



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-00243

Work-Product

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His undesirable discharge be upgraded to honorable.

APPLICANT'S CONTENTIONS

He quotes passages from his character references, one from his area defense counsel (ADC) at the time of his discharge and the second from his commander, which he contends express disagreement with his undesirable discharge. The first letter from his ADC, delivered to the applicant at the time of discharge, states, among other things, that his undesirable discharge status was an injustice. The applicant quotes, "I [the ADC] would only add that as far as I am concerned, it would seem to me to be an injustice for you to have received an undesirable discharge when the recommendation of those people who were closest to you (Squadron Commander) was for a discharge of better quality...I would be willing as well to place my thoughts into a letter or affidavit to assist you in this regard. Further let me offer the services of my office and myself in working [to gather the materials necessary to upgrade your discharge]."

The second letter from his commanding officer vouches for his character and service and states, "I did not personally feel that an undesirable discharge was appropriate in this case...I recommend he receive a general discharge."

He did not pursue an upgrade of his discharge at the time because he was upset and hurt about his treatment. He regrets that decision, and now, at the age of 72, he wants to amend his record to reflect the true character of his service as honorable.

In support of his request for clemency, the applicant provides character references.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman (E-2).

On 5 Feb 70, according to DD Form 4, *Enlistment Contract – Armed Forces of the United States*, the applicant enlisted in the Air Force Reserve (AFR) for a period of six years.

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Controlled by: SAF/MRB

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Limited Dissemination Control: N/A

POC: SAF.MRBC.Workflow@us.af.mil

On 10 Jun 75, according to ARPC Form 75, *Extended Active Duty (EAD) Order*, Special Order Number [Work-Product], the applicant was ordered to EAD for a period of 17 months and 29 days unless sooner relieved, with an effective date of duty of 4 Aug 75 and report not later than 4 Aug 75.

On 19 Jun 75, according to ARPC Form 75A, *Amendment/Revocation of EAD Orders*, Special Order Number [Work-Product], Special Order Number [Work-Product], dated 10 Jun 75, was amended to correct the applicant's social security number.

On 22 Jul 75, according to an applicant letter to the Commanding Officer, 77 APS, he requested a honorable discharge from the AFR claiming he was a conscientious objector. On the same day, in a separate letter, he requested a hardship discharge, and in a third letter, requested a discharge based on the grounds of erroneous enlistment, or alternatively, failure to meet retention standards.

According to an 1840 ABW/DPMQS memorandum, dated 1 Aug 75, the applicant was notified his EAD order was amended to delay reporting from 4 Aug 75 to 4 Sep 75 to allow him to comply with a physical examination and apply for a hardship discharge.

On 1 Aug 75, according to ARPC Form 75A, Special Order Number [Attorney-Client] Special Order Number [Work-Product], dated 10 Jun 75, was amended to reflect: effective date of duty is 4 Sep 75 and report not later than 4 Sep 75.

On 21 Aug 75, according to an 1840 ABW/DPMQS memorandum, the applicant was notified his application for discharge as a conscientious objector was incomplete and additional information was requested. Additionally, the applicant was notified his physical examination found him medically qualified for general military service.

On 27 Aug 75, according to an 1840 ABW/DPMQS memorandum, the applicant was notified his request for a hardship discharge could not be processed as he failed to produce supporting documents or evidence to support his request.

On 3 Sep 75, according to ARPC Form 75A, Special Order Number [Work-P...], Special Order Number [Work-Product], dated 10 Jun 75, was amended to reflect: effective date of duty is 6 Oct 75 and report not later than 6 Oct 75.

On 6 Oct 75, according to AF Form 2098, *Duty Status Change*, the applicant's duty status changed from Ordered to EAD to AWOL [Absent Without Leave].

On 7 Oct 75, according to a letter to the applicant from his civilian counsel, his counsel advised him not to report pursuant to the EAD orders and/or letters requiring him to do so.

On 5 Nov 75, according to AF Form 2098, the applicant's duty status changed from AWOL to Deserter.

On 3 Apr 76, according to AF Form 2098, the applicant's duty status changed from Deserter to Deserter - Dropped From Unit Rolls (DFR).

On 8 Apr 76, according to AF Form 2098, the applicant's duty status changed from Deserter – DFR to PFD [Present for Duty].

On 16 Apr 76, according to a *Charge Sheet*, the applicant was charged with the following:

Charge – Violation of the Uniform Code of Military Justice, Article 86

- Specification: In that [the applicant], did, at Whiteman Air Force Base, Missouri, on or about 6 Oct 75, without authority, absent himself from his organization, to wit: [military unit], and did remain so absent until on or about 8 Apr 76.

On 20 Apr 76, according to an applicant memorandum to 351 Trans/CC, the applicant requested discharge for the good of the service pursuant to Air Force Manual 39-12, *Separation for Unsuitability, Misconduct, Personal Abuse of Drugs; Resignation or Request for Discharge for the Good of the Service; and Procedures for the Rehabilitation Program*, paragraph 2-78. He acknowledged, if approved, he may receive an undesirable discharge under conditions other than honorable. On 21 Apr 76, the applicant submitted a statement to accompany his discharge request, with supporting documentation.

On 27 Apr 76, according to a 351 LGT/CC memorandum, the applicant's commander recommended the applicant's request for discharge be approved, and he be furnished a general discharge certificate.

On 5 May 76, the Staff Judge Advocate found the discharge package legally sufficient.

On 7 May 76, according to a 351 CSG/CC memorandum to 8 AF/CC, he recommended the applicant's request for discharge be approved, and the applicant be furnished a general discharge certificate.

According to AF Form 100, *Request and Authorization for Separation*, the applicant was discharged, effective 28 May 76, under other than honorable conditions (UOTHC).

On 28 May 76, according to DD Form 214, *Report of Separation from Active Duty*, provided by the applicant, he was furnished an undesirable discharge and credited with total service for pay of 5 years, 9 months, a total net active service of 5 months, 17 days, and 185 days time lost (6 Oct 75 – 7 Apr 76).

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

POST-SERVICE INFORMATION

On 20 Jul 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 C). The applicant replied on 7 Nov 23 and provided an FBI report. According to the report, the applicant was arrested on 19 Dec 76 for Susp[icion] of Homicide and on 20 Dec 02 for DWI [driving while intoxicated].

The applicant's complete response is at Exhibit D.

APPLICABLE AUTHORITY/GUIDANCE

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness issued supplemental guidance, known as the 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 paragraphs 6 and 7 of the Wilkie Memo.

On 20 Jul 23, Board staff provided the applicant a copy of the clemency guidance (Exhibit C).

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.

AIR FORCE EVALUATION

AF/JAJI recommends denying relief based on the claim of legal error. There is insufficient evidence of material error or injustice to warrant granting the requested relief.

The applicant contends an undesirable discharge is an injustice. He provided supplemental documents to support his position, including his DD Form 214, a letter from his former ADC, and a letter from his former commander. The applicant's FBI Identity History Summary Check shows he was arrested in 1976 for "Susp of Homicide" and in 2002 for DWI. No additional details are provided regarding disposition of the charges.

The Secretary of the Air Force (SecAF) is authorized to correct any service record when the SecAF considers it necessary to correct an error or remove an injustice. Title 10, United States Code § 1552(a)(1) (10 USC § 1552(a)(1)); DAFI 36-2603, *Air Force Board for Correction of Military*

Records (AFBCMR), paragraph 1.1. (4 Oct 22). Such corrections shall be made by the Secretary acting through boards of civilians in the executive part of the DAF. 10 USC § 1552(a)(1); DAFI 36-2603, paragraph 1.1.. This authority is exercised by the AFBCMR.

During the relevant time, the applicant was an airman (E-2) and served in the AFR for approximately five years and seven months. He was involuntarily recalled to extended active duty on 6 Oct 75. He did not report as ordered and was therefore considered AWOL until 8 Apr 76, when apprehended by the FBI in Kansas City, Missouri. The applicant was returned to military control and placed in confinement. The documents show the applicant attempted to obtain a discharge from the AFR based upon hardship and identifying as a conscientious objector. He was unsuccessful. The applicant stated when he was ordered to active duty, he relied on the advice of his civilian attorney not to report to duty as ordered. On 16 Apr 76, the applicant was charged with AWOL and the charge was referred to trial by special court-martial. On 20 Apr 76, after consulting with an attorney, the applicant submitted a request for discharge for the good of the service in lieu of trial by court-martial. In his request, the applicant acknowledged he could receive an undesirable discharge because of his request. Records show the applicant's commander and the installation staff judge advocate recommended a general discharge. The 8 AF/CC, or his designee, was authorized to approve the applicant's request for discharge in lieu of court-martial. On 28 May 76, the applicant was separated with an undesirable discharge.

DAFI 36-2603, 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 or injustice to the detriment of the applicant.

We defer to the factfinder and find no error or injustice. 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, the applicant's claims are no more than a disagreement with the separation authority's decision to discharge him with an undesirable service characterization. The applicant did not provide evidence to support that the commander's decision was arbitrary or capricious or that an injustice occurred. To the contrary, when the applicant submitted his request for the administrative discharge in lieu of court-martial, he acknowledged he may receive an undesirable discharge.

The complete advisory opinion is at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 22 Apr 24 for comment (Exhibit F) but has received no response.

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 concludes the applicant is not the victim of 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 applicant did not provide evidence to support that the commander's decision was arbitrary or capricious or that an injustice occurred, therefore, the applicant's claims are no more than a disagreement with the separation authority's decision to discharge him with an undesirable service characterization.

Additionally, it appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. Nor was the discharge unduly harsh or disproportionate to the offenses committed. The applicant acknowledged in his request for discharge for the good of the service that he may be discharged with a UOTHC service characterization, and he was aware of the adverse nature of such a discharge and possible consequences. In the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the evidence presented, and in the absence of post-service information, and the criminal history provided by the applicant, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's record.

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, paragraph 2.1., considered Docket Number BC-2023-00243 in Executive Session on 12 Sep 24:

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Panel Chair

Work-Product

, Panel Member

Work-Product

, Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 16 Jan 23.

Exhibit B: Documentary Evidence, including relevant excerpts from official records.

Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 20 Jul 23.

Exhibit D: FBI Report, dated, 7 Nov 23.

Exhibit E: Advisory Opinion, AF/JAJI, dated 18 Apr 24.

Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 22 Apr 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

Signed by: USAF

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