit N: Notification of Advisory, SAF/MRBC to Applicant, dated 25 Sep 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.

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Board Operations Manager, AFBCMR