



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-01233

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His bad conduct discharge (BCD) be revoked, or in the alternative be upgraded to an honorable discharge.
2. He receive backpay, service credit and time in grade (TIG), effective the date of the AFBCMR's decision.
3. His records be corrected to reflect he was commissioned as an officer in 2008 and his grade and time in service reflect his commissioning in 2008.

APPLICANT'S CONTENTIONS

His court martial conviction should be revoked based on the Supreme Court's decision in *Van Buren v. United States*. In this case, the United States Supreme Court rejected the "improper use theory" that a person violates 18 U.S.C. § 1030 by using his authorized access for an improper purpose. This theory formed his conviction in 2004. However, the military judge advocates assigned to review his court martial have refused to apply the decision in his petition for appeal. The Air Force Court of Criminal Appeals (AFCCA) also declined to apply the Supreme Court's decision in his case. He committed the same act the plaintiff committed, except instead of license plates, he took another member's social security number (SSN). However, he also had open, unrestricted access to the system.

In Jan 22, he filed a complaint in Federal Court. The judge stated he had a stated claim. However, the Assistant United States Attorney (AUSA) opined the decision in *Van Buren v. United States* was applicable but proper relief was not available. It is undisputed he had unfettered access to the computer system. The military argued since he was using the obtained information to commit larceny, he exceeded the authorized access. He was alleged to have used the access to divert another airman's money to a children's charity in Siberia and he stole \$800 from another airman. As a result, he was given a BCD.

The military courts blew him off and repeated the original finding he exceeded his authorized access without further discussion to [redacted's] testimony. The government filed a response arguing jurisdiction issues but did not dispute his conviction would have been prohibited if *Van Buren* was decided at the time of his court martial.

The District Court decided that *Van Buren* did not change the legal situation sufficiently to warrant an issuance of a *writ of mandamus* (order to lower court to perform their duty) because the substance of his case was a larceny charge. The District Court found that since the Computer Fraud and Abuse Act (CFAA) charge was not the substantive charge, there was no constitutional

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violation. However, the finding does not bind the Board from doing the right thing and invalidating his discharge.

He completed his bachelor's degree in 2008. He would have applied for a commission had he not been court martialled.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, dated 10 Mar 04 reflects the applicant was punished under Article 15 for the following: (1) He violated a lawful order issued by a senior noncommissioned officer (SNCO) to have no contact with the named airman first class (E-3); (2) He wrongfully tried to confront and converse with her and (3) He was disrespectful in language toward an NCO who was in the execution of his office. Punishment included reduction to the grade of E-3, with a new date of rank (DOR) of 18 Mar 04 and seven days of extra duty.

The applicant received a referral enlisted performance report (EPR) for the period ending 18 Mar 04. The referral EPR states he continually exhibited an inability to conform to military standards, he violated lawful orders on multiple instances, he was reprimanded for inappropriate sexual references, and he required close supervision.

On 29 Mar 08, [redacted] *Work-Product* was published. The Order stated the applicant was arraigned on the following offenses at a GCM:

Charge I: Article 80. Plea: Not Guilty. Finding: Withdrawn and dismissed.

Specification: The applicant between 1 Sep 05 and 6 Oct 05, attempted to violate a lawful general regulation by wrongfully soliciting or causing to solicit the named airmen to provide their network user identification and password information. Plea: Not Guilty. Finding: Withdrawn and dismissed.

Charge II: Article 89. Plea: Not Guilty. Finding: Withdrawn and dismissed.

Specification. Did on or about 2 Mar 05, behave himself with disrespect toward a superior commissioned officer by writing and dispatching a disrespectful letter. Plea: Not Guilty. Finding: Dismissed by the military judge.

Charge III: Article 92. Plea: Not Guilty. Finding: Withdrawn and dismissed.

Specification. Having knowledge of a lawful order issued by a SNCO to not contact senior airman (E-4) [redacted], dated 24 Feb 04, he contacted her between 16 Aug 05 and 6 Oct 05. Plea: Not Guilty. Finding: Withdrawn and dismissed.

Charge IV: Article 134. Plea: Guilty. Finding: Guilty.

Specification 1: The applicant between 16 Aug 05 and 6 Oct 05 knowingly created and maintained or caused to be created and maintained an internet webpage which appeared similar to the official base webpage, and then through email correspondence, wrongfully solicited or caused to be solicited computer network user identification and password information from the named airmen. He then wrongfully requested these airmen to access the false internet webpage, such

conduct being to the prejudice of good order and discipline in the armed forces. Plea: Guilty. Finding: Guilty.

Specification 2: Did between 1 Sep 05 and 6 Oct 05 knowingly and falsely pretend to be an employee acting under the authority of the base computer system administrator and solicited computer network user identification and password information from each of the named airmen in violation of 18 U.S.C. § 912. Plea: Guilty, except the words “in violation of 18 U.S.C. § 912” and substituting the words “such conduct being to the prejudice of good order and discipline in the armed forces.” To the excepted words, Not Guilty; to the substituted words, Guilty. Finding: Guilty, except the words “in violation of 18 U.S.C. § 912.” Of the excepted words, Not Guilty; of the substituted words, Guilty.

Per [REDACTED] dated 25 Jul 08, the applicant’s sentence to a BCD, confinement for 10 months, reduction to the grade of E-1, a fine of \$750 and an additional three months’ confinement if the fine was not paid was affirmed.

On 12 Nov 08, the applicant was discharged with a BCD and narrative reason for separation of “Court Martial (Other).” He served 7 years, 4 months and two days of active duty service.

Following his GCM, the applicant filed a petition in 2011 with the District Court for reinstatement or in the alternative for an honorable discharge, back pay and other relief which was denied by the District Court. In 2014, the applicant pursued appellate relief through direct appeal of the AFCAA decision and twice sought *writ of error coram nobis* (called to attention facts that would have changed the judgment but were outside of the record and unknown to the court at the time of judgment), which were also denied.

United States District Court Order, *Applicant v. The AFCCA, Department of the Air Force and the Secretary of the Air Force (SECAF)*, filed 29 Sep 23, granted the defendant’s (AFCCA) motion to dismiss the applicant’s complaint with prejudice. The Court stated the applicant, after what appeared to have been a prank gone awry, wanted to get out from under his BCD. The suit results from a 2021 United States Supreme Court decision in *Van Buren v. United States*. The applicant argued the decision voids his conviction of unauthorized access to the Air Force’s computer system. He also argued the larceny conviction should be void. The applicant argued the charges were insufficient and the government did not and could not know he took, obtained or withheld any paycheck. At no point did the applicant have a paycheck in his possession. With regard to the charges that he exceeded his authorization and was using the accessed information for improper use, the arguments were unsupported by the evidence as the *Van Buren* decision held that unauthorized use of information to which a person has access is not a CFAA violation. The Court opined the applicant was not entitled to the relief as there was no constitutional violation.

The United States Court of Appeals in a decision filed 1 Mar 24 reflects the Court recognized that the *Van Buren* decision causes the CFAA count to be subject to voiding; however, took no action to alter the applicant’s status. The Court found the way the Air Force charged the case did not support the linking of the CFAA and the larceny charges.

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

POST-SERVICE INFORMATION

The applicant provided an FBI Criminal History Record dated 14 Aug 14. The FBI report contains no other arrests aside from the applicant’s sentence of court martial.

APPLICABLE AUTHORITY/GUIDANCE

The AFBCMR is without authority to reverse, set aside, or otherwise expunge a court martial conviction. Rather, in accordance with 10 U.S.C. § 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 issued supplemental guidance, known as the Wilkie Memo, 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 Memo.

On 13 Oct 23, the Board staff provided the applicant a copy of the clarifying guidance (Exhibit C).

Per 10 U.S.C. § 531(a)(1) Original appointments in the grades of second lieutenant (O-1), first lieutenant (O-2) and captain (O-3) shall be made by the President alone.

Van Buren v. United States. On 3 Jun 21, the Supreme Court of the United States ruled *Van Buren* did not violate the CFAA of 1986. *Van Buren*, a former police sergeant, used his patrol car computer to access a law enforcement database to retrieve information about a particular license plate number in exchange for money. Although he used his own, valid credentials to perform the search, his conduct violated a department policy against obtaining database information for non-law enforcement purposes. He was charged with a felony in violation of the CFAA, which subjects to criminal liability anyone who intentionally accesses a computer without authorization or exceeds authorized access. Per 18 U.S.C. § 1030(a)(2), the term “exceeds authorized access” is defined to mean accessing a computer with authorization and to use such access to obtain or alter information that the accessor is not entitled to obtain or alter. He was convicted by a jury and sentenced to 18 months in prison. The Supreme Court opined *Van Buren* did not violate the CFAA. The provision covers those who obtain information from particular areas in the computer, such as files, folders or databases, to which their computer access did not extend. It does not cover those who like *Van Buren* have improper motives for obtaining information otherwise available to them. The Court opined the government’s interpretation of the statute attached criminal penalties to a breathtaking amount of commonplace computer access. If the “exceeds authorized access” clause criminalized every violation of a computer use policy, then millions of otherwise law abiding citizens are criminals. For example, in the workplace, employers commonly state that computers and electronic devices can be used only for business purposes. The government’s reading of the statute is that an employee who sends a personal email or reads the news using her work computer would have violated the CFAA. The parties agree that *Van Buren* accessed the law enforcement database system with authorization. The only question is whether *Van Buren* could use the system to retrieve license plate information. Both sides agreed he could. Accordingly, he did not “exceed authorized access.” Therefore, the Circuit Court’s decision was reversed, and the case was remanded for further proceedings.

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

AF/JAJI recommends denial. No additional information has been provided to suggest clemency in the form of a discharge revocation or upgrade is warranted.

The applicant's case pertains to a court martial; therefore, the Board action can only be on the basis of clemency and not on the basis of error or injustice. In accordance with 10 U.S.C. § 1552(f), the AFBCMR cannot correct court martial records unless the correction is one of two types of actions: (1) Correction of a record to reflect an action taken by review authorities or (2) Action on the sentence of court martial for purposes of clemency.

On 26 Dec 04, he was found guilty at a GCM. He was sentenced to a BCD, confinement for 10 months, reduction to the grade of E-1 and a fine. In the 17 years following his conviction, the applicant has challenged the conviction and sentence with the AFCCA many times on various grounds, to include the legal and factual sufficiency of his conviction. The AFCCA denied relief on each occasion.

AF/JAJI finds no grounds to grant clemency in the form of a discharge revocation or upgrade. In his request for relief, he focuses on only one of the offenses for which he was found guilty. However, he was found guilty by a military judge of other serious offenses for which he was charged and sentenced. The military judge, the fact finder, was in the best position to evaluate the evidence and determined the appropriate sentence for the applicant. The applicant also had prior nonjudicial punishment (NJP) during his short time in the Air Force for violating two lawful no contact orders and being disrespectful towards an NCO. The AFCCA had numerous opportunities to review the issues raised by the applicant through various appeals and petitions. The AFCCA is convinced of the applicant's guilt beyond a reasonable doubt and determined he was not entitled to any relief. In 2021, the AFCCA stated, "This Court has consistently found over the course of

the extended litigation on this case that there was overwhelming evidence in the record of trial to support the court martial findings of guilt for computer fraud and abuse.”

The United States District Court also reviewed certain aspects of the applicant’s case. The Court concluded the applicant was not entitled to a *writ of mandamus* and he is not entitled to a *writ of habeas corpus*. The case was dismissed.

The complete advisory opinion is at Exhibit D.

APPLICANT’S REVIEW OF EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 21 Feb 24 for comment (Exhibit E), and the applicant replied on 21 Mar 24. In his response, the applicant contended it is true the District Court denied relief, although it found he was not guilty of the crime of unauthorized access. The reason for the decision was the same reason AF/JAJI recommends denial that there are other valid charges. He was given a BCD based on all the charges. However, it is not known if the military judge would have issued the same sentence had the decision in *Van Buren v. United States* been available. The larceny charge is also legally deficient. What is known is that he is not guilty of violating the CFAA. Because of this fact, the Board is requested to invalidate his discharge.

The applicant’s complete response, with attachments, is at Exhibit F.

FINDINGS AND CONCLUSION

1. The application is timely. 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. Therefore, the Board declines to assert the three-year limitations 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 AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant’s contentions. The Board finds no evidence that the sentence of the military court was improper or that it exceeded the limitations set forth in the Uniform Code of Military Justice. As noted, this Board is without authority to reverse, set aside or otherwise expunge a court martial conviction. Further, the Board finds the applicant has not sustained his burden of proof his case is similar to the Supreme Court decision in *Van Buren v. United States* to warrant relief. As pointed out by AF/JAJI and acknowledged by the applicant, his case was reviewed multiple times by the AFCCA and the Federal District Court and his appeals were denied. Accordingly, the Board finds the applicant has been afforded his due process appeal rights. In the interest of justice, the Board considered upgrading the applicant’s discharge on the basis of equity, fundamental fairness and clemency (Wilkie Memorandum); however, the Board finds insufficient evidence to warrant relief. The applicant vigorously argues his BCD should be revoked or upgraded on the basis of the decision in *Van Buren v. United States* and believes the Courts ruled erroneously against him; however, he has provided no evidence he accepts responsibility for his severe acts of misconduct; nor has he expressed any remorse or provided any post-service evidence of rehabilitation. The Board notes the applicant provides an FBI report showing he has had no arrests since his discharge; however, a clean FBI report alone is insufficient to upgrade his BCD for his serious acts of misconduct. Therefore, the Board finds no basis for upgrading his discharge at this time based on the passage of time, the overall quality of the applicant’s service, the seriousness of the offenses committed, and the applicant’s post-service conduct. With respect to the applicant’s request, he be appointed and commissioned as an

officer, the Board, which serves on behalf of the SecAF, in the correction of military records, is without authority to make appointments or promotions of officers. Therefore, the Board recommends against correcting the applicant's records.

4. The applicant has not shown that 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 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-2022-00481 in Executive Session on 19 Jul 24:

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 30 Mar 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Clarifying Guidance), dated 13 Oct 23.
- Exhibit D: Advisory opinion, AF/JAJI, dated 31 Oct 23.
- Exhibit E: Notification of advisory, SAF/MRBC to applicant, dated 21 Feb 24.
- Exhibit F: Applicant's response, w/atchs, dated 21 Mar 24.

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.

2/11/2025

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Board Operations Manager, AFBCMR

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