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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-00038

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COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

Her bad conduct discharge (BCD) be upgraded to general (under honorable conditions).

APPLICANT'S CONTENTIONS

She previously served honorably from 23 Jan 80 to 17 Sep 86 and has received awards for academic achievement and meritorious service. The discharge was for an isolated incident of marijuana use and the punishment was not equivalent to the offense. Since separating from the Air Force, she has been a law-abiding citizen and wants the right to bear arms and seek Department of Veterans Affairs (DVA) benefits.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman basic (E-1).

On 26 Oct 89 and 25 Jan 90, SF 600, *Chronological Record of Medical Care*, indicates the applicant was participating in the drug rehabilitation program undergoing mandatory drug testing which noted she had a good attitude in the program and was participating well.

Dated 18 Jan 90, DD Form 458, *Charge Sheet*, provided by the applicant, indicates she was charged with wrongful use of marijuana on two separate occasions, in Aug and Sep 89.

On 18 Nov 90, the convening authority published General Court-Martial Order (GCMO) Number [Wor...] The Order stated the applicant's sentence of confinement for 30 days and reduction to the grade of airman basic as promulgated in GCMO Number [W] was affirmed and her discharge from the service with a BCD was to be executed.

On 4 Dec 90, the applicant received a BCD. Her narrative reason for separation is "Conviction by Court-Martial" and she was credited with 10 years, 10 months, and 11 days of total active service.

AFBCMR Docket Number BC-2022-00038

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Controlled by: SAF/MRB
CUI Categories: [Work-Product]
Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

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

POST-SERVICE INFORMATION

On 13 Jun 22, the Board sent the applicant a request for post-service information and advised the applicant she was required to provide a Federal Bureau of Investigation (FBI) Identity History Summary Check, which would indicate whether or not she 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 15 Jun 22 and provided an FBI report. According to the report, the applicant has had no arrests since discharge. The applicant also provided a personal statement, a character statement, and letter from her employer and her civilian appraisal.

The applicant's complete response is at Exhibit D.

APPLICABLE AUTHORITY/GUIDANCE

This Board is without authority to reverse, set aside, or otherwise expunge a court-martial conviction. Rather, in accordance with Title 10, United States Code, Section 1552(f), actions by this Board regarding courts-martial are limited to two types: 1) corrections reflecting actions taken by the reviewing officials pursuant to the Uniform Code of Military Justice (UCMJ), for example, if a convening authority or appellate court took action but that action was not reflected in an Air Force record; and 2) action on only the sentence of the court-martial and solely for the purpose of clemency.

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 13 Jun 22, the Board staff provided the applicant a copy of the clarifying 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.

Under Other than Honorable Conditions. This characterization is used 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 members. 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 DAF.
- 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 abuse of a child, sexual harassment, and attempts to commit these offenses.

AIR FORCE EVALUATION

As a preliminary matter, AF/JAJI informs the AFBCMR because this application pertains to a court-martial, board action can only be on the basis of clemency and not on the basis of an error or injustice. The AFBCMR's authority stems from 10 U.S.C. § 1552. Pursuant to Section 1552(f), the AFBCMR cannot correct court-martial records unless the correction is one of two types of action: (1) correction of a record to reflect an action taken by review authorities under Chapter 47, UCMJ; or (2) action on the sentence of a court-martial for purposes of clemency. Hence, AFBCMR corrections can merely reflect actions regarding a court-martial that were already taken by review authorities under the UCMJ (such as convening authority clemency, or appellate corrections); or the AFBCMR can take action only on the sentence, but even then, only on the basis of clemency, and not alleged error or injustice.

AF/JAJI recommends denying the application. Based on a review of the total record available, AF/JAJI finds no grounds to grant clemency in the form of a discharge upgrade. The applicant acknowledged her guilt of the offense for which she was charged and sentenced by a military judge. No additional information has been provided to suggest clemency in the form of a discharge upgrade is warranted.

The complete advisory opinion is at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 23 Jun 23 for comment (Exhibit F), 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 the victim of an injustice. While the Board agrees with the advisory opinion from AF/JAJI finding no error in the original discharge process, the Board disagrees with their recommendation to deny the applicant's request and recommends relief based on clemency. The Board contemplated the many principles included in the Wilkie Memorandum to determine whether to grant relief based on an injustice or fundamental fairness and finds the applicant's discharge characterization for wrongful use of marijuana disproportionately harsh judging by the standards set today. Furthermore, the Board considered the applicant's post-service conduct and achievements, length of time since the misconduct, seriousness of the offenses which led to her discharge, her character and reputation, job history, and degree of contrition. The applicant presented some supporting evidence indicating she made a successful post-service transition, as indicated on her FBI background check showing no criminal activity post-discharge, her employment records, and her character reference letter. Given the evidence presented, the Board finds the applicant's post-service accomplishments and the nature of her misconduct sufficient enough to warrant a discharge upgrade. Therefore, the Board recommends the applicant's records be corrected 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 on 4 December 1990, she was discharged with service characterized as general (under honorable conditions), and a separation code of JFF and corresponding narrative reason for separation of Secretarial Authority.

CERTIFICATION

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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-2022-00038 in Executive Session on 26 Jul 23 and 14 Aug 23:

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Panel Chair

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s, Panel Member

Panel Member

All members voted to correct the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 29 Dec 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 13 Jun 22.

Exhibit D: Applicant's Response, w/atchs, dated 15 Jun 22.

Exhibit E: Advisory Opinion, AF/JAJI, dated 21 Jun 23.

Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 23 Jun 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.

3/6/2024

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Board Operations Manager, AFBCMR

Signed by:

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AFBCMR Docket Number BC-2022-00038

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