

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-02371

XXXXXXXXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His official military personnel records amended to reflect:

a. He was involuntarily separated from the Active Guard/Reserve (AGR) program while in sanctuary status.

b. He was awarded six months constructive active duty credit towards retirement, with all associated back pay and allowances.

APPLICANT'S CONTENTIONS

Per counsel, the applicant is requesting correction to his records regarding his sanctuary protections, the command's attempts to undermine the intent of those sanctuary protections, and the retaliatory actions taken by his command within a toxic and hostile work environment, which effectively led to a constructive involuntary separation. He was properly eligible for and granted sanctuary protection under the applicable statutes and regulations. The provisions aim to ensure a stable transition into retirement and protect servicemembers from undue hardship or arbitrary changes in their status. However, his command improperly attempted to undermine that intent by granting orders in 30-day increments. This practice placed the applicant in a state of uncertainty and vulnerability, impeding his ability to plan for a smooth and orderly transition into retirement. Further, the toxic and hostile work environment exacerbated his situation. The command's retaliatory actions, in response to the applicant seeking to address the inadequate sanctuary implementation and hostile work environment, amounted to constructive involuntary separation. He was subjected to a pattern of adverse treatment, hindering his ability to perform his duties effectively, advance his career, and maintain his well-being.

The applicant has a history of attempting to hold other officers accountable for perceived violations of regulations and laws which he claims resulted in retaliation, including being denied promotion. He was eventually promoted and applied to the Air Force Board for Correction of Military Records (AFBCMR) regarding the date of his promotion, which was amended to reflect an earlier period.

Despite his promotion, he alleges he continued to face acts of retaliation, culminating in the issuance of a Letter of Reprimand (LOR) after a command-directed investigation (CDI), which he believes was improperly conducted. As a result, he was forced to retire while in sanctuary status and denied the remaining six months needed for a full active duty retirement.

The sequence of events began in Mar 14 when he was denied promotion during his transfer between state Air National Guard (ANG) units. In Oct 15, he resigned his AGR position due to a lack of accountability regarding inappropriate relationships among senior officers. In Nov 15, he filed an abuse of authority complaint against his group commander citing the denial of his promotion and seeking his promotion to the rank of lieutenant colonel, effective 24 Mar 14. Supporting his complaint was a memorandum which revealed his promotion was rescinded based

on allegations of a lapse in integrity during his Oct 13 fitness test. The accusation was later determined to be unfounded, and it was confirmed he did not falsify his fitness test.

The wing commander notified the applicant the abuse of authority complaint was completed with findings and recommendations in Jan 16. While some of his allegations were unsubstantiated, it was revealed the procedures outlined in Air Force Instruction (AFI) 36-2504, *Officer Promotion, Continuation and Selective Early Removal in the Reserve of the Air Force*, were not properly followed and there was a lack of command oversight. The wing commander recommended proceeding with the applicant's promotion in accordance with the regulations. In Mar 16, the applicant filed a reprisal complaint and Inspector General (IG) rebuttal against the wing commander and his squadron director of operations, for a biased investigation, requesting an outside investigator. He alleged the wing commander ignored evidence and had a conflict of interest, while the director of operations demanded his transfer and ignored his appeal.

In Aug 16, the applicant was transferred from his squadron, allegedly as an act of retaliation. During this time, he requested permanent change of station funding from his AGR orders to move his family, which was seen as unjust by the squadron leadership. His orders were eventually updated and the move was completed. When he requested a DD Form 214, *Certificate of Release or Discharge from Active Duty*, upon completion of his AGR orders, he was denied.

In Oct 16, he became a witness in an IG complaint against his wing commander, and in Dec 16, was informed by another lieutenant colonel that his wing commander had discussed the applicant's complaint with him, revealing his identity as well as other anonymous complaints. This violated the trust in the IG process and command leadership.

On 23 Feb 17, orders were issued incorrectly stating he had waived his sanctuary status; however, the waiver provided was improper and not signed by the applicant. He brought this to the attention of his group commander who stated he was unaware of this issue. The applicant followed up with meetings with leadership and, concerned about losing sanctuary benefits, signed a memorandum invoking sanctuary. He notified his group commander who stated the applicant's physical training (PT) status was reviewed and he had only one failure on record, allowing him to test once he returned to full duty status. His group commander also signed a memorandum, dated 26 Apr 17, acknowledging his sanctuary status and stating the applicant would be on orders until retirement, around 31 May 18. Due to funding constraints, he was only able to provide active duty orders in 30-day increments. In doing so, the applicant's command attempted to have him waive sanctuary during the 30-day increments. He did not sign any of the waivers. In May 17, his wing commander contacted the applicant's employer regarding his sanctuary status and the Uniformed Services Employment and Reemployment Rights Act. The applicant questioned his wing commander about this, but received no satisfactory response and no action was taken against his wing commander.

In Apr 17, the applicant reported to Flight Medicine with chest pains which were attributed to toxic command environment and bullying related to invoking sanctuary. From Apr 17 through June 17, he was on medical profile for possible heart attack conditions until he could see a cardiologist. An angiogram conducted in May 17 found the condition was due to stress and not a long-term complication. Despite his medical condition, he failed a subsequent PT test in Jul 17.

In Jun 17, a CDI was initiated against the applicant. He was interviewed regarding three allegations made by the State Headquarters Chief of Staff. Two of the allegations were unsubstantiated, but the Chief of Staff ordered a copy of the allegations be withheld from him. He was only given one hour to submit a rebuttal. The investigating officer personally believed the allegations were part of a witch hunt against the applicant for invoking sanctuary. In Sep 17, his orders were still being issued on a recurring 30-day basis. He was also informed he would

undergo a Medical Evaluation Board for severe obstructive sleep apnea but was later told the process would not start as he revealed his plans to retire in Apr 18.

In Oct 17, the applicant received an LOR issued by the Chief of Staff and was summoned to meet with his group commander to discuss it but was told he was not authorized to bring an attorney. During the meeting, he was physically threatened and told he should have signed the sanctuary waiver. The LOR accused him of making false official statements in Mar 17 and Apr 17 and misrepresenting material facts to a medical provider, allegations that were allegedly substantiated in the CDI. Additionally, he was accused of failing PT tests in Nov 14, Nov 16, and Jul 17. Despite his medical diagnoses and limited physical ability, the reprimand included his failure to achieve a satisfactory score on his PT test over several years.

He voluntarily retired from the [State] ANG on 1 Dec 17. He was compelled to retire early due to continued threats, unfair prosecution, and a lack of justice in addressing his complaints and investigations. On 4 Jan 22, he received notification from the Defense Finance and Accounting Service (DFAS) stating he owed \$881.00 for collection of his Servicemembers Group Life Insurance (SGLI) premiums. The notice said the premiums were paid because he had an active payroll account that was not separated by his unit finance office. He submitted a pay adjustment authorization from his former unit and was informed his debt was reduced to \$37.50.

The applicant provided a letter of support from the State Air Surgeon attesting to his professionalism, dedication, and competence. He goes on to acknowledge the applicant experienced intermittent abdominal pain which led to his PT test failure in Nov 14. Subsequent testing revealed a medical condition requiring cholecystectomy. He recommended the PT test failure be invalidated due to the underlying medical condition and the restrictions on personal fitness training during the treatment period. However, his involvement in the applicant's care was abruptly terminated by the command, and despite documented civilian medical records and physician notes, the medical group determined the fitness failure could not be retroactively excused. A letter of support from a retired lieutenant colonel also attested to the applicant's competence and stated he too retired due to the toxic atmosphere. A final letter of support from a unit major stated the applicant was the subject of scrutiny for the Air Force fitness test when no one else was.

In discussion, counsel contended based on the clear statutory and regulatory requirements, the applicant was entitled to sanctuary protection. This is supported by him actually being placed into sanctuary after invoking its protections. Due to the command's displeasure with his protections, their attempts to provoke his waiver or voluntary separation are both improper and produced such a retaliatory and toxic environment that his constructive discharge can only be categorized as involuntary. Accordingly, he was illegally separated from active duty while in sanctuary status and disallowed retirement eligibility.

The applicant was eligible for sanctuary protection under the provisions of Title 10, United States Code § 12686(b) (10 USC 12868(b)) and in accordance with AFI 36-2131, *Administration of Sanctuary in the Air Reserve Components*. The improper and unsubstantiated LOR and various CDIs against the applicant, as well as the bullying, toxic, and biased command environment led to his constructive discharge from active duty, which can only be construed as an improper involuntary separation. By issuing short-term orders, the command sought to require the applicant to sign waivers of sanctuary for each order. This violated the spirit and intent of the sanctuary policy. He faced retaliation, including an LOR and a CDI, contributing to a hostile command environment. The LOR was issued following a CDI that lacked proper procedural fairness, transparency, and impartiality. The allegations were unjustified and unsupported by sufficient evidence. The CDI was carried out in a biased manner with a predetermined outcome and failed to adhere to established investigative procedures. The applicant operated within a hostile command environment characterized by unfair treatment,

unjustified accusations, and retaliation. The command authorities neglected their duty to provide a safe and supporting working environment, creating an untenable situation for the applicant and amounted to constructive discharge.

The implications were clear. His command was laying the framework for a manufactured basis for his removal from active duty in a manner that avoided sanctuary protections. Faced with such a reality, he could either voluntarily resign with an honorable character of service or face a much more undesirable outcome by risking separation for cause from the AGR program. To be more specific, the applicant was forced to decide whether to save his career or continue to face harassment and hostility with the hopes of hanging on long enough to retire. Consequently, it is essential that his involuntary separation be deemed invalid and appropriate remedies be provided to redress the harm caused. Given the clear statutory and regulatory requirements, it is imperative the AFBCMR correct his records to reflect the true circumstances surrounding his separation.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired [State] Air National Guard lieutenant colonel (O-5) awaiting retired pay at age 60.

On 7 Jan 16, according to a XXX ARW/CC memorandum to the applicant, Subject: IG Complaint – Referral of Complaint (FRNO XXXXX), provided by the applicant, his allegations were found to be unsubstantiated; however, investigation found the procedures for promotion delay were not properly executed and did not have proper command oversight.

According to Special Order Number XXX, dated 23 Jan 19, Special Order Number XXX, dated 19 Oct 16, was revoked and Special Order Number XXX, dated 4 Feb 16, is amended to read: Date of Rank: 12 Dec 12, Effective Date: 24 Mar 14.

According to a memorandum from the applicant to XXX SOW/IGQ, Subject: Rebuttal and Reprisal Relating to IG Complaint (FRNO XXXXX), dated 31 Mar 16, provided by the applicant, he responded to the XXX ARW/CC memorandum, dated 7 Jan 16.

According to Order Number XXXXX, dated 23 Feb 17, provided by the applicant, he was called to active duty under Authority: Special Training State (Title 32, FTNGD-OTH), 32 USC 502(f)(1)(B) & 503, for the period 3 Mar 17 – 22 Mar 17. Per paragraph 6, "The member has waived the sanctuary protection of 10 U.S.C. 12686(a) for the period of AD authorized by this order. This AD tour has been approved by Wing/CC on 23 Feb 17."

According to a memorandum from the applicant to JFHQS [State], dated 6 Mar 17, Subject: Claim for Active Duty Sanctuary, provided by the applicant, he invoked his right to claim sanctuary.

According to an unsigned/undated XXX SOSS/FSS Memorandum for Statement of Understanding, Subject: Waiver of Active Duty (AD) Sanctuary for [applicant], provided by the applicant, he waived his right to sanctuary provided under 10 USC §12686(b) for the period 23 Mar 17 – 21 Apr 17.

According to a XXX OG/CC memorandum, dated 26 Apr 17, provided by the applicant, he voluntarily invoked sanctuary in accordance with 10 USC 12686(a) and would be on orders with

the [State] Air National Guard until retirement, which would occur on or about 31 May 18. Due to funding source constraints, active duty orders would be provided in 30-day increments until resolution for longer term orders.

On 31 Oct 17, according to DD Form 214, the applicant was furnished an honorable discharge, with Narrative Reason for Separation: Vol Ret Sufficient Service for Retirement, and was credited with 19 years, 5 months, 8 days active service.

On 30 Nov 17, according to NGB Form 22, *Report of Separation and Record of Service*, the applicant was furnished an honorable discharge from the [State] Air National Guard, under Authority and Reason: AFI 36-3209, Paragraph 2.16.; Physical Disqualification/Eligible-Applied for Retirement/15 or More Years Sat Service, SPD: RBD, and credited with 27 years, 5 months, and 11 days total service for retired pay.

On 1 Dec 17, according to Reserve Order XXXXX, dated 6 Nov 17, the applicant was relieved from current assignment, assigned to the Retired Reserve Section, and placed on the USAF Reserve Retired List, with Reason: Elig for Retired Pay Except for Attainment of Eligibility Age.

According to a DFAS letter to the applicant, dated 4 Jan 22, provided by the applicant, he incurred a debt of \$881.00 for collection of Service Member's Group Life Insurance premiums.

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

AIR FORCE EVALUATION

NGB/A1PP recommends partially granting the application. Based on the documentation provided by the applicant and analysis of the facts, there is evidence of an error or injustice. Per 10 USC 12686, "a member of a reserve component who is on active duty and is within two years of becoming eligible for retired pay or retainer pay under a purely military retirement system may not be involuntarily released from that duty before he becomes eligible for that pay."

The advisor reviewed the applicant's source documents provided, the Air National Guard Orders Writing System (AROWS), AFI 36-2131, 10 USC 12686, and the applicant's Automated Records Management System (ARMS) for supporting documents. He had 6,877 active duty points prior to his AROWS order beginning 3 Mar 17. The applicant invoked sanctuary on 6 Mar 17, and the order received multiple amendments extending the order to 31 Oct 17 for a total of 243 days, and the applicant was issued a DD Form 214 for the dates of 3 Mar 17 – 31 Oct 17. The ARMS record contained a separation order relieving the applicant from the [State] ANG and an NGB Form 22 citing a date of separation of 30 Nov 17. A copy of the applicant's retirement order cites the applicant's transfer to the Inactive Retired Reserve, effective 1 Dec 17.

The advisor finds the applicant's claim of involuntary separation while in sanctuary status unsubstantiated. The applicant voluntarily filed and elected to separate as cited on the applicant's separations orders and is considered a voluntary separation. Further, the unit did not violate sanctuary per 10 USC 12686 as the law cites, "may not be involuntarily separated." The unit acknowledged the applicant's right to invoke sanctuary and provided the parameters in a memorandum to retain the applicant on orders; however, due to resource constraints, orders would only be extended in 30-day increments. The applicant's AROWS orders history illustrated the unit continued to extend his orders without a break in service or involuntary separation.

However, the unit failed to follow established Air Force policy in accordance with AFI 36-2131, paragraph 2.3.2., which provided, “The State is required to provide full-time military employment, utilizing the current authorized AGR resources.” Therefore, the advisor recommends the applicant’s request for six-month active duty credit for retirement be granted. He had 6,877 active duty points prior to the orders beginning 3 Mar 17 and separated on 30 Nov 17. He is missing approximately 184 active duty points to obtain 20 years of service.

The complete advisory opinion is at Exhibit C.

APPLICANT’S REVIEW OF AIR FORCE EVALUATION

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

FINDINGS AND CONCLUSION

1. The application was not 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 not the victim of an error or injustice. While the Board notes the comments of NGB/A1PP in favor of partially granting relief, the Board believes a preponderance of the evidence fails to substantiate the applicant’s contentions. Once the applicant invoked sanctuary, the unit complied with the statutory requirement to maintain him in an active duty status. While the unit did not place the applicant on continuous active duty orders utilizing AGR resources, their rationale was explained in their memorandum dated 26 Apr 17, as was their intent to maintain the applicant on active duty until he was retirement eligible, while pursuing resolution to obtain longer term orders. While the applicant alleges a toxic and hostile work environment, there is insufficient evidence to support this contention. Additionally, despite his speculation regarding the command’s intentions regarding separating him for cause to circumvent his sanctuary protections, except for the LOR, dated 16 Oct 17, there is no evidence of adverse actions or progressive discipline that would justify such an action. The Board finds the applicant voluntarily separated and applied for a reserve retirement, thereby waiving his entitlement to continuation in sanctuary status. The Board also notes the applicant did not file the application within three years of discovering the alleged error or injustice, as required by 10 USC § 1552, and Department of the Air Force Instruction 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*. The Board does not find it in the interest of justice to waive the three-year filing requirement and finds the application untimely.

RECOMMENDATION

The Board recommends informing the applicant the application was not timely filed; it would not be in the interest of justice to excuse the delay; 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-2023-02371 in Executive Session on 23 May 24 and 30 May 24:

, Panel Chair
, Panel Member
, Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 11 Jul 23.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory opinion, NGB/A1PP, atchs, dated 2 Feb 24.
Exhibit D: Notification of advisory, SAF/MRBC to Counsel, dated 22 Feb 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.

X

Board Operations Manager, AFBCMR