

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-03242

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His administrative demotion to the rank of technical sergeant (E-6) be void and removed from his records. He receive all back pay and allowances.

APPLICANT'S CONTENTIONS

On 15 Oct 19, he was demoted to the rank of technical sergeant. In accordance with AFI 36-2502, *Enlisted Airman Promotion/Demotion Programs*, he requests restoration of his rank with date of rank (DOR) of 1 Oct 08. Since 2016, he was unable to successfully complete a Fitness Assessment (FA) due to multiple medical reasons. He failed two FAs in a row, then passed one, which the commander mistakenly invalidated, then he failed two more. It appeared he had four consecutive FA failures, which triggered an administrative demotion action. On 27 Apr 21, the fitness assessment appeals board (FAAB) reviewed and approved his appeal for the 6 Jul 18 invalidated FA test. The basis for his remaining FA failures were due to medical reasons.

On 2 Jan 20, his commander informed him he was not selected for continuation in the Active Guard Reserve (AGR) program, he would revert to Drill Status Guard (DSG) and he was advised to submit his retirement application. The administrative demotion was full of technical errors. The demotion order stated he had until 2 Dec 18 to concur or nonconcur. The date is 10 months prior to the demotion action. The legal counsel assigned to assist him was unavailable. He could not be reached by phone and an e-mail could not be found. One week after his demotion, his leadership accomplished six years' worth of previously neglected enlisted performance reports (EPR). The EPRs were referral and included numerous errors.

He provides an unsigned letter from his group commander dated 9 Jul 21. It states extraordinary circumstances exist to reinstate his rank of master sergeant (E-7) with date of rank DOR 1 Oct 08. The determination of the FAAB on 27 Apr 21, the approved medical evaluation board (MEB) dated 23 Mar 21, and the Secretary of the Air Force Personnel Council (SAFPC) determination he served satisfactorily in the rank of master sergeant support granting an exception to policy to restore his grade.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired master sergeant (E-7). His highest grade held (HHG) in the Air National Guard (ANG) is technical sergeant (E-6). He was retired for disability per 10 U.S.C. § 1372.

The applicant received referral EPRs for the reporting periods ending 9 May 15, 30 Sep 15, 30 Sep 16, 30 Sep 17, 30 Sep 18 and 30 Sep 19. All reports show rater signature date 18 Oct 19, additional rater signature date 21 Oct 19 and unit commander signature date 23 Oct 19.

On 5 Jan 18, the applicant received a letter of counseling (LOC) for his 30 Nov 17 failed FA.

On 13 Jul 18, the force support squadron (FSS) informed his commander the FA on 6 Jul 18 was invalidated due to the applicant being exempt from three components although he did not have an approved profile or duty limiting condition. The applicant provides AF Form 469, *Duty Limiting Condition Report*, dated 24 Aug 18 showing he was on FA profile and exempt from the run/walk, push-up and sit-up components through 6 Jul 18.

On 10 Jan 19, the applicant received an LOC for his FA failure with an abdominal circumference of 42 inches. The applicant was exempt from the aerobic, push up and the sit up components.

On 6 Oct 19, the applicant was notified of the administrative demotion action in accordance with AFI 36-2502, paragraph 11.1.2.4.2.6.1.2, Failure to Fulfill Responsibilities. The reason was his four consecutive FA failures since Jun 16. Since 2011, the applicant completed 12 FAs, of which only two were passing, one in 2012 and the other in 2014.

Per Special Order XXXX dated 11 Oct 19, the applicant was demoted to the rank of technical sergeant, with date of rank (DOR) 15 Mar 00 and effective date 15 Oct 19. The authority cited is AFI 36-2502, paragraph 6.3.5.

On 23 Mar 21, the informal physical evaluation board (IPEB) recommended the applicant be permanently retired for physical disability with a compensable rating of 50 percent for his conditions of residuals of right shoulder labral tear, degenerative left shoulder labral tear, left leg exertional compartment syndrome, left leg exertional compartment syndrome, and right leg exertional compartment syndrome.

On 29 May 21, the SAFPC determined the applicant served satisfactorily in the higher grade of master sergeant within the meaning of 10 U.S.C. § 1372.

Per Special Order XXXX dated 8 Jul 21, the applicant was placed on the permanent disability retired list in the rank of master sergeant per AFI 36-3212, *Physical Evaluation for Retention, Retirement and Separation*, with compensable percentage for physical disability of 50 percent. His highest grade held on active duty shows Reserve grade technical sergeant.

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

APPLICABLE AUTHORITY/GUIDANCE

AFI 36-2905, *Air Force Physical Fitness Program, Attachment 7*, Administrative and Personnel Actions, Table A7.1, Optional Administrative and Personnel Actions, Administrative Demotion (Enlisted) is marked for third and fourth failures. The table states administrative actions are illustrative and not binding. Unit commanders exercise discretion when selecting optional command action, keeping in consideration the need for progressive discipline.

10 U.S.C. § 1372 Grade on retirement for physical disability. Unless entitled to a higher grade under some provision of law, any member of an Armed Force who is retired for physical disability is entitled to the grade in which they served satisfactorily as determined by the Secretary of the armed force from which retired.

AIR FORCE EVALUATION

NGB/A1PP recommends partial grant. The applicant's demotion order was completed incorrectly citing the incorrect paragraph and reason of AFI 36-2502 to execute the demotion. The unit should have used Chapter 11 of the instruction at the time the order was accomplished. However, they cannot advise on the fitness or medical portions of the request.

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 3 Dec 21 for comment (Exhibit D), but has received no response.

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 Board concludes the applicant is the victim of an error or injustice. The Board Majority concurs with the rationale and recommendation of NGB/A1PP and finds a preponderance of the evidence substantiates the applicant's contentions in part. Specifically, the applicant has provided sufficient evidence to show there is an error on his administrative demotion order dated 11 Oct 19. The authority listed on the demotion order is also different from the authority on the commander's notification of involuntary demotion action memorandum, dated 6 Oct 19. However, for the remainder of the applicant's request, the Board Majority found the evidence presented did not demonstrate an error or injustice, and the Board Majority therefore finds no basis to recommend granting that portion of the applicant's request. In this respect, the applicant contends the FA failures were due to multiple medical conditions. However, the Board Majority notes per the AF Form 469, dated 24 Aug 18 and the notification of involuntary discharge memorandum, the applicant was placed on FA exemptions for all FA components, with the exception of the abdominal circumference measurement due to his medical conditions. The commander's demotion notification memorandum dated 6 Oct 19 also states the applicant only passed two FAs out of 12 FAs since 2012 and lists four failed FAs due to failure of the abdominal circumference measurement. Accordingly, the Board Majority finds the administrative demotion for failure to maintain standards and fulfill responsibilities was in accordance with AFI 36-2905, and within the commander's authority and discretion. The Board Majority does not know why the unit prepared six referral EPRs simultaneously on 18 Oct 19; however, it appears his commander used the available progressive disciplinary actions in accordance with AFI 36-2905. In this respect, the applicant provides and the administrative demotion notification memorandum lists verbal counseling by the unit fitness program manager and the issuance of LOCs. Moreover, the Board finds the applicant, a senior noncommissioned officer, should have understood it was his responsibility to maintain standards, to include fitness standards. The applicant also contends his administrative demotion should be void and his master sergeant rank restored based on his retirement for physical disability and the SAFPC determination his HHG satisfactorily was master sergeant. In support of his request, he also provides an unsigned letter of support. However, the Board Majority finds the unsigned letter of support is immaterial. Nonetheless, the Board Majority finds his retirement for physical disability and the SAFPC determination his disability retirement be in the grade of master sergeant are not sufficient rationale to void the administrative demotion for FA failures. Moreover, the SAFPC determination is independent of the administrative demotion action and does not indicate the administrative demotion was improper or unjust. Therefore, the Board Majority recommends correcting the applicant's records as indicated below.

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 pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show the authority for the administrative demotion per Special Order Work-Product, dated 11 Oct 19 is AFI 36-2502, *Enlisted Airman Promotion and Demotion Programs*, dated 12 Dec 14, paragraph 11.1.2.4.2.6.1.2; instead of paragraph 6.3.5.

However, regarding the remainder of the applicant's request, the Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the application will only be reconsidered upon receipt of relevant evidence not already considered by the Board.

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-2021-03242 in Executive Session on 17 Mar 22:

- , Panel Chair
- , Panel Member
- , Panel Member

The Board Majority voted to partially correct the record as indicated. Work-Product, voted to grant the request for relief and provided a Minority Report (Exhibit E). 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, NGB/A1PP, dated 15 Nov 21.
- Exhibit D: Notification of advisory, SAF/MRBC to applicant, dated 3 Dec 21.
- Exhibit E: Minority Report, dated 23 Mar 22.

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.