



**CUI//SP-MIL/SP-PRVCY**

**UNITED STATES AIR FORCE  
BOARD FOR CORRECTION OF MILITARY RECORDS**

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**RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2022-00278

*Work-Product*

**COUNSEL:** *Work-Product*

**HEARING REQUESTED:** YES

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**APPLICANT'S REQUEST**

1. His under other than honorable conditions (UOTHC) discharge be upgraded to honorable or general (under honorable conditions).
2. His separation code and corresponding narrative reason for separation of "KFS" (In Lieu of Trial by Court-Martial) be changed to "JFF" (Secretarial Authority).
3. He be given a military retirement.

**APPLICANT'S CONTENTIONS**

He was the victim of impermissible racial discrimination and was retaliated against for reporting inappropriate and racially charged emails. His innocent misuse of his government travel card (GTC) and the subsequent punishment he received for the same mistake highlights the discriminatory behavior of his command. He submitted a complaint with the Inspector General's (IGs) office alleging retribution and reprisal indicating he received multiple punishments for a single incident and highlighted gross disparities between his punishments as compared to other airmen. The decision to discharge him with an UOTHC characterization was an arbitrary and capricious abuse of discretion that was motivated by invidious racial animus and failed to take into consideration his previous 18 years of honorable service. He consistently exceeded expectations throughout his lengthy eighteen-year career, as indicated by the plethora of performance reports in which he received the highest marks possible.

His decision to submit a request for a discharge in lieu of a court-martial was due to grossly insufficient advice he received from his detailed defense counsel. This ineffective assistance from counsel ultimately led to his separation from service just two years shy of reaching retirement eligibility. But for the above mentioned, to include a violation of his Article 31 rights, he would have not only been retained in service due to the government's inability to meet their burden of proof, he would have finished out the remaining two years he needed to reach retirement eligibility. His decision to submit a request for discharge in lieu of trial by courts-martial is not demonstrative of his guilt, but was merely the culmination of multiple instances of racial discrimination and his dissatisfaction with a justice system that was clearly biased against him.

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Limited Dissemination Control: N/A  
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The applicant's complete submission is at Exhibit A.

## **STATEMENT OF FACTS**

The applicant is a former Air Force staff sergeant (E-5).

On 29 Jun 08, AF Form 3070A, *Record of Nonjudicial Punishment Proceedings*, indicates the applicant received nonjudicial punishment (NJP), Article 15 for failing to obey a lawful general order by wrongfully introducing and possessing sexually explicit images. He received a reduction in grade to staff sergeant (E-5), suspended until 28 Dec 08, and forfeiture of \$1,361.00 pay for two months.

On 4 Aug 08, AF Form 366, *Record of Proceedings of Vacation of Suspended Nonjudicial Punishment*, indicates the applicant violated Article 92 by wrongfully transmitting offensive or obscene language depicting sexually harassing material through the government email system. The applicant was reduced to the grade of staff sergeant (E-5) with a new date of rank (DOR) of 4 Aug 08.

On 17 Nov 08, AF Form 3070A, indicates the applicant received NJP, Article 15 for dereliction of duty for refraining from using his GTC for personal use on or between Oct 07 and Apr 08. He received 45 days of extra duty.

Dated 12 Feb 09, AF Form 3212, *Record of Supplementary Action under Article 15, UCMJ*, indicates the applicant's NJP received on 17 Nov 08 was set aside.

Dated 10 Jun 09, the applicant provided a memorandum to the Work-Product IG office of a complaint filed by him stating he was severely punished for the same offense three times; was wrongly punished for events that occurred in the past that were taken care of with a previous commander; for falsified statements made against him; and for reprisal and retribution for turning in inappropriate emails from fellow airmen.

On 19 Oct 10, the applicant requested a discharge in lieu of a trial by court-martial, indicating he understood, if approved, would result in an UOTHC discharge. An updated request dated 21 Oct 10, indicates the applicant was afforded the opportunity to consult legal counsel and was counseled by his appointed Area Defense Counsel (ADC) of his rights and privileges.

On 21 Oct 10, the applicant's commander recommended the applicant be discharged in lieu of a trial by court-martial stating it is in the best interest of justice to the Air Force. If he is convicted, which is not guaranteed, it is unlikely he would receive a harsh sentence based on his career prior to his misconduct in the last few years. This letter also indicated the applicant was under investigation for failing to pay a debt of \$5,671.98.

On 22 Oct 10, the Staff Judge Advocate found the discharge action legally sufficient.

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On 25 Oct 10, the discharge authority directed the applicant be discharged in lieu of a trial by court-martial, with an UOTHC service characterization.

On 4 Nov 10, AF Form 3070A, indicates the applicant received NJP, Article 15 for failure to go, for willfully disobeying a lawful order, and for failing to pay his debt in the sum of \$549.37. He received a reduction in grade to senior airman (E-4).

On 16 Nov 10, the applicant received an UOTHC discharge. His narrative reason for separation is "In Lieu of Trial by Court-Martial" and he was credited with 18 years, 3 months, and 10 days of total active service.

On 9 Jun 11, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge.

On 7 Jun 12, the AFDRB 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.

On 27 Jul 22, an email was sent to the DAF/IG office to request case files pertaining to the applicant. On 28 Jul 22, the office confirmed no files were available and stated the Automated Case Tracking System (ACTS) database has a ten year disposition date for any closed case. Based on the timeframe provided, DAF/IG would no longer have records.

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

**POST-SERVICE INFORMATION**

On 18 Jul 22, the Board sent the applicant a request for post-service information and advised the applicant he was required to provide a Federal Bureau of Investigation (FBI) Identity History Summary Check, which would indicate whether or not he 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 F). The applicant replied on 12 Aug 22 and provided an FBI report. According to the report, the applicant was arrested on 28 Dec 13 for driving with a suspended license. The applicant also provided a personal statement, character reference letters, a certification certificate, college transcripts and degree, and a report of his employment history.

The applicant's complete response is at Exhibit G.

**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

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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 the supplemental guidance, paragraphs 6 and 7.

On 18 Jul 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit F).

AFI 36-3208, *Administrative Separation of Airmen*, describes the types of service characterization:

**Honorable.** The quality of the airman's service generally has met 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.

**Under Honorable Conditions (General).** 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 airman's military record.

**Under Other than Honorable Conditions.** 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 airmen. 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 Air Force.
- 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 assault of a child, sexual abuse of a child, forcible sodomy and attempts to commit these offenses.

### **AIR FORCE EVALUATION**

DAF/JA recommends denying the application. The record contains insufficient evidence or allegation of an error or injustice tending to undermine the applicant's voluntary discharge. The applicant asserts an error and injustice, alleging that his discharge was a culmination of multiple instances of racial discrimination; he had exemplary service; and his ADC provided him with

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ineffective assistance. While condemning all acts of racial discrimination, there is no evidence that the applicant's discharge was racially motivated. There is also no evidence that the applicant was discharged as retaliation for his reporting or racist conduct, as he alleges. This argument is a misleading distraction, as the evidence is unequivocal that he was untrustworthy by forging a letter from his commander regarding his trustworthiness to regain his Top Secret/Secret Compartmented Information (TS/SCI) clearance. The evidence is also unequivocal that he voluntarily requested to be discharged with a UOTHC in lieu of being tried by court-martial and risk a federal criminal conviction and punishment.

In regards to his claims of exemplary service, the commander determined that his service did not outweigh his misconduct and referred charges to a court-martial, then accepted the applicant's voluntary request to be discharged, deferring to the commander's discretion in balancing the applicant's past service against his current service. However, noted for the Board, it is reasonable to conclude his commander did weigh his positive service when he gave the applicant multiple chances by suspending one NJP rank reduction and setting aside another NJP in total.

The applicant argues the following: "As indicated above, and acknowledged by the government, the only evidence the government had in its possession to suggest that the applicant forged the document in question was obtained in violation of his Article 31b rights. Because this evidence was obtained in violation of his rights, it was inadmissible at trial. Given the fact that the government's only piece of physical evidence was inadmissible, it was wholly unreasonable and borderline negligent to submit a Chapter 4 discharge request." This is a misstatement of the facts. The applicant is referring to an evidentiary matter that was analyzed when the chain of command was considering his voluntary request for an UOTHC discharge. On 22 Oct 10, the 9 AF/JA, in its legal advice to the commander, mistakenly stated that additional copies of the forged letter could not be located, and that the only existing copy was the one that the applicant handed to the commander after the commander asked him for it. The 9 AF/JA further contemplated the possibility that this forged letter may be suppressed at trial because the commander had not read the applicant his Article 31b rights (military equivalent to Miranda rights). The Staff Judge Advocate was mistaken. He incorrectly thought the applicant turned over the forged letter – the proof of his crime – to Work-Product after the commander allegedly questioned him without a 31b rights warning. However, it was actually the unforged original letter that the applicant turned over to his commander. The forged letter was given to A2 voluntarily by the applicant in an attempt to deceive, and it was lawfully in the government's possession and faced no possibility of evidentiary suppression at trial. That forged letter was the only letter required to prove that the applicant was guilty of violating Uniform Code of Military Justice (UCMJ) Article 107. The forged letter, plus the squadron commander's testimony that he had not written or signed it, plus the testimony of the recipient of the forged letter at A2 are the only pieces of dispositive evidence. Even assuming for argument's sake that the unforged original letter was necessary for conviction, our legal opinion is that the non-incriminating nature of the unforged original letter, plus the nature of the question by the squadron commander demonstrate no violation of the applicant's 31b rights.

Finally, the applicant also misrepresents the facts in alleging ineffective assistance of counsel because his defense counsel did raise the issue of the Article 31b rights. In her 19 Oct 10, letter requesting an UOTHC discharge in lieu of trial, the ADC argued this potential evidentiary

weakness in the government's case – that the unforged original letter was obtained without 31b rights – and even echoed the Article 32 Investigating Officer's observation regarding the same issue. Hence, not only is the applicant incorrect in describing the unforged original letter as the "only evidence" of his forgery, he is also incorrect in alleging that his ADC was "wholly unreasonable and borderline negligent."

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 5 Apr 22 for comment (Exhibit D), and the applicant replied on 5 May 22. In his response, the applicant's counsel contends he was the victim of repeated racial discrimination, as demonstrated by the fact that he was subjected to multiple NJPs for misconduct that he did not commit and often received much harsher punishments than his white counterparts who engaged in very similar misconduct. Multiple studies have confirmed that disparate treatment was an overarching theme in the Air Force justice system during his period of service. One must ask how does an airman with such an outstanding service record for nearly sixteen years get into trouble during his last two years of service. His service was otherwise exemplary notwithstanding the incident for which he was ultimately separated from service. The advisory points to numerous NJPs that the applicant received yet makes no attempt to address the clear instances of racial discrimination. The applicant does not deny that he engaged in certain instances of misconduct. He has owned up to those instances of misconduct and they were never repeated in the future. His misconduct was largely unintentional. He was routinely punished more harshly than white airmen who committed the same or similar misconduct. The investigation by the Air Force into its justice system has established that there is an unexplainable disparity between the rate and severity of punishments received by airmen of color and their white counterparts. The numerous NJPs that he was subjected to are evidence of the report's conclusion. He was an airman who had succeeded at every stage of his career prior to 2008. He was then subjected to numerous punishments for conduct that his white counterparts often received a verbal or written counseling for. He submitted a request for discharge in lieu of trial by court-martial not because he was guilty of the offense for which he had been charged. He left the service because he was tired of the discrimination he had faced. His service record only contains numerous instances of punishment because of the racial animosity that was directed toward him. He was a dedicated airman who was a few years shy of reaching retirement eligibility before he was separated from service. He has lost access to all veterans benefits associated with military service, to include access to health benefits and education benefits. His previous 18 years of honorable military service do not warrant such a harsh punish

The applicant's complete response is at Exhibit E.

### **FINDINGS AND CONCLUSION**

1. The application was timely filed. Given the requirement for passage of time, all clemency requests are technically untimely. However, it would be illogical to deny a clemency application as untimely, since the Board typically looks for over 15 years of good conduct post-service.

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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. The Board concurs with the rationale and recommendation of DAF/JA and finds a preponderance of the evidence does not substantiate the applicant's contentions. Specifically, the Board did not find that the applicant's discharge was racially motivated or was in retaliation for his reporting of fellow airmen nor does the Board find the applicant's contention he should be given a military retirement due to the above mentioned allegations warranted. Additionally, the Board finds the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. The applicant has provided no evidence which would lead the Board to believe his service characterization was contrary to the provisions of the governing regulation, unduly harsh, or disproportionate to the offenses committed.

Nonetheless, in the interest of justice, the Board considered upgrading the applicant's discharge. In support of his request for an upgrade, the applicant has provided an FBI report, a personal statement, character reference letters, a certification certificate, college transcripts, and a report of his employment history. The applicant admits to making some mistakes, but denies the offense to which he was court-martialed stating his Article 31b rights were violated and his appointed counsel provided ineffective assistance. The Board did not find the applicant's rights were violated nor did they find his counsel was negligent.

The Board contemplated the many principles included in the Wilke Memo 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. While the applicant has presented some supporting statements indicating he has apparently made a successful post-service transition, the Board does not find the documentation sufficient to conclude they should upgrade the applicant's discharge at this time. In this respect, the supporting statements from the applicant's managers and neighbor indicate their admiration for the applicant and the way he has lived his life since his separation. However, these statements do not provide his impact in the community and if the impact is so admirable the Board could conclude an upgrade of his discharge would not constitute an injustice to those who have earned this characterization of service. In addition, the applicant has provided an FBI report indicating he has had some criminal activity since his discharge. While, the incident occurred approximately nine years ago, and given the evidence presented, the Board does not find the applicant's submission sufficient to grant the requested relief.

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The applicant retains the right to request reconsideration of this decision, which could be in the form of a personal statement, additional 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. Therefore, the Board recommends against correcting the applicant's record.

4. Inspector General Department of the Air Force, Report of Inquiry (ROI), Independent Racial Disparity Review (IRDR), dated Dec 20. The IRDR confirmed racial disparity exists for Black service members in law enforcement apprehensions, criminal investigations, military justice, administrative separations, placement into occupational career fields, certain promotion rates, professional military educational development and leadership opportunities. While the data shows racial disparity, it did not indicate causality. Administrative Disciplinary Actions: unlike Articles 15 and court-martials, there is no requirement for supervisors, first sergeants or commanders to consult with the base legal office on administrative disciplinary actions. There is no tracking of whether supervisors and commanders issue Letters of Reprimand (LOR), Letters of Admonishment (LOA), and Letters of Counseling (LOC) in a similar manner, magnitude and frequency to enlisted members, regardless of race, gender or ethnicity.

5. The applicant alleges he has been the victim of reprisal and has not been afforded full protection under the Whistleblower Protection Act (10 USC § 1034). By policy, reprisal complaints must be filed within one year of the alleged incident or discovery to facilitate the inspector general (IG) investigation. The applicant did provide a memorandum indicating he filed an IG complaint; however, he has not provided any evidence regarding the investigation or outcome of the complaint alleging reprisal. Nevertheless, the Board reviewed the complete evidence of record to reach its own independent determination of whether reprisal occurred. Based on their review, the Board concluded the applicant has failed to provide substantial evidence to establish that he was reprisal against for making a protected communication. Therefore, in the absence of persuasive evidence to the contrary, the Board does not find that the applicant has been the victim of reprisal.

6. 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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2022-00278 in Executive Session on 21 Sep 22:

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*Work-Product*, Panel Chair  
*Work-Product*, Panel Member  
*Work-Product*, Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 22 Nov 21.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, DAF/JA, dated 5 Apr 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 5 Apr 22.
- Exhibit E: Applicant's Response, dated 5 May 22
- Exhibit F: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 18 Jul 22.
- Exhibit G: Applicant's Response, w/atchs, dated 12 Aug 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.

5/1/2024

*Work-Product*

Board Operations Manager, AFBCMR  
Signed by: *Work-Product*