



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02985

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His general (under honorable conditions) discharge be upgraded to honorable.

APPLICANT'S CONTENTIONS

The Air Force should not have separated him under AFI 36-3208, *Administrative Separation of Airmen*, paragraph 5.51, because his command did not support this action with sufficient evidence showing he had a requisite conviction for a qualifying offense. Rather, available information suggests the command, just like others at the time, pursued convenience instead of any examination of the circumstances. Available information does not establish he had a civilian conviction for which a punitive discharge would have been authorized for the same or closely related offense under the Manual for Courts-Martial, and available information likewise does not establish he was ever sentenced by civilian authorities to confinement for six months. The Air Force failed to produce any records to show the separation action met the requirements of the AFI.

Furthermore, the Letter of Reprimand (LOR) dated 13 Feb 02 erroneously references a Work-Product Work-Product that is not part of the state's criminal code, and he could never have been convicted under this or any other provision under Work-Product. Additionally, this statute does not define "battery" or "battery of a household member." Nothing in the LOR explains the meaning of the commander's allegation of assault or anything specific about how he was supposedly rude, insolent, or angry. The Work-Product defines three discrete offenses: assault, unlawful contact, and battery. The commander's letter of reprimand; however, improperly blends elements of all three offenses and fatally fails to support all the elements of any one of the offenses. The Work-Product law does not define any offense as an assault in a rude insolent or angry manner, and therefore the commander's letter of reprimand fails to articulate any cognizable offense. There is no direct evidence he did anything wrong; he does, however, provide direct, credible evidence about what happened. He never committed any offense; although he was arrested and entered a nolo contendere plea, he did not understand what that meant. He thought by entering this plea, he would be able to walk out of the courtroom with no further consequences. He did not know this plea would result in a conviction or could cause a separation from the Air Force. Systemic racial bias manifested in his command when they made no apparent effort to follow up with Ms. W----- about her letter, not to mention command's failure

AFBCMR Docket Number BC-2021-02985

Work-Product

Work-Product

to put any effort toward precisely alleging any factual basis. This type of bias is so deeply ingrained in the military and the criminal justice system that he did not give serious thoughts to challenging the outcome and just accepted the punishment.

In support of his request the applicant provides a personal statement, copies of military records and several reports regarding racial disparity.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman first class (E-3).

On 3 May 02, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFI 36-3208, paragraph 5.51 for a civilian conviction. The specific reason for the action was due to the guilty verdict by a civilian court of assault and sentencing to 120 days in jail of which 110 days were suspended. He was issued an LOR for this incident. Other LORs (six over the period of 4 Nov 99 thru 22 Oct 01) and Letters of Counseling (LOCs) (four over the period of 8 Nov 99 thru 15 Mar 01) were listed as attachments to this letter but are not available for review.

On 21 May 02, the Staff Judge Advocate found the discharge complied with AFI 36-3208 and the record was legally sufficient to support the discharge action of the applicant for a civilian conviction.

On 5 Jun 02, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct" and he was credited with 3 years, 6 months, and 25 days of total active service.

On 28 Jan 09, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge contending he was unemployed due to a lack of work and was taking this opportunity to further his education; however, his type of discharge may have hindered his educational benefits.

On 5 Aug 10, the AFDRB found the applicant submitted no issues contesting the equity or propriety of the discharge and concluded the discharge was consistent with the procedural and substantive requirements of the discharge regulation and was within the discretion of the discharge authority and the applicant was provided full administrative due process.

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

POST-SERVICE INFORMATION

On 13 Mar 23, the Board sent the applicant a request for post-service information, including a standard criminal history report from the Federal Bureau of Investigation (FBI); however, he has not replied.

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 paragraphs 6 and 7 of the Wilkie memorandum.

On 13 Mar 23, the Board staff provided the applicant a copy of the clemency bulletin based on fundamental fairness guidance (Exhibit C).

Department of the Air Force Instruction (DAFI) 36-3211, *Military Separations*, describes the authorized service characterizations.

Honorable. The quality of the airman's 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 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 member's military record.

AIR FORCE EVALUATION

AF/JAJI recommends denying the application. After careful review, AF/JAJI finds the applicant has not provided sufficient evidence of an error or injustice that would undermine his discharge. Pursuant to DAFI 36-2603, *Air Force Board for Correction of Military Records*, dated 4 Oct 22, paragraph 3.4.4, states the burden to provide evidence of an error or injustice belongs to the applicant, not to the Air Force. Hence, any contention based on an alleged failure by the Air Force to provide records must fail. Similarly, arguments based on the limited nature of available evidence must also fail, such as his contention available information (emphasis added) does not establish he had a civilian conviction for which a punitive discharge would have been authorized and his contention there is no direct evidence the applicant did anything wrong.

After all, pursuant to DAFI 36-2603, paragraph 3.5, applicants are required to file an application within three years after the error or injustice was discovered, or, with due diligence, should have been discovered. Although the AFBCMR may waive the timeliness requirement, we remind the Board the difficulty of locating decades-old records is one of the reasons for the three-year rule. The applicant attempts to reconcile unavailable records in his favor by contending since there are no records, there was no evidence of multiple domestic assaults, no basis for civilian police to arrest him, no basis for civilian authorities to charge him, no basis for [Work-Product] Circuit Court to accept his voluntary and informed *nolo contendere* plea, and no basis for the Air Force to administratively separate him with a general discharge. However, the doctrine of “presumption of regularity” assumes the opposite. Federal courts have long recognized the strong presumption of regularity accompanying government proceedings, including that the military carries out its responsibilities properly, lawfully and in good faith (*Richey v. United States*, 322 F.3d 1317, 1326, Federal Circuit 2003; *Porter v. United States*, 163 F.3d 1304, 1316, Federal Circuit 1998, and *Berkley v. United States*, 59 Federal Claims 675, 693, 2004). Hence, there is a strong presumption the applicant’s discharge was proper.

Furthermore, the applicant specifically challenges his LOR, alleging it contains errors which prove the discharge was consequently erroneous. First, the applicant incorrectly tethers the LOR to the discharge. An administrative discharge is a separate and distinct action from an LOR, and, as noted above, AF/JAJI applies a strong presumption the discharge was administered properly, especially in light of the investigation and the past history of domestic assault the LOR referenced. Furthermore, the applicant incorrectly challenges the LOR by misrepresenting what the commander intended to convey. The LOR states an investigation has disclosed the applicant did assault W----- in a rude, insolent or angry manner and he was found guilty by L----- County Circuit Court of battery of a household member as defined by [Work-Product]. The applicant argues [Work-Product] is not part of the state’s criminal code and thus he could never have been convicted under this or any other provision under [Work-Product] [Work-Product] and he argues [Work-Product] does not define “battery” or “battery of a household member.” The applicant is only correct in that he was not convicted under [Work-Product] [Work-Product] and the section does not define “battery.” However, he is incorrect the commander was erroneous, or the LOR or the discharge was invalid. A review of [Work-Product] reveals it is a portion of the [Work-Product] Statute which provides definitions, and it specifically defines the term, “household member.” Hence, the LOR could be rewritten to put quotation marks around the defined term, “household member;” however, a lack of such quotation marks does not render the LOR or the discharge legally insufficient.

Finally, AF/JAJI advises the Board the applicant pled *nolo contendere* to the charges stemming from the domestic assault and arrest on 29 Oct 01. According to [Work-Product] Rules of Criminal Procedure, Rule 11, a plea of “*nolo contendere*” has the same effect as a plea of guilty for the purposes of a criminal case. Although the applicant now alleges there is no direct evidence, he did anything wrong and the assault victim wrote to the [Work-Product] seven months after the assault indicating the statement given to the police was exaggerated, the applicant’s voluntary and knowing *nolo contendere* plea contradicts both assertions.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 20 Sep 23 for comment (Exhibit E) but has received no response.

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. It appears the discharge and the LOR issued due to his civilian court conviction was consistent with the substantive requirements of the regulations and was within the commander's discretion. Nor was the discharge unduly harsh or disproportionate to the offenses committed. The Board concurs with the rationale and recommendation of AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant's contentions. The applicant has the burden of proof to support his claims and the Board finds the preponderance of evidence, to include the statement from W-----, does not support counsel's allegations he was not convicted by a civilian court to which he entered a plea of "nolo contendere" or that the Air Force did not have jurisdiction to discharge him because the records do not exist. Furthermore, the Board acknowledges the applicant's contention he was discriminated against and inequality and systemic racism was the root of his discharge; however, other than his own assertions and the numerous reports submitted by counsel regarding systematic racism in the military, we do not find the evidence presented sufficient to support this claim.

Nonetheless, in the interest of justice, the Board considered upgrading the applicant's discharge. The Board contemplated the many principles included in the Wilke memorandum 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. The applicant did not provide any evidence to show he made a successful post-service transition to conclude the Board should upgrade the applicant's discharge at this time and therefore recommends against correcting the applicant's record.

Work-Product

The applicant retains the right to request reconsideration of this decision, which could be in the form of a personal statement, 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.

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, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2021-02985 in Executive Session on 25 Oct 23:

Work-Product

Panel Chair

Work-Product

, Panel Member

Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 19 Aug 21.

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

Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 13 Mar 23.

Exhibit D: Advisory Opinion, AF/JAJI, dated 8 Sep 23.

Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 20 Sep 23.

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.

1/4/2024

Work-Product

Board Operations Manager, AFBCMR

Signed by:

Work-Product

AFBCMR Docket Number BC-2021-02985

Work-Product