

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXXXXXX

DOCKET NUMBER: BC-2019-04123

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The nonjudicial punishment (NJP) under Article 15, Uniform Code of Military Justice (UCMJ), imposed on 6 Oct 11, and any rank, pay, allowances, entitlements, rights, and privileges affected by the NJP be restored.

RESUME OF THE CASE

The applicant is an honorably discharged Air Force airman (E-2).

On 6 Oct 11, according to AF Form 3070A, *Record of Nonjudicial Punishment Proceedings (AB thru TSgt)*, the applicant, an airman first class (E-3) was offered NJP under Article 15, UCMJ, for: (1) On or about 21 Sep 11, unlawfully covering the nose and mouth of, and push [Spouse] with his hands; and (2) On or about 21 Sep 11, unlawfully sit on and hold down [Spouse] with his body, in violation of Article 128, UCMJ.

On 14 Oct 11, the commander decided the applicant committed one or more of the alleged offenses and imposed the following punishment: (1) Reduction to the airman (E-2), suspended through 13 Apr 12; and (2) Reprimand.

On 16 Nov 11, according to AF Form 366, *Record of Proceedings of Vacation of Suspended Nonjudicial Punishment*, the applicant's suspended reduction to E-2 was vacated because he violated his commander's order by going to [Spouse's] house and verbally communicating with her, in violation of Article 92, UCMJ. The applicant was reduced to the grade of E-2, with a new date of rank of 14 Oct 11, effective 16 Nov 11.

On 15 Mar 14, according to General Court-Martial Order (GCMO) No. XX, dated 4 Sep 14, the applicant, an E-2, was tried at a general court-martial and found guilty of engaging in sexual acts, to wit: sexual intercourse with [Spouse], by using a restraint applied to the body, sufficient that [Spouse] could not avoid or escape the sexual conduct, in violation of Article 120, UCMJ; and unlawfully pushing and covering the nose and mouth of [Spouse] with his hands, in violation of Article 128, UCMJ. He was sentenced to confinement for four years, forfeiture of all pay and allowances, and reduction to the grade of E-1, with only the confinement and forfeiture approved to be executed.

Additional Charge I. The applicant pled not guilty and was found not guilty for violating his commander's order by going to [Spouse's] house in 2011 and verbally communicating with her, in violation of Article 92, UCMJ.

On 15 Mar 14, according to AF IMT 2098, *Duty Status Change*, dated 19 Mar 14, the applicant was placed in duty status code 17 (Military Confinement) for a period of four years.

On 14 Feb 17, according to AF IMT 2098, dated 14 Feb 17, the applicant was released from military confinement and placed on duty status code 00 (Present for Duty), with 1067 lost days.

On 8 Mar 17, according to DD Form 214, *Certificate of Release or Discharge from Active Duty*, dated 10 Mar 17 [original], the applicant was furnished an honorable discharge, in the grade of E-1, with Narrative Reason for Separation: Completion of Required Active Service, and credited with 4 years, 3 months, and 15 days of active service, with 2 years, 10 months, 28 days lost time [15 Mar 14 to 13 Feb 17].

On 12 Jun 17, a corrected DD Form 214 was issued, reflecting the applicant was furnished an honorable discharge, on 8 Mar 17, in the grade of E-2, with Narrative Reason for Separation: Completion of Required Active Service, and credited with 7 years, 2 months, and 24 days of active service, with no lost time.

On 6 Sep 18, according to GCMO No. XX, the findings of guilt along with the sentence promulgated in GCMO No. XX, dated 4 Sep 14, were set aside by the United States Court of Appeals for the Armed Forces. All rights, privileges, and property of which the applicant has been deprived by virtue of the sentence in his former trial were restored.

On 28 May 20, the Air Force Board for Correction of Military Records (AFBCMR) considered and denied the applicant's request to amend his date of discharge from 8 Mar 17 to 18 May 18 and for retroactive promotion to the rank of technical sergeant (E-6), with his request for back pay for his period of confinement and retrial being administratively resolved by the Defense Finance and Accounting Service (DFAS). However, the Board did concur with the AFPC/DP2SPP (Enlisted Promotions) recommendation to remove his AF Form 910, *Enlisted Performance Report (AB thru TSgt)*, for the period 15 Aug 13 through 14 Mar 14, from his records, as its basis was the court-martial conviction which was set aside.

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 G.

On 31 Mar 23, the United States Court of Federal Claims remanded the case, instructing the AFBCMR as follows:

1. The remand period shall conclude no later than 22 May 23, or upon notice to the court that the remand issue has been resolved. The case in this court is stayed until that time.

2. The AFBCMR shall address the limited issue of establishing the amount of pay the plaintiff may still be due for his "period of confinement" and for "periods after confinement during court-martial" at the E-2 rate. **(Pending administrative correction by DFAS).**

3. The government should promptly locate the plaintiff's records to determine what has been previously paid to the plaintiff and what might not have been properly paid and remains owed to the plaintiff. **(Pending administrative correction by DFAS).**

3. The AFBCMR shall review the plaintiff's records provided by the defendant and issue a decision within 45 days of this order.

4. Within five days of the AFBCMR decision, and no later than 22 May 23, the parties shall file a joint status report reflecting the decision of the AFBCMR and propose a schedule of further proceedings, if any.

The United States Court of Federal Claims remand order is at Exhibit H.

On 20 Apr 23, the applicant, via counsel, requested he be restored to the rank of airman first class (E-3) as a matter of equity because the court-martial acquitted him of the same allegations for which the Article 15 proceedings reduced him from E-3 to E-2. Additionally, he requested the Board consider his application for restoration of E-3 concurrently with the matters remanded to it by *XXXXX v. United States*, 2023 U.S. Claims LEXIS XXX (XXXXXXX).

On 18 Feb 14 and 10-14 Mar 14, the applicant was tried before a general court-martial. Contrary to his pleas, he was convicted of one specification of rape and two specifications of assault consummated by a battery in violation of Articles 120 and 128, UCMJ. The Air Force Court of Criminal Appeals affirmed this conviction.

On 22 May 17, the Court of Appeals for the Armed Forces (CAAF) reversed his convictions and authorized a rehearing. The applicant was tried again, but on 18 May 18, was acquitted of all charges. He has no remaining court-martial conviction.

The applicant applied to the Board requesting retroactive promotion to E-6, arguing he would have been promoted to E-6, but for the reversed convictions. The Board, in Decision BC-2019-0123, dated 20 Aug 20¹ [sic], denied his request due to lack of promotion testing; however, did not consider lesser included relief, specifically, restoration of his E-3 rank.

He subsequently filed in the Court of Federal Claims, seeking restoration of E-3 and retroactive promotion to E-4. His claim was denied, the court holding they are equitable matters solely within the discretion of this Board. The court did remand the matter to the Board to determine whether the applicant received correct back pay for the periods in which he was incarcerated and in which he was recalled to active duty for the purpose of retrial, by the court-martial which acquitted him.

The applicant was specifically acquitted for Charge II [Article 120] at the rehearing court-martial, the same allegations for which he was punished at an Article 15 proceeding on 18 Oct 11² [sic]. The Board should restore him to E-3 because it cannot, as a matter of equity, allow an Article 15 punishment to stand when a court-martial acquitted him of the same allegations.

The applicant's complete submission is at Exhibit I.

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

On 22 May 23, the United States Court of Federal Claims received the parties joint status report, which reflected remand proceeding had not been concluded in this matter and additional time will be required to complete the remand proceedings, which have been impacted by intervening events, as "on or about 18 Apr 23, the plaintiff submitted a request to the AFBCMR for reconsideration of certain issues and asked that the reconsideration be conducted concurrently with the remand ordered by the Court."

1. Pursuant to Rule 52.2 of the Rules of the United States Court of Federal Claims, the parties' request was granted. The period of remand shall continue until 21 Aug 23 and the case in this court remained stayed.

2. The parties shall file a joint status report on the progress of the remand on 23 Jun 23, and monthly thereafter.

¹ The Record of Proceedings for BC-2019-04123 was signed on 21 Jul 20.

² The Article 15 was imposed on 6 Oct 11, the commander determined the applicant committed the offenses on 14 Oct 11, and on 18 Oct 11, the applicant indicated he would not appeal the decision.

The United States Court of Federal Claims amended remand order is at Exhibit J.

AIR FORCE EVALUATION

AF/JAJI recommends denying the application. After careful consideration of all matters of law and equity, there is no basis to support a restoration to E-3. The Board's disposition of the original application directed removal from all pertinent records the applicant's Enlisted Performance Report for the period 15 Aug 13 through 14 Mar 14 and denied all other requests in the application. The applicant now requests restoration to E-3, as a matter of equity, contending the NJP cannot be permitted to stand because a court-martial acquitted him of the same allegation.

On 14 Oct 11, the applicant received NJP for assaulting his wife by pushing and holding her down. He was punished with a reprimand and a reduction in rank from E-3 to E-2, suspended through 13 Apr 12, after which time it would be remitted without further action, unless sooner vacated. On 15 Nov 11, he violated a lawful order to not contact his wife; therefore, the suspension of his rank reduction was vacated. He was reduced to E-2 with a date of rank of 14 Oct 11, effective 16 Nov 11.

The applicant received a Letter of Reprimand in Apr 12 for failure to follow technical data during a maintenance task, and on 17 Dec 12, received NJP for being derelict in the performance of his duties by negligently failing to repair a damaged wire bundle on the left wind leading edge of an aircraft. He was punished with a reprimand and a rank reduction to airman basic (E-1), which was suspended through 26 Jun 13, after which time it would be remitted without further action, unless sooner vacated.

On 15 Mar 14, a general court-martial found the applicant guilty of rape of his wife, on divers occasions, in violation of Article 120, UCMJ, and two specifications of assault consummated by a battery of his wife, in violation of Article 128, UCMJ. One of the two assaults consummated by battery had been the basis of his 14 Oct 11 NJP. He was sentenced to reduction to E-1, forfeiture of all pay and allowances, and confinement for four years.

On 22 May 17, the CAAF reversed his conviction and authorized the convening authority to order a rehearing in his case due to the appearance of unlawful command influence (UCI). The basis of the appearance of UCI regarded the decision by the Commander, [Numbered] Air Force (Numbered AF/CC), to refer the case to a general court-martial. In Feb 13, the Numbered AF/CC used his clemency authority under Article 60, UCMJ, to set aside the guilty finding and sentence in an unrelated case of aggravated sexual assault. This action received attention from the media and members of Congress. On 27 Dec 13, the Air Force Chief of Staff relayed to Numbered AF/CC that the Secretary of the Air Force had lost confidence in him, and he could either retire voluntarily at the rank of major general or wait for the Secretary to remove him from command in the immediate future. Coincidentally, on the same day, the Numbered AF/CC received the applicant's case to decide whether to refer to trial by general court-martial. On 28 Jan 14, when interviewed by the applicant's defense counsel, he stated there "probably is an appearance of UCI but I wasn't affected by it." He also stated it would be "foolish to say there is no appearance of UCI." The CAAF found "under the totality of these circumstances, we conclude the applicant has shown some evidence of unlawful command influence by the Secretary of the Air Force and/or the Chief of Staff of the Air Force, regarding the referral of the instant case to a general court-martial." *United States v. XXXXXX, XXXXX* (C.A.A.F. XXXXX). In May 18, the applicant was re-tried by a general court-martial and found not guilty of all charges.

The applicant challenges the 14 Oct 11 NJP and his reduction from E-3 to E-2, contending that equity requires restoration to E-3 because he was later found not guilty of the same underlying facts at his May 18 court-martial. AF/JAJI disagrees as the 2011 NJP is untethered to his set-aside court-martial conviction. First, an NJP administered by a commander under Article 15, UCMJ, is not a criminal judicial proceeding akin to a court-martial. Among the differences is a lesser standard of proof at NJP. Even if a subsequent court-martial found the applicant not guilty, that does not invalidate the commander's finding of misconduct. Second, the Court of Military Appeals (CMA), predecessor to the CAAF, held that a prior NJP does not preclude a subsequent court-martial for the same offense. In analyzing the rules for court-martial, the CMA found, "it is clear...that Congress did not intend for imposition of nonjudicial punishment to preclude the subsequent court-martial of a servicemember accused of a serious crime." *United States v. Pierce*, 27 M.J. 367, 368 (C.M.A. 1989). Although a member can be given credit for a prior punishment, neither *United States v. Pierce* nor any other law or policy requires an NJP to be invalidated by a subsequent acquittal at court-martial. Hence, they find no error or injustice in the 14 Oct 11 NJP.

Finally, since the applicant's request for restoration to E-3 is based on equity, another consideration is relevant. His reduction to E-2 was the direct result of his violation of a no-contact order subsequent to the NJP, and therefore, cuts against his argument on equity grounds.

The complete advisory opinion is at Exhibit L.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 3 Aug 23 for comment (Exhibit M), and the applicant replied on 3 Sep 23. In his response, counsel contended the applicant was found not guilty of the offense which was the basis of the 1 Oct 11 [sic]³ Article 15. It is fundamentally unfair to maintain him in a reduced grade because of conduct of which he is not guilty. At his first court-martial, he was found not guilty of violating the no-contact order which formed the basis for the revocation action; therefore, is not guilty of all relevant misconduct. The advisory opinion claims the 2011 NJP is untethered to the applicant's court-martial. This premise defies common sense. The 2011 NJP was for the exact same allegation and is therefore tethered to the finding of not guilty. Although one commander found him guilty at an NJP, a court-martial consisting of a legally trained military judge and numerous senior officers and enlisted personnel [the jury] found him not guilty. The opinion does not explain how punishing the applicant for an assault he did not commit is fair or just.

The advisory opinion cites *United States v. Pierce* which does not support its position. Although a highly disfavored practice because it smacks of unfairness, the advisory is correct – an accused may face court-martial for an offense for which he has previously faced NJP. However, "in these rare cases, an accused must be given complete credit for any and all NJP suffered: day-for-day, dollar-for-dollar, stripe-for-stripe." *United States v. Pierce*, 27 M.J. 367, 369 (C.M.A. 1989) (emphasis added). "[I]n cases where an accused is first punished under Article 15 and later faces trial by court-martial for the same offense, he "must be given complete credit..." *United States v. Grant*, 1999 CCA LEXIS 302, *3 (A.F. Ct. Crim. App. November 29, 1999) (unrep.) citing *Pierce*, 27 M.J. at 369 (emphasis added). The applicant is requesting complete credit that *Pierce* and *Grant* say he should in fairness receive and he wants his stripe back.

Finally, the advisory ignores that the applicant was twice court-martialed. At his first court-martial, the applicant was found not guilty of violating the no-contact order which caused the suspended reduction to be implemented. The Air Force Court of Criminal Appeals opinion after

³ The Article 15 was imposed on 6 Oct 11 and on 14 Oct 11, the commander determined the applicant committed one or more of the offenses alleged.

his first court-martial follows: “Before he was court-martialed, Appellant received nonjudicial punishment for assaulting [Spouse] on or about 21 September 2011, Later, the suspended reduction in rank was vacated after Appellant allegedly failed to obey an order not to contact [Spouse] on or about 24 October 2011. This ‘failure to obey’ was the same misconduct that was alleged in the specification of Additional Charge I [at [applicant’s] first court-martial], of which Appellant was acquitted.” *United States v. XXXXXX*, XXXXX (A.F. Ct. Crim. App. XX Mar. XXXX). To be clear, the applicant was found not guilty of violating the no-contact order at his first court-martial, and not guilty of the alleged assault at his second court martial. The Board should find maintaining his punishment for two allegations of which he is not guilty is fundamentally unfair.

The applicant’s complete response is at Exhibit N.

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 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. AF/JAJI’s recommendation appears to be based primarily on the fact the actions taken against the applicant were properly executed in accordance with governing policy. The Board also fails to find that any of the actions taken were improper at the time of execution or were not done in accordance with pertinent policy. Nevertheless, it is the Board’s opinion that approval of the requested relief would be appropriate based on the following considerations. The applicant’s Article 15 in 2011 stemmed from allegations the applicant assaulted his spouse in violation of Article 128, UCMJ. As punishment he was given a suspended reduction to the grade of E-2 and a reprimand. His commander subsequently vacated the suspended reduction because the applicant contacted his spouse in 2011, in violation of Article 92, UCMJ. In a 2014 court-martial, the applicant was found not guilty of violating the 2011 no contact order, and in 2018, following a rehearing, the applicant was acquitted of additional charges, including the same assault charge for which he received Article 15 punishment in 2011. The fact that the Article 15 and court-martial allegations stem from the same operative facts - same victim, same time frame, weighs against a finding of independence. Counsel states since the applicant was found not guilty at court-martial, according to *United States v. Pierce*, his Article 15 should be set aside. However, while *United States v. Pierce* does not strictly apply, the principle that a court-martial outcome impacts a prior NJP for the same offense does apply in this case and would likewise weigh in favor of a set aside. Therefore, the Board finds there is sufficient evidence the misconduct alleged during the NJP is no different than the charges levied during the court-martial for which the applicant was found not guilty. Accordingly, in the interest of justice, 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 the NJP under Article 15, UCMJ, imposed on 6 Oct 11, be set aside and removed from his records, and any rank, pay, allowances, entitlements, rights, and privileges affected by the NJP be restored.

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-2019-04123 in Executive Session on 21 Sep 23:

, Panel Chair
, Panel Member
, Panel Member

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

Exhibit G: Record of Proceedings, w/ Exhibits A-F, dated 27 Jul 20.
Exhibit H: Court of Federal Claims Remand Order, 7 Apr 23.
Exhibit I: Application, DD Form 149, w/atchs, dated 20 Apr 23.
Exhibit J: Court of Federal Claims Remand Order, 23 May 23.
Exhibit K: Documentary evidence, including relevant excerpts from official records.
Exhibit L: Advisory Opinion, AF/JAJI, dated 2 Aug 23.
Exhibit M: Notification of Advisory, SAF/MRBC to Counsel, dated 3 Aug 23.
Exhibit N: Counsel's Response, dated 3 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.

X

Board Operations Manager, AFBCMR