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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-00785

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

Remove nonjudicial punishment action under Article 15, Uniform Code of Military Justice (UCMJ) from his official military records.

APPLICANT'S CONTENTIONS

The Article 15 was for missing a training appointment during the day; an appointment his team scheduled him for but did not inform him of in any way. The Article 15 was the result of poor leadership at the time. He was bullied by the Shop Chief, and the Shop Chief was abruptly replaced and isolated to an office about one year later. Additionally, the record was never removed as conveyed to him by his First Sergeant.

He was deployed on Operation SOUTHERN WATCH thereafter in 2000-2001 and won Airman of the Year for Group and Group Staff in 2002 while assigned to Work-Product, Korea. He honorably served out two additional years that were amended onto his enlistment during Basic Training, despite being a minor and never receiving his bonus.

His character and record have been outstanding in continued service to this day, despite this injustice, and ongoing deteriorating health. He is a licensed architect and continues to work for the Department of Defense (DoD) as a licensed professional with the United States Army Corps of Engineers. He is a valuable sought-after resource by all DoD agencies.

He did not know the record was still in existence and only discovered it after researching his personnel file in 2021 in preparation for possible re-entry into the reserve.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is an honorably discharged Air National Guard staff sergeant (E-5).

On 23 Nov 99, according to AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, the applicant was issued nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ) for violation of Article 86, UCMJ for, at Work-Product, Florida, on or about 14 Sep 99, without authority, failed to go at the time prescribed to his appointed place of duty, to wit: Hazardous Cargo training, Building Work-Product. The applicant received reduction to the grade of Airman

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and forfeiture of \$250.00 pay per month for 2 months suspended until 21 May 00, after which time it would be remitted without further action, unless sooner vacated. Additionally, 30 days correctional custody to begin on 23 Nov 99.

On 22 Jul 03, the applicant was furnished an honorable discharge from the Regular Air Force, with Narrative Reason for Separation: Completion of Required Active Service, credited with 6 years active service, and transferred to the Air National Guard.

On 30 Oct 09, the applicant was furnished an honorable discharge from the Air National Guard, with Authority and Reason: AFI 36-3209, Paragraph 3.12.1., Expiration of Enlistment, SPD: KBK [Expiration of Enlistment/Less Than 120 MSO/No MSO] and credited with 12 years total service for retired pay.

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

AIR FORCE EVALUATION

AFPC/DP2SSM 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.

In accordance with Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, dated 18 Sep 17:

3.5. Applicants must file an application within 3 years after the error or injustice was discovered, or, with due diligence, should have been discovered. Timeliness is not measured strictly from the date of the action/event the applicant alleges makes then the victim of an error or injustice, but is measured from the date of when the error or injustice was discovered or should have been discovered by the applicant with reasonable diligence. In accordance with federal law, time on active duty is not included in the 3-year period. An application filed later is untimely and may be denied by the Board on that basis.

3.5.1. The Board may excuse untimely filing in the interest of justice.

3.5.2. If the application is untimely filed, the applicant should explain why the application was untimely filed and why it would be in the interest of justice for the Board to waive the statute of limitations.

Additionally, per AFI 36-2608, *Military Personnel Records Systems*, dated 16 Apr 2021:

6.5.3.2.2. The AF Form 3070 is filed in the electronic Master Personnel Record Group (eMPerRGp), but not in the individual's selection record.

6.8. For colonels and below, keep the NJP in the selection record for ten years, except for substantiated conduct, any single act of which, tried by court-martial, could have resulted in the imposition of a punitive discharge and confinement for more than one year. In those cases, keep the NJP in the selection record permanently.

6.8.2. The removal of NJP from the selection record has no bearing on the permanent filing of the NJP in the officer or enlisted Airman's MHRR (Correspondence and Miscellaneous Group). MHRR permanently retains all NJPs unless set aside in the entirety in accordance with AFI 51-202.

8.4. Adverse documents are permanently retained in the eMPerRGp (Correspondence and Miscellaneous Group) unless rescinded in accordance with AFI 36-2907, *Adverse Administrative Actions*, or removal is directed by the Air Force BCMR.

Table A2.1 *Management of Record Document*, item 152, also reflect that it is permanent.

Further, in accordance with AFI 36-2907, dated 22 May 20 (IC 15 Jan 21):

1.1.4. Article 15 of the Uniform Code of Military Justice is nonjudicial punishment that allows commanders to administratively discipline Airmen without a court-martial.

2.2. Standard of Proof. The Standard of Proof for adverse administrative actions is the “preponderance of the evidence.” This standard will be used when evaluating the evidence and every element of the alleged offenses. (T-1).

2.2.1. A preponderance of the evidence exists when it is more likely than not that events have occurred as alleged. Preponderance of the evidence is not determined by the number of witnesses or exhibits, but by all the evidence and evaluating factors such as a witness’ behavior, opportunity for knowledge, information possessed, ability to recall, as well as related events and relationship to the matter being considered.

2.4.6.4. RICs, LOCs, LOAs or LORs no longer contained in a PIF or UIF. Air Force records contained in other Air Force records systems, not a unit PIF or UIF (for example, senior officer UIFs), may not be rescinded by a commander or civilian director. After the disposition date of the record (in either a PIF or UIF) has passed, members may apply to the Air Force Board for Corrections of Military Records to have their records of RICs, LOCs, LOAs, or LORs removed from other Air Force records systems.

On 23 Nov 99, the applicant acknowledged receipt of the Article 15. Although the applicant claims to have discovered the error or injustice in 2021, when he was considering going into the reserve, he was aware of the contents of the Article 15 at the time it was issued and could have sought AFBCMR relief at that time. The applicant separated from active duty on 22 Jul 03, and his DD Form 149, *Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section 1552*, was signed on 1 Mar 22, which is outside the requisite time limit. Additionally, on the AF Form 3070, the applicant marked the box, “I have attached a written presentation” but did not provide the supporting document, nor is it within his official personnel record.

The applicant received the Article 15, currently in his official military personnel record, based on the preponderance of evidence in accordance with AFI 36-2607. According to the guidance prescribed above, the AF Form 3070 is permanently retained in the electronic Master Personnel Record Group (eMPerRGp), or removal is directed by the AFBCMR.

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 25 Apr 22 for comment (Exhibit D) but has received no response.

AIR FORCE EVALUATION

DAF/JA recommends denying the application. After careful consideration, the applicant has provided no evidence of error or injustice to undermine the Article 15's findings or punishment.

As bases for his request, the applicant alleges 10 errors or injustices on his DD Form 149; however, 7 of the 10 allegations do not regard error or injustice, and instead regard his good performance and valued work. Therefore, this legal analysis does not address those claims, but analyzes only the three allegations that regard error or injustice.

On 23 Nov 99, the applicant's commander administered nonjudicial punishment proceedings pursuant to Article 15, UCMJ. The commander found the applicant did the following: "On or about 14 Sep 99, without authority, fail to go at the time prescribed to your appointed place of duty, to wit: Hazardous Cargo Training, Building Work..." in violation of Article 86, UCMJ. The commander punished the applicant with reduction in rank to Airman and forfeiture of pay, which were suspended then remitted. The applicant was also punished with 30 days correctional custody.

Prior to receiving nonjudicial punishment, the applicant consulted with a defense attorney and waived his right to be tried by court-martial. Afterward, he declined to appeal the findings or punishment. Subsequently, the nonjudicial punishment was determined to be legally sufficient by the staff judge advocate.

With regard to the allegation that the nonjudicial punishment record should have been "removed as conveyed [...] by the 1st Sgt at the time," the advisor finds it lacks merit without any evidence. Furthermore, the applicant had an opportunity to consult with a defense attorney, who would have clarified the rules regarding nonjudicial punishment removal or advised him not to rely on an alleged statement by the First Sergeant.

Regarding the allegations that he was unaware of his duty to attend training, and that the nonjudicial punishment was the result of bullying by the Shop Chief, the advisor interprets these allegations to be challenges to the commander's findings of guilt. These allegations lack merit as there is no supporting evidence. Additionally, such a challenge to his guilt could have been litigated at court-martial proceedings, which he waived.

Finally, after advice provided by his counsel, the applicant could have refused nonjudicial punishment and demanded a trial before a judge or a jury of his peers, which he opted against, and 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 nonjudicial punishment.

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 31 Oct 22 for comment (Exhibit F) but has received no response.

FINDINGS AND CONCLUSION

1. The application was not timely filed. While the applicant asserts a date of discovery within the three-year limit, the Board does not find the assertion supported by a preponderance of the

evidence. The Board does not find it in the interest of justice to waive the three-year filing requirement.

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 rationales and recommendations of AFPC/DP2SSM and DAF/JA and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Article 15 is filed in the applicant's official military record in accordance with applicable guidance and no information has been submitted by the applicant to cast doubt on the legal sufficiency of the nonjudicial punishment. 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 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-2022-00785 in Executive Session on 10 Jan 23:

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, 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 1 Mar 22.

Exhibit B: Documentary evidence, including relevant excerpts from official records.

Exhibit C: Advisory Opinion, AFPC/DP2SSM, dated 21 Apr 22.

Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 25 Apr 22.

Exhibit E: Advisory Opinion, DAF/JA, dated 28 Oct 22.

Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 31 Oct 22.

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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.

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