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**UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS**

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-00868-2

Work-Product

COUNSEL: *Work-Product*

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider his request to be given a 20-year retirement.

RESUME OF THE CASE

The applicant is a former Air Force lieutenant colonel (O-5) who was discharged on 27 Aug 19 for serious or recurring misconduct punishable by military or civilian authorities, with a general (under honorable conditions) discharge.

On 26 Jan 22 and 8 Mar 22, the Board considered and denied his request for a 20-year retirement and concluded the applicant was not the victim of an error or injustice. The Board concurred with the rationale and recommendations of the offices of primary responsibility and found a preponderance of the evidence did not substantiate the applicant's contentions. Specifically, the Board noted the Board of Inquiry (BOI) hearing and discharge was consistent with the substantive requirements of the regulations and was within the commander's discretion. Nor was the BOI hearing and discharge unduly harsh, unfairly biased, or disproportionate to the offenses committed. The Board took notice of the applicant's contentions the separation notifications were allegedly backdated, and his final pay was not ready on 27 Aug 19. However, with respect to discharge notifications, the Board did not find the allegedly backdated discharge notifications to be in error and considered them to be administrative paperwork similar to the DD Form 214, *Certificate of Release or Discharge from Active Duty*, which merely executes the Secretary of the Air Force (SAF) instrument, as they are not discharge certificates within the meaning of 10 U.S.C. Section 1168(a). Additionally, with respect to the applicant's contention a substantial part of his final pay was not ready on 27 Aug 19; the Board found no evidence a substantial part of the applicant's pay was not ready for delivery on 27 Aug 19. Furthermore, the Board applied liberal consideration to the evidence submitted by the applicant; however, it was not sufficient to grant the applicant's request as there was no evidence his deployment experiences caused any mood or behavioral changes causing his misconduct which resulted in a BOI hearing and discharge.

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 K.

**AFBCMR Docket Number BC-2021-00868-2
CUI//SP-MIL/SP-PRVCY**

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CUI//SP-MIL/SP-PRVCY

On 12 Jan 24, the applicant, through counsel, filed a complaint in the U.S. Court of Federal Claims alleging the AFBCMR erroneously applied the law to the facts in this case when the Board affirmed the Air Force's wrongful discharge after he completed twenty years of active federal military service prior to the effective date of his separation and is therefore entitled to be retired with pay and benefits. On 27 Aug 19, the SAF issued its decision on the BOI recommendation, and he was issued orders directing he be separated with an effective date of 6 Sep 19. On 28 Aug 19, while he was completing his out-processing, he was issued an amendment changing his effective date of separation to 28 Aug 19 and later that same day was issued another amendment further changing the effective date of separation to 27 Aug 19. The Board wrongfully applied the law in determining the actual delivery of the discharge certificates is not necessary only when service members are aware or on notice their military status has been terminated. He had no prior notice or awareness the BOI recommendation had been or would be approved by the SAF until he received separation orders at the end of the day on 27 Aug 19 which had an effective date of 6 Sep 19. Additionally, the applicant's final pay or a portion of his final pay could not be ready for delivery as the finance office did not learn of his separation from the service prior to 28 Aug 19 and he was not given ample time to out-process.

On 29 Jan 24, the court remanded the applicant's case to the AFBCMR pursuant to Rule 52.2 of the Rules of the Court of Federal Claims in lieu of an answer to Plaintiff's Complaint, instructing the AFBCMR to evaluate his claims related to his retirement and take any administrative actions in furtherance of, and consistent with, that reconsideration. The government asserts, without admitting error, a remand will serve the interests of justice, because the Board based the decision at issue on advice from the Military Justice and Discipline office, but the Court has now determined the Air Force Personnel Center (AFPC) should provide advice on the central question in this case. Additionally, the government seeks a remand because Plaintiff's motion for judgment upon the administrative record appears to add information and argument not previously raised before the Board.

The applicant's complete submission and the Court motion are at Exhibits L and M.

AIR FORCE EVALUATION

AFPC/JA recommends denying the application finding the applicant failed to prove any material error or injustice warranting relief. On 4 Apr 19, the BOI recommended the applicant be discharged with a general service characterization and the Secretary of the Air Force Personnel Council (SAFPC) approved the BOI's recommendation on 27 Aug 19. According to 10 U.S.C. Section 1186, a retirement-eligible officer shall not be involuntarily separated, but rather, shall be retired. The applicant became retirement eligible on 28 Aug 19; however, in order to effectuate and execute SAF's decision to involuntarily separate, vice retire the applicant, AFPC established the applicant's date of separation (DOS) as 27 Aug 19. This was directed by AF/JAA, who indicated SAFPC's directive is the date of discharge in this case. The applicant's counsel argues he remained on active duty through 28 Aug 19, he was engaged in completing patient records and began out-processing later that day. However, there is no requirement in law or policy for a member to be on active duty to complete out-processing actions as they are administrative functions.

CUI//SP-MIL/SP-PRVCY

Moreover, the applicant's counsel has cited numerous Federal cases in the interpretation of 10 U.S.C. Section 1168 to argue the applicant's date of discharge could not have been set as 27 Aug 19 because the applicant had not received delivery of his DD Form 214 or notification of his 27 Aug 19 DOS prior to 28 Aug 19; his final pay was not ready for delivery on 27 Aug 19; and he had not started his "clearing process" until 28 Aug 19. Counsel's argument is misplaced. As stated in each of the cases, the applicant's counsel has cited, these factors establish "in personam jurisdiction" over a member for Uniform Code of Military Justice (UCMJ) purposes. This permits the Air Force to hold a member beyond his/her DOS in order to court-martial him/her. Such is wholly separate from establishment of a DOS. Upon receipt of a SAFPC directive directing separation, AFPC establishes a DOS. The DOS that is established is the date that is used to calculate a member's years/months/days of service. If, as applicant's counsel argues, a DOS should not be set while a member is under "in personam jurisdiction" then the DD Form 214 would never be available for delivery, since a condition precedent to severing "in personam jurisdiction" is receipt of the DD Form 214, which sets the DOS.

The complete advisory opinion is at Exhibit N.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 20 Mar 24 for comment (Exhibit O), and the applicant replied on 15 Apr 24. In his response, the applicant contends, through counsel, the advisory opinion misapplies the law, Title 10 U.S.C. Section 1186, and ignores the case law from several federal civilian court cases that have examined the pertinent statute defining the mandatory prerequisites necessary to effectuate proper discharges from the military. To effectuate the discharge of a military member, the government must deliver, or have ready for delivery, his discharge certificate and at least a substantial part of his final pay. The highest military appellate courts have interpreted this section of the statute in a series of cases determining when a member is actually discharged from the service. In those cases, the government argued the individual remained in the military and was subject to courts-martial jurisdiction (the in personam jurisdiction the advisory opinion misapplies to this case); that is, the individual's apparent discharge was ineffective because the Section 1168(a) elements necessary for an actual discharge were not properly executed. Notwithstanding, Section 1168(a) applies to all military discharges whether through courts-martial or otherwise, the advisory opinion would now have this Board ignore the government's courts-martial arguments and the military appellate courts' decisions interpreting Section 1168(a) because this is not a court-martial case.

In *Butler v. United States*, (U.S. v. *Butler* 519 F.3d 637 (5th Cir. 2011)), the court determined *Butler* was in fact discharged at the time of his arrest because his discharge documents were ready for delivery and *Butler* had notice of his discharge. Although, the Fifth Circuit used decisions by military appellate courts in defining prerequisites for discharge, it primarily relied upon several cases from the Federal Claims Court that examined the application of Section 1168(a) to discharges. The Claims Court, in examining cases that had absolutely nothing to do with courts-martial jurisdiction, found two specific instances when the actual delivery of a discharge certificate was not necessary. First, actual delivery is not necessary when the discharge documents are ready for delivery, and the service member had notice of the discharge (*Earl v. United States*, 27 Fed.Cl. 36, 36 (Fed.Cl.1992)). Second, when a service member's discharge documents are ready for

CUI//SP-MIL/SP-PRVCY

delivery and both parties understand the situation, delivery is not crucial (*Hamon v. United States*, 10 Cl.Ct. 681, (Cl.Ct. 1986)). Neither the *Butler* case nor the Claims Court cases had anything to do with courts-martial in personam jurisdiction. Furthermore, the Air Force failed to complete the second statutory criteria for discharging military members, the provision of final pay or a substantial portion thereof. The U.S. Court of Federal Claims analyzed 10 U.S.C. Section 1168(a) and held that a military member's final pay does not need to be received by the member to complete the discharge process, but a substantial part of the final pay only needs to be ready for delivery to service members on their separation date (*Spehr v. United States*, 51 Fed. Cl. 69 (2001)).

He was not informed of his discharge until the end of the day on 27 Aug 19 when he was notified SAFPC approved the BOI recommendation, and his DOS would be 6 Sep 19. Assuming the SAFPC decision to approve the BOI recommendation is the "discharge certificate" and it was ready for delivery on 27 Aug 19, he did not receive notice his discharge date was 27 Aug 19 until he received the second amendment to his original separation notice on 28 Aug 19, after he completed twenty years of active duty service. Accordingly, it is impossible the Air Force satisfied the "delivery of the discharge certificate" prior to end of the day on 27 Aug 19 as required by statute and interpreted by the federal courts; therefore, he continued his active duty service through 28 Aug 19. Additionally, AFPC notified his military personnel flight the morning of 28 Aug 19, his DOS would be set to 27 Aug 19, and he was unaware of his discharge until late afternoon on 27 Aug 19. These two facts make it inconceivable his finance office had his pay or a substantial portion ready for delivery as the statute requires prior to his out-processing the office on 28 Aug 19 and he did not receive his final pay until 30 Aug 19.

Lastly, the advisory opinion attempts to negate his active duty on 28 Aug 19 by arguing there is no requirement in law or policy for a member to be on active duty to complete out-processing actions, as they are administrative functions. While it may be true there is no requirement for a member to be on active duty to out-process from the military, that statement does not apply here because his status as an active duty Air Force officer did not change between 27 and 28 Aug 19. The evidence in this case clearly proves he remained on active duty performing his official duties through 28 Aug 19.

It may have been the SAFPC intent to discharge him prior to his retirement eligibility date, but that intent does not negate or forgive compliance with the law and regulations to effectuate his separation from the Air Force. The SAFPC delay in making a decision concerning the BOI recommendation was neither caused by nor a result of his action or inactions. That delay, however, did result in his additional months of honorable and creditable service for the Air Force in the treating and healing of Air Force personnel and family members. The facts clearly establish he completed twenty years of active commissioned service with the Air Force.

The applicant's complete response is at Exhibit P.

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 report provided by the Court remand order, the applicant's submission, the AFPC/JA advisory, and the applicant's response, the Board concludes the applicant is not the victim of an error or injustice finding a preponderance of the evidence does not substantiate the applicant's contentions. On 4 Apr 19, the BOI recommended the applicant be discharged with a general service characterization and AF/JAA directed his DOS as the date of the SAFPC directive. The applicant became retirement eligible on 28 Aug 19; however, in order to effectuate and execute SAF's decision to involuntarily separate the applicant instead of retiring him, his DOS was established as 27 Aug 19. Counsel argues the applicant had no prior notice or awareness the BOI recommendation had been or would be approved by the SAF until he received separation orders at the end of the day on 27 Aug 19; however, the Board finds it unreasonable to believe the applicant had no prior awareness of his pending discharge based on the BOI recommendation. Furthermore, the Board finds the applicant did not have to be in a military status to perform his out-processing as these are administrative functions and again finds no evidence to suggest a portion of his final pay was not available for release on 27 Aug 19. Except for the applicant's own contention through counsel, a portion of his pay could not be available for release due to the timing of his out-processing, the applicant submits no further evidence to support this argument. Per DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 3.10.5, applicants have the burden of proof for providing evidence in support of their claim. 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 DAFI 36-2603, paragraph 2.1, considered Docket Number BC-2021-00868-2 in Executive Session on 9 May 24

<i>Work-Product</i>	Panel Chair
<i>Work-Product</i>	Panel Member
<i>Work-Product</i>	Panel Member

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

- Exhibit K: Record of Proceedings, w/ Exhibits A-J, dated 26 Jan 22 and 8 Mar 22.
- Exhibit L: Court Motion filed by Counsel, dated 12 Jan 24.
- Exhibit M: Court of Federal Claims Remand Order, dated 29 Feb 24.
- Exhibit N: Advisory Opinion, AFPC/JA, dated 20 Mar 24.
- Exhibit O: Notification of Advisory, SAF/MRBC to Applicant, dated 20 Mar 24.

Exhibit P: Applicant's Response, w/atchs, dated 15 Apr 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.

5/14/2024

Work-Product

Board Operations Manager, AFBCMR
Signed by: USAF