

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-01876

XXXXXXXXXX

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

He be reinstated to the grade of master sergeant.

APPLICANT'S CONTENTIONS

He erred by leaving his duty station 15 to 20 minutes early to take his daughters to school. At the time, he was under the pressure of raising two young girls. He was performing a challenging operation and was prescribed Prozac making him less alert. He was also coping and overcoming with sadness while doing his job and taking care of his children. The suspended reduction to the grade of technical sergeant was unjust and harsh. The subsequent reduction after a Self-Assessment Visit (SAV) inspection "does not hold water." He passed on 68/70 tested items with a rating of satisfactory or better with skeleton manning and almost no experienced personnel. In terms of propriety, the Article 15 punishment and reduction appear excessive. In terms of equity, the punishment was overly severe.

In support of his request counsel submits a detailed brief, copies of his Department of Veteran Affairs (DVA) Rating Decision, performance reports, character statements, transcripts, photos and various other documents associated with his request.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

On 1 Feb 97, according to Special Order Wor..., the applicant was promoted to the grade of master sergeant (E-7).

On 26 Sep 01, according to AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, the applicant's commander notified him that she was considering whether she should punish him under Article 15, Uniform Code of Military Justice (UCMJ), because on 28 Aug 01, he, without authority, went from his appointed place of duty. The applicant acknowledged that he understood his rights, consulted a lawyer, waived his right to court-martial and accepted nonjudicial proceedings under Article 15, UCMJ. The applicant was reduced to the grade of technical sergeant and it was suspended until 1 Apr 02, after which time it was to be remitted without further action, unless sooner vacated. He was also reprimanded and had to forfeit \$100.00 pay per month for two months.

On 26 Feb 02, according to AF Form 366, *Record of Proceedings of Vacation of Suspended Nonjudicial Punishment*, the applicant was notified his commander was considering whether to vacate the suspension of his nonjudicial punishment (NJP). The AF Form 366 states the applicant knew, or should have known of his duties, was derelict in the performance of those duties in that he negligently failed to ensure flight records and databases, aviation and pay orders, and on-the-job training records were properly maintained and audited, as it was his duty to do so. The suspended NJP was vacated and the applicant was reduced to the grade of technical sergeant with a new date of rank of 5 Oct 01.

On 31 May 02, the applicant was retired in the grade of technical sergeant (E-6) after serving 20 years, 10 months and 29 days of active duty.

On 3 Sep 02, the Secretary of the Air Force found that the applicant did not serve satisfactorily in any grade higher than technical sergeant and would not be advanced under the provisions of Section 8964, Title 10, United States Code.

On 27 Jan 22, the Board staff provided the applicant a copy of the liberal consideration guidance to the applicant's counsel (Exhibit F).

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

AIR FORCE EVALUATION

The AFBCMR Psychological Advisor finds no error or injustice with his discharge and no evidence his mental health condition may cause or mitigate his disciplinary action. The Psychological Advisor recommends the Board obtain an advisory from a personnel subject matter expert to address his request to reinstate his rank as this is a personnel matter.

The complete advisory opinion is at Exhibit C.

DAF/JA recommends denying the application. The applicant asserts the punishment was too severe. The punishment did not exceed reasonable limits, and the commander did not abuse his discretion, especially since the reduction in rank was suspended for a period of six months. The punishment imposed was within the permissible range for the applicant's offense. The applicant has not submitted any new evidence or information that casts doubt on the legal sufficiency of the NJP. The applicant could have demanded court-martial in lieu of NJP and presented his case and any evidence before a jury of his peers, which he opted against. Therefore, JA finds no basis to set aside the applicant's NJP.

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 27 Jan 22 for comment (Exhibit E), but has received no response.

The applicant's complete response is at Exhibit F.

FINDINGS AND CONCLUSION

1. The application was not 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 not the victim of an error or injustice. The Board concurs with the rationale and recommendations of the Psychological Advisor and DAF/JA and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board is satisfied that the application of liberal consideration does not warrant relief. The Board also notes the applicant did not file the application within three years of discovering the alleged error or injustice, as required by Section 1552 of Title 10, United States Code, and Air Force Instruction 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*. The Board does not find it in the interest of justice to waive the three-year filing requirement. Therefore, the Board finds the application untimely and 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 application was not timely filed; it would not be in the interest of justice to excuse the delay; 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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2021-01876 in Executive Session on 23 Feb 22:

, 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 8 Apr 21.
- Exhibit B: Relevant excerpts from Military Human Resource Record.
- Exhibit C: Advisory Opinion, AFBCMR Psychological Advisor dated 25 Aug 21.
- Exhibit D: Advisory Opinion, DAF/JA, dated 26 Jan 22.
- Exhibit E: Notification of Advisory, SAF/MRBC to Counsel, dated 27 Jan 22.
- Exhibit F: Letter, SAF/MRBC, Notification of Clarifying Guidance, dated 27 Jan 22,

w/atchs.

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