

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2021-03390

XXXXXXXXXXXXXX

**COUNSEL:** XXXXXXXXXXX

**HEARING REQUESTED:** YES

### APPLICANT'S REQUEST

His military record be corrected to reflect the following:

1. Reinstatement in the United States Air Force in the grade of technical sergeant (E-6).
2. Retroactive promotion to the grade of master sergeant (E-7), effective Jan 20.
3. Back pay based on corrected grade and date of rank.

### APPLICANT'S CONTENTIONS

Counsel, on behalf of the applicant, contends he was separated pursuant to Air Force Instruction (AFI) 36-3208, *Administrative Separation of Airmen*, paragraph 5.55. The command specifically alleged the applicant committed a sexual act upon an airman without her consent. His separation was effective 27 Dec 18, and he was given an Under Other Than Honorable Conditions (UOTHC) service characterization. The applicant petitioned the Air Force Discharge Review Board (AFDRB) for a discharge upgrade on 8 May 19. The AFDRB granted the applicant relief by upgrading his characterization of service to Honorable and changed his Narrative Reason for Separation to Secretarial Authority. Although the applicant received a new DD Form 214, *Certificate of Release or Discharge from Active Duty*, he did not receive a decisional document from the AFDRB.

The applicant is entitled to relief for the following reasons: 1) he was not guilty of the allegation made against him and the government failed to prove that he was guilty by a preponderance of the evidence; 2) the government failed to produce the alleged victim in this case; therefore, the applicant was deprived of basic due process in that he was unable to confront his accuser; and 3) the applicant's performance and character, as evidenced in his military record and letters of support from colleagues, indicate he should have been retained in the service.

The applicant did not sexually assault the airman and has consistently maintained since his initial interview with the Air Force Office of Special Investigations (AFOSI) that his sexual interaction with the airman was consensual. He told the AFOSI, "When she said "No," I stopped" which is evidence he did exactly as he should have done. Additionally, the government did not prove his guilty by a preponderance of evidence. There are various facts that support the applicant's version of events and raise doubt regarding the government's case.

The video of the complainant's AFOSI interview was entirely unreliable both in form and substance. There is a discrepancy in the time of the complainant's interview and the time stamp on the video. The timing of the interview was important because the timeline of the offense and her subsequent activities would indicate she was tired and rushed through her statement to AFOSI. The audio failed for approximately five minutes and the complainant only spent four minutes of the interview discussing the assault itself. Critically, the complainant said, "honestly, I'm not even completely sure" or words to that effect while referencing the assault. This is evidence the complainant forgot she consented to sex with the applicant and may have felt guilty about it after the fact. Additionally, there was no corroboration of the complainant's version of

events. The testimony from the AFOSI and the nurse are simply regurgitations of what the complainant told them. Finally, the complainant claimed she vomited while being sexually assaulted, which we know to be untrue as AFOSI found no evidence of vomit in the room.

The AFOSI was significantly biased against the applicant, only interested in pursuing evidence that inculpated him. The AFOSI failed to test the section of carpet for vomit, assuming the spot on the carpet was vomit. Further, the applicant stated he stopped when the complainant said to stop, but according to the AFOSI that sounded like sexual assault and thus an admission. The AFOSI is trained to believe alleged victims of sexual assault without question, so anything the applicant said was going to be an admission in their eyes. This institutional bias impacted both the investigation and the administrative separation board to the applicant's detriment.

The complainant's memory issues were central to the case. The defense called an expert witness who opined the complainant's memory was not reliable and what she did recall was reconstructed by her mind to paint her in a positive light. Also, the evidence suggests the complainant used details from a prior sexual assault to fill gaps in her missing memory from her interaction with the applicant. Accordingly, the accuracy of the complainant's memory of the night in question is in serious doubt.

There is additional evidence the sexual intercourse was consensual. Several defense witnesses testified about the complainant's behavior that night and attested the complainant and applicant appeared to be together on a date. The complainant stated she was not flirtatious with the applicant, so she was either lying or did not remember events from that evening; therefore, no one can exclude the possibility that she consented to sex with the applicant.

The applicant was entitled to the presumption of innocence at the start of his administrative separation board. Unless the government presented evidence that proved guilt by a preponderance of evidence, the administrative separation board had a legal and moral obligation to conclude he was innocent of the allegation. The government failed to meet this burden and the administrative separation board's findings should be vacated.

Additionally, the government's entire case was predicated on the allegations of the complainant. For reasons that remain unclear, the complainant refused to participate in the administrative separation board. The applicant's counsel submitted a lengthy legal objection to admitting the complainant's hearsay statements; however, the legal advisor overruled the defense's objection, and the statements were introduced. The administrative separation board was provided the statements and the defense was unable to cross examine the key witness, leaving the administrative separation board with a one-sided and untested version of events. It was a legal error for the administrative separation board to receive the complainant's AFOSI interview and statements, and their consideration was unfair, unjust, and inequitable in light of her refusal to participate.

If the government believed the applicant committed sexual assault, it should have initiated a court-martial, but instead sent the case to an administrative separation board because it knew the evidence was weak and the complainant did not want to participate. The rules at an administrative separation board favor the government, the burden of proof is lower, and the respondents have fewer rights and protection than in a judicial proceeding. If the complainant was unwilling to participate in the case against the applicant, the case should have been dropped. He should have had the opportunity to confront his accuser. The administrative separation board was deprived of the opportunity to weigh and evaluate the credibility of the central witness in the case, and given her credibility was of importance, it was a clear error to allow her statements in lieu of her in-person testimony. While it is understood this was not a court-martial, depriving the applicant of the opportunity to confront his accuser was a gross violation of his rights.

Accordingly, the administrative separation board's findings were erroneous and should be vacated.

Finally, the evidence presented to the administrative separation board strongly indicated the applicant served effectively and honorably since his enlistment in 2006 and served over 12 years at the time of his separation. His military record supports the conclusion he was a superior performer with unlimited potential. He had an unquestioned track record of success and leadership and was clearly well-suited for continued service and promotion. The administrative separation board erred in concluding he committed an act of sexual assault and they erred in voting to separate him from service. Accordingly, the administrative separation board's findings should be vacated.

The applicant's complete submission is at Exhibit A.

## **STATEMENT OF FACTS**

The applicant is an honorably discharged Air Force technical sergeant (E-6).

On 22 Aug 18, according to 35 MXG/CC memorandum, provided by the applicant, he was notified of the commander's recommendation for discharge from the Air Force for Misconduct: Sexual Assault, according to Air Force Policy Directive 36-32, *Military Retirements and Separations*, and AFI 36-3208, Chapter 5, paragraph 5.55. The specific reason for the action was, [the applicant] did, at or near Misawa, Aomori, Japan, on or about 22 Sep 17, committed a sexual act upon [airman], without her consent.

On 17 Sep 18, according to 35 MXG/CC memorandum to 35 FW/CC, provided by the applicant, the applicant's commander recommended he be discharged from the Air Force for Misconduct: Sexual Assault, under the provisions of AFI 36-3208, Chapter 5, paragraph 5.55..

On 18-19 Sep 18, according to documentation provided by the applicant, an Administrative Discharge Board (ADB) was convened at Misawa Air Base, Japan. The ADB found the applicant did commit a sexual act on [airman] without her consent and recommended the applicant be discharged from the Air Force with an Under Other Than Honorable Conditions (UOTHC) discharge.

On 27 Dec 18, the applicant was discharged with an UOTHC service characterization.

On 8 May 19, according to DD Form 293, *Application for the Review of Discharge from the Armed Force of the United States*, provided by the applicant, the applicant applied to the Air Force Discharge Review Board (AFDRB), requesting his discharge be upgraded to honorable, and the Narrative Reason for Separation, the Separation Code, and the Reentry Code be changed to reflect "Secretarial Authority" as the basis for separation.

On 20 Oct 20, the AFDRB recommended the applicant's official military record be amended to reflect an honorable service characterization, Narrative Reason for Separation: Secretarial Authority, and Reenlistment Eligibility Code of 3K.

On 22 Oct 20, the applicant was issued a DD Form 214, effective 27 Dec 18, with a Character of Service: Honorable, Narrative Reason for Separation: Secretarial Authority, Separation Code: KFF, Reentry Code: 3K, and credited with 12 years, 4 months, 6 days active service.

On 5 Feb 23, according to documentation provided by the applicant, a computerized polygraph examination was conducted on the applicant. A report of examination was provided for the Board's consideration.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisories at Exhibits C and F.

## **APPLICABLE AUTHORITY/GUIDANCE**

AFI 36-2502, Enlisted Airman Promotion/Demotion Programs, Chapter 2 – *Regular Air Force Airman Promotions to Grades Amn Through CMSgt*:

2.7. *MSgt Promotions*: TSgts eligible for promotion to MSgt compete and test under the WAPS in the CAFSC held on the PECD. Individuals with a reporting identifier (RI) or special duty identifier (SDI) designated as their CAFSC on the PECD will compete within that RI or SDI. Consideration for promotion to the grade MSgt is comprised of a two-part process consisting of WAPS factors and a central evaluation board.

## **AIR FORCE EVALUATION**

AF/JA recommends denying the application. Their review indicates no error or injustice.

On 19 Sep 18, an administrative separation board determined the applicant did, at or near Misawa, Aomori, Japan, on or about 22 Sep 17, commit a sexual act upon an airman, without her consent, and by causing bodily harm. The administrative separation board recommend the applicant be separated from the Air Force with an UOTHC discharge. As a result, he was discharged for reason of Misconduct, with a character of service of UOTHC.

On 8 May 19, the applicant petitioned the AFDRB for a discharge upgrade. He challenged the factual determinations and various procedural aspects of the administrative separation board hearing. The AFDRB determined that based on the applicant's quality of service, the UOTHC characterization was inequitable, and upgraded his character of service to honorable, changed the reason for discharge to Secretarial Authority, and changed the reenlistment eligibility code to 3K. The AFDRB decision was not based on any error or injustice in the administrative separation board's factual findings regarding the applicant's misconduct, or any error or injustice in the hearing proceedings.

At the core of the applicant's allegation of error or injustice are challenges to various procedural aspects of the administrative separation hearing. However, the law is clear that an administrative separation hearing is sharply distinct from a court-martial, and the due process issues discussed by the applicant do not apply to the hearing. Hence, the allegation of error or injustice related to the lack of due process and improper evidentiary determinations are misplaced.

The applicant also argues that he was not guilty, and the government failed to prove its case. These contentions are not addressed as the Air Force Board for Correction of Military Records (AFBCMR) is not the appropriate forum to re-litigate facts. The applicant already had the opportunity to present his case to the administrative separation board with the aid of a defense attorney. Rather, the advisor defers to the administrative separation board, who was in the best position to make a determination on the facts. After an exhaustive review, the advisor finds no reason to question the legal sufficiency of the administrative separation board's factual findings.

Finally, the applicant argues he should have been retained in the Air Force. Irrespective of the AFDRB's discharge characterization upgrade, they found no evidence to suggest the applicant's discharge itself was erroneous or unjust.

The complete advisory opinion is at Exhibit C.

## **APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 20 Jan 23 for comment (Exhibit D), and the applicant replied on 23 Jan 23. In his response, counsel, on behalf of the applicant, contended the advisory asserts the applicant's case was adjudicated via an administrative separation board; therefore, the due process, procedural, and substantive errors raised in his petition for relief are misplaced. The advisory opinion also makes the ludicrous assertion that the AFBCMR is not the appropriate forum to re-litigate the facts of the case. The AFBCMR is required to assess whether discharges contain errors or injustices, which would include whether a separation board erred in its assessment and application of the law and facts of a particular case.

The advisory opinion's dismissive attitude toward the errors, deficiencies, and injustices outlined in the applicant's petition for relief is disappointing, if not unsurprising. It contains no analysis or factual discussion whatsoever. The applicant provided evidence and argument in support of his application. Nothing in the advisory adds anything to understanding this case and amounts to nothing more than a biased, conclusory opinion, and should be disregarded. The applicant has demonstrated the result in his case constitutes both an error and injustice and he is entitled to relief.

The applicant's complete response is at Exhibit E.

## **AIR FORCE EVALUATION**

AFPC/DPMSPP recommends denying the application. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice.

The applicant entered the Air Force on 22 Aug 06 and was promoted to technical sergeant (E-6) on 1 Jul 14. He was discharged from the Air Force on 27 Dec 18.

An administrative separation board determined the applicant did, at or near Misawa, Aomori, Japan, on or about 22 Sep 17, commit a sexual act upon an airman, and recommended the applicant be separated from the Air Force with an UOTHC discharge. The applicant states he is not guilty of the allegation and the government failed to prove he was guilty by a preponderance of evidence.

On 8 May 19, the applicant petitioned the AFDRB. The AFDRB determined based on the applicant's quality of service, the UOTHC characterization was inequitable. This decision was not based on any error or injustice in the administrative separation board's findings.

In accordance with AFI 36-3208, the applicant was discharged as a result of the administrative separation board and no additional evidence was submitted that states the applicant's rank should be reinstated from the administrative separation board.

The complete advisory opinion is at Exhibit F.

## **APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 30 Jan 23 for comment (Exhibit G), and the applicant replied on 30 Jan 23. In his response, counsel, on behalf of the applicant, contended it contains no discussion of the facts or issues raised by the applicant in his original filing. The sum total of the advisory is a conclusory and unsupported assertion that there is no evidence of an injustice.

The advisory opinion's dismissive attitude toward the errors, deficiencies, and injustices outlined in the applicant's petition for relief is disappointing, if not unsurprising. It contains no analysis or factual discussion whatsoever. The applicant provided evidence and argument in support of his application. Nothing in the advisory adds anything to understanding this case and amounts to nothing more than a biased, conclusory opinion, and should be disregarded.

In a separate declaration provided by the applicant, he contends there was strong evidence the airman's text message contradicted the story she told the AFOSI agents during the interview. Another issue was the AFOSI agent's written statement reflected that the airman told the applicant to stop, and he ignored her request. When he first saw this statement, he was furious because it was false. He informed his lawyer at the time but was told there was not anything he could do about it as it would be hard to accuse a federal agent of lying. When the AFOSI agent was called to the stand he stated he was not sure what the applicant said, but this was overlooked during his trial.

Finally, the applicant contends he brought up the fact that the weekend after the incident, the airman was at a bar like nothing happened, enjoying her night, and a few weeks after, the applicant's friend saw the airman at the club dancing and drinking like nothing happened to her. Normally, if a person experiences a traumatic incident, there would be a change in their behavior.

Instead of being viewed as a monster, the applicant asks to be looked at as a victim of a huge misunderstanding. The evidence shows he did nothing wrong. He asked that his Air Force history and the testimonials from friends and co-workers be viewed, as he is just a victim that wants his career and life back and will continue to fight because he knows he is innocent.

The applicant's complete response is at Exhibit H.

## **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, to include the applicant's rebuttal, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendations of AF/JA and AFPC/DPMSP and finds a preponderance of the evidence does not substantiate the applicant's contentions. While the AFDRB found the applicant's UOTH service characterization was inequitable, there was no finding of error or injustice in the discharge itself. There was insufficient evidence for the Board to contest or overturn their decision. Finally, there was no evidence presented to reflect the applicant met the requirement to compete and test for promotion to master sergeant (E-7), in accordance with AFI 36-2502, prior to his discharge. 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 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-2021-03390 in Executive Session on 22 Feb 23:

, Panel Chair  
, 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 29 Sep 21.  
Exhibit B: Documentary evidence, including relevant excerpts from official records.  
Exhibit C: Advisory Opinion, AF/JA, dated 18 Jan 23.  
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 20 Jan 23.  
Exhibit E: Applicant's Response, w/atch, dated 23 Jan 23.  
Exhibit F: Advisory Opinion, AFPC/DPMSPP, dated 27 Jan 23.  
Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 30 Jan 23.  
Exhibit H: Applicant's Response, w/atch, dated 30 Jan 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.

X

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Board Operations Manager, AFBCMR