



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2020-03274-2

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider his request to be granted a Reserve retirement.

RESUME OF THE CASE

The applicant is a former Air Force Reserve (AFR) lieutenant colonel (O-5) who was court-martialed and dismissed from the service on 27 May 11. The applicant plead not guilty but was found guilty in violation of Article 134 for wrongfully and knowingly possessing visual depictions of minors under the age of 18 engaging in sexually explicit conduct.

On 15 Jun 21, the Board considered and denied his request for a Reserve retirement; finding the applicant had provided insufficient evidence of an error or injustice to justify relief. The Board agreed with the findings and recommendation of ARPC/DPTT which found the applicant, due to being dismissed, was not eligible for non-regular retired pay per Title 10, U.S.C., Section 12740. Reserve Order **Work-Product** was produced on 18 Sep 17, to be effective 3 Oct 17, on applicants 60th birthday, to process the applicant's pay; however, since he was dismissed from service, this order was produced in error and was revoked on 16 Oct 17.

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 E.

On 13 Oct 23, the applicant requested reconsideration of his request for a Reserve retirement. He again contends he was contacted by his lawyer and was told to submit his paperwork for retirement as it would be approved. It was his understanding, in order to receive retirement, his dismissal would be removed. He did not do anything knowingly wrong but accepts responsibility. He received a correspondence from the Reserve office at **Work-Product** Air Force Base and was told he would be recommended for a retirement, which he believes was approved in 2014 and he was reflected as retirement eligible by ARPC at the time.

In support of his reconsideration request, the applicant submitted new evidence, the letter from AFLOA/JAJA informing the applicant there is a special process whereby retirement eligible

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members who are court-martialed with a punitive discharge may be granted a form of clemency and still allowed to retire.

The applicant's complete submission is at Exhibit F.

APPLICABLE AUTHORITY/GUIDANCE

Under 10 U.S.C. Section 12740, *Eligibility: denial upon certain punitive discharges or dismissals*, a person who is convicted of an offense under the Uniform Code of Military Justice (UCMJ) (chapter 47 of this title) and whose sentence includes death; or is separated pursuant to sentence of a court-martial with a dishonorable discharge, a bad conduct discharge, or (in the case of an officer) a dismissal, is not eligible for retired pay under this chapter.

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 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. However, paragraph 6l states changes to the narrative reason for a discharge and/or an upgraded character of discharge granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, the payment of past medical expenses, or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded character.

AIR FORCE EVALUATION

ARPC/JA recommends denying the application. ARPC/JA reviewed the applicant's General Court Martial Order, pronouncing the sentence of seven months confinement and dismissal from the Air Force and affirming the sentence of seven months confinement and dismissal from the Air Force. The applicant's letter from appellate counsel mentions the possibility of clemency that would permit him to retire vice dismissal. However, there is no evidence the applicant submitted

an application for clemency or of the outcome of any such application for clemency. The advice given by the applicant's appellate counsel does not constitute evidence the Air Force committed an error or injustice adversely affecting the applicant.

This appeal addresses whether the revocation of orders transferring the applicant to the Retired Reserve in 2017 was an error or injustice. ARPC issued Reserve Order **Work-Product** dated 18 Sep 17 in violation of 10 U.S.C. Section 12740 and appropriately corrected this error by revoking this order, issuing Reserve Order **Work-Product** on 16 Oct 2017. While being transferred to the Retired Reserve contrary to law would have been a boon to the applicant, revoking the erroneous retirement order to comply with statute does not make the applicant the victim of an error or injustice. The applicant's letter from appellate counsel suggesting he may be a candidate for clemency does not, by a preponderance of the evidence, suggest he is the victim of an error or injustice.

The complete advisory opinion is at Exhibit G.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 25 Jul 24 for comment (Exhibit H), 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 ARPC/JA and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board finds the issuance of his retirement order was properly revoked and does not consider this an error or injustice. Furthermore, the Board took note of the applicant's submission and the letter from the AFLOA office; however, the Board finds no evidence the applicant's conviction was overturned nor does the Board find evidence the applicant was granted clemency or was eligible for a Reserve retirement. Per 10 U.S.C. Section 12740, the applicant is not eligible for retirement because he was convicted of an offense under the UCMJ and was dismissed from the Air Force. This Board is without authority to reverse, set aside, or otherwise expunge a court-martial conviction and can only grant relief based on clemency or make a correction to the record that the convening authority or appellate court took. The applicant has a right to apply to the AFBCMR for a discharge upgrade based on clemency; however, according to DoD guidance referenced in the Wilkie Memorandum, an upgraded character of discharge granted solely on equity, injustice, or clemency grounds will not result in further pay and benefits. Therefore, the Board recommends against correcting the applicant's records. If the applicant chooses to apply for a discharge upgrade based on clemency, he must reapply to the AFBCMR and provide a Federal Bureau of Investigation (FBI) Identity History Summary Check (IdHSC).

Guidance for this process is attached. Therefore, the Board recommends against correcting the applicant's records.

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 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-2020-03274-2 in Executive Session on 22 Aug 24 and 26 Aug 24:

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Panel Chair
, Panel Member
, Panel Member

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

Exhibit E: Record of Proceedings, w/ Exhibits A-D, dated 15 Jun 21.

Exhibit F: Application, DD Form 149, w/atchs, dated 13 Oct 23.

Exhibit G: Advisory Opinion, ARPC/JA, dated 12 Jul 24.

Exhibit H: Notification of Advisory, SAF/MRBC to Applicant, dated 25 Jul 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.

9/6/2024

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Board Operations Manager, AFBCMR
Signed by: USAF