

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-00776

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His administrative demotion be replaced with a proportionate disciplinary action.

APPLICANT'S CONTENTIONS

The administrative demotion action has inadvertently removed him from his career field and the Air Force due to high year of tenure (HYT) as a senior airman (E-4). He requests the administrative demotion be replaced with a more appropriate disciplinary action in accordance with AFI 36-2502, *Enlisted Promotion/Demotion Programs*, paragraph 6.1.5. The wing staff judge advocate (WG/JA) also provided him with only two duty days to generate a response, although AFI 36-2502 provides for three duty days to respond.

His goal was to serve in the military as long as he could. He has proven himself durable, dependable, honest and loyal. He has nearly a flawless record. His leadership is neglecting his years of outstanding service and denying him the opportunity to rehabilitate amid his one bad decision. He provides letters of support and character reference statements in his behalf.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force senior airman (E-4).

On 26 Jan 20, the applicant was arrested for driving under the influence (DUI) off-base by the state highway patrol.

On 28 Dec 20, the applicant received a letter of reprimand (LOR) from his unit commander for his off-base DUI on 26 Jan 20.

In response to the LOR, His area defense counsel (ADC) on 3 Jan 21, requested his unit commander consider the LOR in place of the administrative demotion action. The administrative demotion action was being taken almost one year after the alleged misconduct, despite that the allegations were reported to his immediate supervisor and leadership the day after the incident. His prior leadership chose to not take action. For these reasons, the action fails to meet the required purpose of AFI 36-2907, *Adverse Administrative Actions*, and its untimeliness threatens to materially prejudice the applicant's career.

Per the Administrative Demotion Action Memorandum dated 26 Jan 21, the applicant was administratively demoted to the rank of senior airman, with date of rank (DOR) 5 Feb 21 and effective date 8 Feb 21. The reason for the administrative demotion was that on or about 26 Jan 20, he controlled a passenger car while drunk.

The applicant received a referral enlisted performance report (EPR) for the reporting period 1 Feb 20 to 31 Jan 21. The reason was he failed to adhere to Air Force standards when cited for DUI by the state highway patrol, for which he received a LOR and unfavorable information file (UIF).

In a memorandum dated 4 May 21, his wing commander (WG/CC) responded to the applicant's Congressman regarding the applicant's request his administrative demotion be overturned. On 26 Jan 21, his commander demoted him for driving a vehicle while intoxicated in 2020. The appellate authority investigated why a year elapsed between the offense and the demotion. The appellate authority found that part of the delay resulted from new misconduct that the applicant was driving with a suspended license and lying to military law enforcement. The command was unaware of the DUI incident, accounting for the delay in demotion. The applicant was afforded two duty days to submit a supplemental response, with the option for more time if needed. The applicant did not request any additional time. The appellate authority reviewed the case and denied the appeal. The applicant received his full due process rights and there were no violations of Air Force instructions.

On 28 May 21, the applicant wrote his Congressman stating there were many inaccurate statements in the WG/CC memorandum dated 4 May 21. It was not true his leadership was unaware of the incident on 26 Jan 20. On 27 Jan 20, he notified his immediate supervisor and flight chief. They referred him to the ADC and the ADC instructed him not to notify his commander or first sergeant until further understanding of the case was made. Due to COVID-19, his case was postponed numerous times and he was not charged with a DUI until Mar 21, after he was administratively demoted. The statement the appellate authority investigated why a year elapsed between the offense and demotion is also not accurate. His flight chief immediately informed his squadron commander of the incident and that he had been advised to talk to the ADC. If a proper investigation was conducted, the information would have been made clear. It is also untrue he was driving with a suspended license. He had a temporary license when pulled over on 1 Oct 20 by security forces while on the installation and cited for driving without a license. On 7 Oct 20, the charges that he gave a false official statement and was driving with a suspended license were dismissed. After these charges were dismissed, his command was notified of the 26 Jan 20 incident. It was made to appear he had withheld the information; however, he notified his supervisor and flight commander immediately after the incident.

On 8 Jun 21, he was honorably discharged in the rank of senior airman with a narrative reason for separation of "Non-retention on Active Duty." He was credited with 10 years, 3 months and 24 days of active duty service.

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

AIR FORCE EVALUATION

AFPC/DP2SPP recommends granting his request. The applicant received a LOR on 28 Dec 20 for the off-base DUI incident on 20 Jan 20. The applicant made no attempt to conceal his infraction and immediately informed his supervisor and flight chief of his DUI infraction, they failed to immediately inform his command. Further, due to no fault of the applicant the administrative procedures were delayed over a year due to COVID-19. While a DUI is a serious infraction, the commander's decision ended a 10-year stellar career with no opportunity for rehabilitation and is counter to AFI 36-2502, paragraph 6.1.4, which states if the commander has sufficient reason to initiate demotion action, the entire military record is used in deciding whether demotion is appropriate. When appropriate an airmen should be given an opportunity to overcome their deficiencies before demotion action is initiated. Even a suspended demotion contingent on good behavior could have achieved the same ends without irrevocably harming the

applicant's career. The Air Force is not a one-mistake service and there are many examples of both enlisted and officer airmen who received DUIs but were given an opportunity to recover and continue to serve honorably. The applicant was denied the opportunity due to an unjust demotion action. The applicant was required to be administratively separated due to HYT, 10 years for senior airman.

The complete advisory opinion is at Exhibit C.

AFPC/JA recommends denial. While they are sympathetic to the fact that the applicant had a good performance record prior to the DUI, it is not in the interest of justice to allow a member with good work performance to be given special consideration for serious misconduct while off duty. In this case, the applicant was driving a vehicle, under the influence of alcohol, swerving in between highway lanes and with a blood alcohol content (BAC) that was twice the legal limit. His actions put his life and the lives of others on the road in grave danger.

The applicant's flight chief notes that while the DUI was reported to him, he elected not to report it up the leadership chain any further. On or about 1 Oct 20, the applicant was detained on the military installation as a result of speeding. Once the applicant presented his temporary license, the system showed his license had been suspended pending the outcome of the DUI charge. It was at this time that the applicant's command was made aware of his pending DUI case.

On 26 Jan 21, he was served with the administrative demotion action. On 29 Jan 21, the applicant provided a response acknowledging he failed to meet Air Force standards and the trust placed upon him. He took full responsibility for the incident and noted he put the lives of those around him and his career in jeopardy. On 4 Feb 21, the SJA found the demotion to be legally sufficient. On 8 Feb 21, the applicant was notified of the demotion authority's decision to demote him. He requested the demotion be replaced with a more appropriate disciplinary action. On 21 Mar 21, the applicant's appeal was denied.

AFI 36-2502, paragraph 6.34, allows for the demotion of airmen for failing to fulfill noncommissioned officer (NCO) responsibilities. Additionally, while the applicant may have had a successful military record prior to the DUI offense, previous good work performance does not offset the severity of this crime. Therefore, because the applicant engaged in serious misconduct by choosing to drive well over the legal limit for alcohol, the administrative demotion was appropriate. The applicant's due process rights were also not violated as there is no prescribed time period afforded to members to reply to additional information and the applicant was provided two days to reply to the additional information. His commander also noted the reason the suspended license became relevant was to explain the significant time difference between when the DUI occurred and the initiation of the demotion action.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant on 20 Jan 22 for comment (Exhibit E). In a response dated 14 Feb 22, he notes the AFPC/JA advisory states that AFI 36-2502 allowed the demotion; however, the AFI also states the demotion should be the last option. As stated by AFPC/DP2SP, he had a stellar career up to this point and was worthy of the opportunity to overcome a poor decision. There are many examples of airmen who received DUIs but were given an opportunity to recover and continue to serve. He does not request "special consideration" for a serious misconduct as AFPC/JA states but is requesting his entire record be considered as required by AFI 36-2502 and the punishment be commensurate with appropriate disciplinary actions. He is confident that an opportunity to return to active duty will

result in his unparalleled success and he will also encourage every airman around him to do the same.

The applicant's complete response is at Exhibit F.

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 error or injustice. While the Board notes the comments of AFPC/JA recommending relief be denied, the Board concurs with the rationale and recommendation of AFPC/DP2SPP in favor of granting relief and finds a preponderance of the evidence substantiates the applicant's contentions. The Board recognizes the applicant was arrested for an off-base DUI on 26 Jan 20. However, the Board finds the untimely administrative demotion more than one year after the incident resulted in an injustice to the applicant. The reason for the delayed administrative demotion appears to be based on allegations the applicant failed to inform his chain of command of the incident; however, the evidence and letters of support clearly show he informed his immediate supervisor and flight chief and was referred to the ADC. While the Board is unable to corroborate whether the applicant's commander was informed or the reasoning beyond the decision to not inform the commander, the evidence clearly shows the applicant informed his immediate leadership (supervisor and flight chief). Moreover, the Board notes the WG/CC's 4 May 21 letter to the applicant's Congressman states they were unaware of the off-base DUI until the applicant was pulled over for speeding on-base and lying to military law enforcement; however, there is no evidence the applicant lied to military law enforcement and an investigation revealed the State had issued the applicant a temporary license pending the outcome of his case. Further, the Board notes the applicant was also issued a LOR on 28 Dec 20 for the same offense. Therefore, the Board recommends correcting the applicant's records as indicated below.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show:

- a. The Administrative Demotion of Airmen Memorandum dated 26 Jan 21, with administrative demotion to the rank of senior airman (E-4) with date of rank (DOR) of 5 Feb 21 and effective date 8 Feb 21 be void and removed from his record.
- b. His rank of staff sergeant (E-5), DOR and effective date of 1 Oct 16 be restored.
- c. He was not discharged from active duty on 8 Jun 21, but on that date he continued to serve on active duty and was ordered permanent change of station (PCS) to his home of selection for the convenience of the government.

CERTIFICATION

The following quorum of the Board, as defined in Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2021-00776 in Executive Session on 21 Jan 22 and 14 Feb 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 26 Mar 21.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, AFPC/DP2SP, w/atchs, dated 14 Dec 21.
Exhibit D: Advisory Opinion, AFPC/JA, dated 10 Jan 22.
Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 20 Jan 22.
Exhibit F: Applicant's response, dated 14 Feb 22.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.11.9.

X

Board Operations Manager, AFBCMR