



CUI//SP-MIL/SP-PRVCY

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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-01009

Work-Product

COUNSEL: **Work-Product**

HEARING REQUESTED: YES

APPLICANT’S REQUEST

His No Pay/No Points status from Feb 18 to Dec 19 be void and he be awarded the associated points and back pay for the period.

APPLICANT’S CONTENTIONS

Counsel, on behalf of the applicant, contends the No Pay/No Point status was unjust and not conducted properly. AFI 36-2254v1, *Reserve Personnel Participation*, and the wing supplement state when a member is under investigation the member’s record should be updated to reflect the ongoing investigation. It does not state the command may place the individual in a No Pay/No Points status. To the contrary, it states an individual on active duty orders at the time of the investigation would be extended. It indicates accountability and jurisdiction be maintained and the member is not precluded from attending drill. Similarly, AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, does not mention any authority to place an individual in a No Pay/No Points status. Even if the command was permitted to place him in a No Pay/No Points status, it would have been done while the investigation was actually occurring. The investigation was from Apr 16 to Nov 16; however, he was not placed in a No Pay/No Points status until Feb 18, well over a year after the investigation was concluded. In Oct 18, his command indicated he would remain in a No Pay/No Points status indefinitely pending resolution of his involuntary discharge. His command arbitrarily and capriciously kept him in the erroneous No Pay/No Points status solely to justify a reason to deny him reenlistment, which attempt was overturned on appeal.

The applicant has suffered for more than four years due to unsupported allegations, investigations and improper actions that resulted in significant personal, professional and financial hardship. The applicant was falsely accused of sexual assault and drug abuse. Many of the baseless adverse actions taken against the applicant have since been resolved, to include the reversal of the denial of reenlistment, reinstatement of his access to classified information and ending of his suspension as a civilian Air Reserve Technician (ART). The No Pay/No Points status caused damage to his career progression and set him back financially and for his eventual retirement.

The applicant’s complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a technical sergeant (E-6) in the Air Force Reserve.

The applicant provides redacted Air Force Office of Special Investigations (AFOSI) Report of Investigation (ROI) dated 1 Aug 16. The ROI shows the applicant was

Controlled by: SAF/MRB
investigated for sexual
CUI Categories: SP-MIL/SP-PRVCY
Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

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assault. An investigation was initiated upon receiving information from the sexual assault response coordinator (SARC). On 18 Mar 16, the victim reported the applicant contacted her via Facebook messenger and stated he sexually assaulted her in May 14. On 10 May 14, the victim was visiting the applicant at his residence. They consumed a large amount of alcohol and the victim fell asleep on the applicant's couch. The next morning she woke up not wearing a shirt and could not recall what had happened the night before. She departed his residence. Later, the applicant sent a text message stating they had sex and he had a video recording as proof. On 28 Jun 16, following advisement of his Article 31 rights, the applicant stated he had sex with the victim but believed it was consensual. The victim refused to provide a statement or any additional information.

The applicant provides a subsequent AFOSI ROI dated 16 Nov 16, which shows the applicant was investigated for drug use. The investigation was initiated upon review of the applicant's cell phone as a part of a separate investigation.

On 2 Feb 17, the applicant's commander requested establishment of a security information file (SIF) for possible controlled substance abuse. While the applicant was being interviewed by the AFOSI he was asked to surrender his cell phone, which he did. After viewing the texts and emails, the AFOSI found evidence of possible controlled substance abuse. The applicant was placed in a non-sensitive position and all access to classified information was withdrawn. The military personnel data system (MilPDS) reflects his personal security clearance status is Secret.

On 6 Feb 18, the applicant was notified by his commander he was placed in a No Point/No Points status in accordance with AFI 36-3209, rule 23, and AFI 36-2254v1 for drug abuse. The applicant was advised he could not participate in any point activity pending investigation and resolution of separation actions.

On 16 Feb 18, the applicant's section chief informed him he was proposing he be indefinitely suspended without pay from his ART position for failure to meet the conditions of employment to maintain a security clearance. The MilPDS reflects the applicant is currently an ART.

On 5 Aug 18, the applicant received a letter of reprimand (LOR) for the following: sexual intercourse with a female while she was intoxicated on 10 May 14, sexual intercourse with a female while she was intoxicated on or between 1 Aug 12 and 31 Oct 12, sending a text message on 10 May 14 disclosing he used drugs by stating he used marijuana and he wrongfully possessed marijuana from 2014 to 2016, he took Molly, also known as methylenedioxyphenol-methamphetamine (MDMA) in 2016 and in 2014 and he distributed oxycodone. By definition his actions were considered criminal. However, since both victims were unwilling to testify, a court-martial was not convened.

The applicant provides drug specimen result dated 10 Aug 18, which shows the specimen was negative for marijuana, cocaine, amphetamine, methamphetamine, opiate, oxycodone, phencyclidine (PCP), barbiturates, benzodiazepines and methadone.

The applicant provides AF Form 418, *Selective Reenlistment Program (SRP) Consideration for Airmen*, dated 1 Sep 19, which reflects the applicant was not selected for reenlistment. Reasons for the nonselection include unsatisfactory participation, failure to maintain fitness standards, failure to maintain medical readiness, suspension of security investigation due to ongoing AFOSI investigation involving sexual assault and drug use and LOR in Aug 18 for suspected use of marijuana, MDMA, oxycodone and sexual assault. On 8 Sep 19, a reenlistment denial appeal board was convened in accordance with AFI 36-2606, *Reenlistment and Extension of Enlistment in the United States Air Force*. The board upheld the nonselection for reenlistment and the wing commander (WG/CC) concurred with the board's decision. The AF Form 418 and the denial of

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his appeal are not included in the applicant's automated records management system (ARMS) record and the MilPDS reflects the applicant is selected and eligible for reenlistment.

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

AIR FORCE EVALUATION

AFRC/FMFQ recommends the applicant be paid the inactive and active duty periods for the 2018 to 2019 duty periods as requested. For the inactive duty periods, manual AF Form 40a(s), *Record of individual Inactive Duty Training*, are needed for the military pay transactions and a certified AF Form 938(s), *Request and Authorization for Active Duty Training/Active Tour*, for payment.

The Barring Act (31 U.S.C. § 3702) establishes a six year statute of limitation on claims against the government. The applicant's claim falls within this time period for backpay for the duty periods from Feb 18 to Dec 19.

The complete advisory opinion is at Exhibit C.

AFRC/A1KK recommends granting the application. At the time (6 Feb 18), the denial of participation memorandum was signed and issued, there was no pending investigation and/or separation action for drug abuse or evidence of verified drug abuse. Therefore, the applicant should not have been denied participation in pay and point gaining activities. Additionally, the cited AFI 36-2909 reference does not justify or authorize placing a member in a No Pay/No Points status and is only used as a basis for separation or discharge for verified drug abusers. Additionally, AFI 36-2254v1 and the wing supplement states when a Reserve member is suspected of committing a Uniform Code of Military Justice (UCMJ) offense, they should update the member's record to reflect under investigation or pending separation. The Reserve unit commander must notify AFRC/A1 to take this action.

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 10 Jul 23 for comment (Exhibit E). Counsel, in a response dated 27 Jul 23, states the applicant concurs with the rationale and recommendations provided in the advisory opinions.

The applicant's complete response is at Exhibit F.

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 concurs with the rationale and recommendations of AFRC/FMFQ and AFRC/A1KK and finds a preponderance of the evidence substantiates the applicant's contentions. In this respect, the applicant has provided evidence to show his placement in a No Pay/No Points status for the reason of drug abuse for the period of Feb 18 to Dec 19 was contrary to the policy and procedures in AFI 36-2909 and AFI 36-2254v1. Although the applicant did not perform duties during the period, the Board recommends, in the interest of justice, the applicant be awarded

sufficient points to show a satisfactory period of service and he be provided the associated back pay and benefits. Therefore, the Board 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 he obtained 50 points per R/R years for the timeframe Feb 18 to Dec 19 for satisfactory years towards retirement for this timeframe and he be paid for the awarded points.

CERTIFICATION

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2022-01009 in Executive Session on 31 Aug 23:

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

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 1 Apr 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory opinion, AFRC/FMFQ, dated 25 Apr 23.
- Exhibit D: Advisory opinion, AFRC/A1KK, dated 27 Jun 23.
- Exhibit E: Notification of advisory, SAF/MRBC to applicant, dated 10 Jul 23.
- Exhibit F: Applicant's response, dated 27 Jul 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.

Work-Product 4/10/2024
Work-Product
Board Operations Manager, AFBCMR
Work-Product