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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02296

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His under other than honorable conditions (UOTHC) discharge be upgraded to honorable.

APPLICANT'S CONTENTIONS

He was accused of a crime he did not commit and was never convicted. He was advised by a lawyer to take the plea deal because it would save the military time and money and his chances of an acquittal were 50/50 since it was his word against the accuser. He has been a good citizen since his discharge working as a real estate agent helping with his church and within his community.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman (E-2).

On 28 Jul 99, the applicant requested he be discharged in lieu of a court-martial. He stated he was aware of the elements of the offense with which he was charged and was afforded the opportunity to consult legal counsel. His Area Defense Counsel (ADC) submitted a request on his behalf asking for discharge in lieu of a court-martial with a general (under honorable conditions) service characterization.

On 9 Aug 99, the applicant's commander recommended the applicant's request for a discharge in lieu of a court-martial be approved with a UOTHC service characterization stating the government would have to prove the allegation of rape as there was no physical evidence. Furthermore, credibility would play a major role in the case to which there was evidence the accuser's credibility could be in question. The specific reason for the action was:

- a. Dated 10 Jun 99, DD Form 458, *Charge Sheet*, indicates the applicant was accused of rape. The applicant's commander indorsed the charge sheet stating the applicant's character of service has been minimally satisfactory stating he had a driving while intoxicated charge in Nov 98 to which he received an Article 15. On this same date, the Staff Judge Advocate found the discharge action legally sufficient.

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On 20 Aug 99, the discharge authority directed the applicant be discharged from the service under the provisions of AFI 36-3208, *Administrative Separation of Airmen*, Chapter 4, pursuant to his request for discharge in lieu of trial by court-martial, with an UOTHC service characterization.

On 3 Sep 99, the applicant received an UOTHC discharge. His narrative reason for separation is "Triable by Court-Martial" and he was credited with two years, five months, and two days of total active service.

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

POST-SERVICE INFORMATION

On 3 Jan 22, 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 14 Mar 22 and provided an FBI report. According to the report, the applicant was arrested on 24 Feb 17 for driving under the influence. He states this is the only incident he has had since his discharge; he was not convicted and attended and completed a diversity program. The applicant also provided character statements, certificates and commendations, awards from his employer, and a copy of his Associate's Degree.

The applicant's complete response is at Exhibit D.

APPLICABLE AUTHORITY/GUIDANCE

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 3 Jan 22, the Board staff provided the applicant a copy of the clemency guidance (Exhibit C).

AFI 36-3208, *Administrative Separation of Airmen*, describes the types of service characterization:

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Honorable. The quality of the airman's service generally has met 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.

Under Honorable Conditions (General). If an airman's service has been honest and faithful, this characterization is warranted when significant negative aspects of the airman's conduct or performance of duty outweigh positive aspects of the airman's military record.

Under Other than Honorable Conditions. 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 airmen. The member must have an opportunity for a hearing by an administrative discharge board or request discharge in lieu of trial by court-martial. Examples of such behavior, acts, or omissions include, but are not limited to:

- The use of force or violence to produce serious bodily injury or death.
- Abuse of a special position of trust.
- Disregard by a superior of customary superior - subordinate relationships.
- Acts or omissions that endanger the security of the United States.
- Acts or omissions that endanger the health and welfare of other members of the Air Force.
- Deliberate acts or omissions that seriously endanger the health and safety of other persons.
- Rape, sexual assault, aggravated sexual contact, abusive sexual contact, rape of a child, sexual assault of a child, sexual abuse of a child, forcible sodomy and attempts to commit these offenses.

FINDINGS AND CONCLUSION

1. The application was timely filed. Given the requirement for passage of time, all clemency and discharge upgrade requests are technically untimely. However, it would be illogical to deny such 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 is not the victim of an error or injustice. Based on the available evidence of record, it appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. The applicant has provided no evidence which would lead the Board to believe his service characterization was contrary to the provisions of the governing regulation, unduly harsh, or disproportionate to the offenses committed. Nonetheless, in the interest of justice, the Board considered upgrading the applicant's discharge. In support of his request for an upgrade, the applicant has provided an FBI report, character statements, certificates, commendations, and awards from his employer, and a copy of his Associate's degree. The applicant contends he has been a good citizen since his discharge and is working as a real estate agent helping with his church and within his community. The Board contemplated the many principles included in the Wilke

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Memo to determine whether to grant relief based on an injustice or fundamental fairness. However, the Board does not find the evidence presented is sufficient to conclude the applicant's post-service activities overcame the misconduct for which he was discharged. This Board very carefully weighs requests to upgrade the character of a discharge and in doing so, considers whether the impact of an applicant's contributions to his or her community since leaving the service are substantial enough for the Board to conclude they overcame the misconduct that precipitated the discharge and whether an upgrade of the discharge would create a larger injustice to those who served honorably and earned the characterization of service the applicant seeks. While the applicant has presented some supporting statements indicating he has apparently made a successful post-service transition, the Board does not find the documentation sufficient to conclude they should upgrade the applicant's discharge at this time. In this respect, the supporting statements from the applicant's family and friends indicate their admiration for the applicant and the way he has lived his life before his entry into the service and since his separation. However, the evidence he provides lacks references that demonstrate his post-service rehabilitation, service to the community, or any degree of remorse pertaining to his in-service conduct. In addition, the applicant has provided an FBI report indicating he has had some criminal activity since his discharge. While, the incident occurred approximately 5 years ago, and given the evidence presented, the Board does not find the applicant's submission sufficient to grant the requested relief.

The applicant retains the right to request reconsideration of this decision, which could be in the form of a personal statement, additional character statements, or testimonials from community leaders/members specifically describing how his efforts in the community have impacted others. Should the applicant provide documentation pertaining to his post-service accomplishments and activities, this Board would be willing to review the materials for possible reconsideration of his request based on fundamental fairness. Therefore, the Board recommends against correcting the applicant's record.

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 the 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-2021-02296 in Executive Session on 30 Nov 22:

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

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Panel Member

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

Exhibit A: Application, DD Form 149, w/atch, dated 2 Jun 21.

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

Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Clemency Guidance), dated 3 Jan 22.

Exhibit D: Applicant's Response, w/atchs, dated 14 Mar 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.

12/21/2023

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Board Operations Manager, AFBCMR

Signed by

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