

RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXX

DOCKET NUMBER: BC-2020-01496

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His type of separation "Dismissal" and character of service "N/A" listed on his DD Form 214, *Certificate of Release or Discharge from Active Duty*, be upgraded to honorable.
2. His narrative reason and corresponding separation code denoted as "Court-Martial (Other)" and "JJD" be changed to "Secretarial Authority" and "JFF."
3. His reentry (RE) code denoted as "N/A" be changed to reflect an honorable discharge.

APPLICANT'S CONTENTIONS

He was a young officer at the time of his misconduct and took responsibility for his actions. He is sorry for what he did and paid a heavy price for his misconduct. He has had a clean criminal history report since his discharge and obtained gainful employment following his dismissal. He requests an upgrade to his discharge based on clemency.

In support of his request for clemency, the applicant provides a personal statement and several character reference letters.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force captain (O-3).

On 18 Sep 98, a Letter of Reprimand (LOR) was issued to the applicant for falsely representing a claim to the Federal Emergency Management Agency (FEMA) in the amount of \$698.00. He was prosecuted and pled guilty in the U.S. District Court. He was sentenced to probation for two years, ordered to perform 100 hours of community service, and pay restitution in the amount of \$6,995.89.

On 30 Aug 99, the convening authority published General Court-Martial Order Number XX. The Order stated the applicant pled not guilty to one charge of theft in the amount of \$2,000.00 (Article 121) and one charge of making a false claim against the United States in the amount of \$11,294.29 (Article 132) which were both dismissed after arraignment. The applicant also pled guilty to one charge and three specifications, of intent to deceive by making a false statement (Article 133) and

one charge and two specifications, of theft in the amount of \$2,000.00 and making a false claim against the United States in the amount of \$11,294.29 (Article 133). The applicant was sentenced to confinement for five months and dismissal from the service.

On 23 Oct 00, the applicant received a dismissal from the service with a character of service and a RE code annotated as "N/A." His narrative reason for separation is "Court-Martial (Other)" and he was credited with 6 years, 9 months, and 13 days of total active service.

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

POST-SERVICE INFORMATION

On 29 Oct 20, 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 18 Dec 20 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 D.

APPLICABLE AUTHORITY/GUIDANCE

This Board is without authority to reverse, set aside, or otherwise expunge a court-martial conviction. Rather, in accordance with Title 10, U.S.C., Section 1552(f), actions by this Board regarding courts-martial are limited to two types: 1) corrections reflecting actions taken by the reviewing officials pursuant to the Uniform Code of Military Justice (UCMJ) (for example, if a convening authority or appellate court took action but that action was not reflected in an Air Force record); and 2) action on only the sentence of the court-martial and solely for the purpose of clemency.

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness (USD P&R) issued supplemental guidance 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 memorandum.

On 29 Oct 20, the Board staff provided the applicant a copy of the “Wilkie memorandum.” (Exhibit C).

The Air Force Instruction (AFI) 36-3207, *Separating Commissioned Officers*, describes the authorized service characterizations that the Secretary of the Air Force (SAF) may direct; however character of discharge does not apply to officers dismissed by court-martial or dropped from the rolls of the Air Force:

Honorable. The quality of the 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 the service has been honest and faithful, this characterization is warranted when significant negative aspects of the member'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.

AIR FORCE EVALUATION

In regards to the applicant’s service characterization on his DD Form 214, AFPC/DPFDD does not make a recommendation but provides the following for information purposes only. On or about 8 Oct 00, the applicant’s general court-martial case with the sentence of dismissal from the Air Force was affirmed under General Court Martial Order 1. Per the Office of the Secretary of Defense (OSD), an officer convicted by a court-martial resulting in a dismissal from the service does not come with a service characterization, which is why “N/A” is on the applicant’s DD Form 214.

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 10 May 22 for comment (Exhibit F), and the applicant replied on 11 May 22. In his response, the applicant’s counsel states the advisory opinion does not contain any substantive analysis or discussion, therefore we have nothing to add beyond what is contained in our original filing.

The applicant’s complete response is at Exhibit G.

FINDINGS AND CONCLUSION

1. The application was timely filed. Given the requirement for passage of time, all clemency requests are technically untimely. However, it would be illogical to deny a clemency 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 U.S.C. § 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 has presented evidence sufficient to demonstrate an injustice regarding part, but not all, of his request. While the Board finds no error in the original discharge process, the Board recommends partial relief based on clemency. In particular, the Board finds the applicant's post-service conduct sufficient to warrant an upgrade to a general service characterization. The basis for granting clemency in the form of an upgrade to a general service characterization is the applicant has maintained a clean criminal record post-discharge and has a positive employment history. He obtained gainful employment following his dismissal, overcoming the obstacles he faced as a result of his punitive discharge and became a training captain. After flying for that employer for eight years, he became rated on the Airbus A320. Although his punitive discharge rendered him ineligible for employment with the major U.S. airlines, the applicant demonstrated resilience and determination by obtaining employment overseas. However, for the remainder of the applicant's request, the evidence presented did not demonstrate an error or injustice, and the Board therefore finds no basis to recommend granting that portion of the applicant's request noting his post-service conduct does not outweigh the seriousness of his offenses to warrant an upgrade to honorable. Therefore, 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 on 23 October 2000, he was discharged with service characterized as general (under honorable conditions), a separation code of "JFF," and corresponding narrative reason for separation of "Secretarial Authority."

CERTIFICATION

The following quorum of the Board, as defined in the Department of the Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2020-01496 in Executive Session on 22 Jun 22:

, Panel Chair
, Panel Member
, Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 15 Apr 20.

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

Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Clemency Consideration Guidance), dated 29 Oct 20.

Exhibit D: FBI Report, dated, 18 Dec 20.

Exhibit E: Advisory Opinion, AFPC/DP2SSR, dated 2 May 22.

Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 10 May 22.

Exhibit G: Applicant's Response, dated 11 May 22.

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