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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-01844

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COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His bad conduct discharge (BCD) be upgraded.

APPLICANT'S CONTENTIONS

He would like his discharge upgraded. He was court-martialed with a bad conduct discharge when he was a young, naïve 20-year-old during the Gulf War. When told he would deploy, he was scared and foolishly went on an alcohol bender. Over that weekend, he lost track of what day it was after sleeping off the hangover in a car. Consequently, he had his roommate's vehicle and woke up to discover the car had been robbed of his roommate's expensive belongings. He made full reparations to his roommate and paid his debt to society. He did not set out to get in trouble but did not know those few days as a scared 20-year-old would affect the remainder of his life. He did not think he needed a lawyer because he was unaware of the benefits and dignity he would lose after leaving active duty, and the detriment of his actions would damage his future as it has.

He has friends and family members who are veterans; however, he is excluded from many events and military functions. He enjoys their guidance, friendship, and comradery. Unfortunately, he is not able to participate because of the level of his discharge. His one and only outburst of immaturity, 30 years ago, prohibits him from becoming a member of the Veterans Administration for life. He speaks highly of his years in the military. His children are proud of his duty to his country. Both of his grandfathers and a few friends had military funerals. He would like to have a military funeral to honor his achievements rather than his mistakes.

Due to this incident, he lost his G.I. Bill but went on to earn a Bachelor's and Master's degree in IT on his own. The Air Force taught him lessons that made him an outstanding person and he believes he deserves this request because he has upheld the standards the Air Force represents. His past has shown he is worthy and the Board will not regret their decision. He begs the Board to have the grace after 30 years, to restore the remaining honor and dignity he has not yet lost. All he asks for is an unembellished upgrade in his discharge status and nothing more.

In support of his request for clemency, the applicant provides a personal statement and character references.

The applicant's complete submission is at Exhibit A.

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STATEMENT OF FACTS

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

On 28 May 92, according to AF Form 2098, *Duty Status Change*, the applicant's duty status changed from Present for Duty to Military Confinement (Sentenced). The Remarks state, "Member was court-martialed for failure to go, wrongful appropriation, stealing property over \$100.00, and disobeying an order. Member was placed in confinement for six months."

On 18 Mar 94, according to General Court-Martial Order (GCMO) Number 20, the applicant's sentence to a bad conduct discharge, confinement for 6 months, forfeiture of \$500.00 pay per month for 6 months, and reduction to airman basic, as promulgated in GCMO Number 19, dated 17 Aug 92, has finally been affirmed. Article 71(c) having been complied with, the bad conduct discharge will be executed. The sentence was adjudged on 28 May 92.

On 28 Mar 94, according to DD Form 214, *Certificate of Release or Discharge from Active Duty*, the applicant received a bad conduct discharge. His separation authority is "GCMO Number 20, 18 Mar 94," narrative reason for separation is "Court-Martial (Other)," and he was credited with 3 years, 11 months, and 29 days of total active service. Dates of Time Lost During This Period: 28 May 92 – 6 Nov 92.

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

POST-SERVICE INFORMATION

On 27 Oct 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 C). The applicant replied on 18 Oct 23 and provided an FBI report. According to the report, the applicant was arrested on:

- 21 Oct 95: Grand Theft - Shoplifting
- 7 Mar 96: Forgery and Receiving Stolen Property
- 15 Oct 03: Domestic Violence
- 2 Dec 03: Domestic Violence
- 10 Mar 09: Possession of Marijuana, Possession of Cocaine, Possession of a Schedule II Controlled Substance, Possession/Display of False Identification with a Government Logo or Seal for a Criminal Act
- 27 Jun 09: Criminal Trespass, Disorderly Conduct, and Simple Assault
- 2 Aug 09: Possession of Cocaine
- 29 Sep 12: Reckless Operation, Driving While Under the Influence, and Speeding

APPLICABLE AUTHORITY/GUIDANCE

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness (USD P&R) 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 27 Oct 22, the Board staff provided the applicant a copy of the clemency 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

AF/JAJI recommends denying the application.

On 28 Mar 94, the applicant was discharged from the Air Force with a bad conduct discharge. On 28 May 92, a general court-martial sentenced him to a BCD, confinement for 6 months, forfeiture of \$500.00 pay per month for 6 months, and a reduction in grade to E-1. Due to the age of the records, AF/JAJI lacks information on the court composition, specific charges, and the applicant's pleas; however, the AF Form 2098, *Duty Status Change*, dated 1 Jun 92, states the reason for the applicant's duty status change from Present for Duty to Confinement was a court-martial sentence for failure to go, wrongful appropriation, stealing property over \$100.00, and disobeying an order.

The applicant had prior misconduct. Although his military human resources record does not contain the record of punishment, a search of the Automated Military Justice Analysis Management System reveals on 31 Jul 91, the applicant received nonjudicial punishment for an unspecified violation of Article 134, Uniform Code of Military Justice (UCMJ). He was punished

with a suspended reduction in grade to E-2 and forfeiture of \$100.00 per month for one month. The applicant also has post-discharge misconduct. A Department of Justice criminal history report reveals numerous arrests and/or convictions between Oct 95 and Apr 13 for misconduct, including simple assault, possession of cocaine, criminal trespass, theft, forgery, domestic violence, and driving under the influence.

The applicant's request for a discharge upgrade pertains to records resulting from a court-martial conviction and sentence. Consequently, pursuant to Title 10, United States Code § 1552(f) (10 USC § 1552(f)), the Air Force Board for Correction of Military Records (AFBCMR) is limited to two types of action: (1) correction of a record to reflect an action taken by review authorities under the 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 act only on the sentence, but only on the basis of clemency and not on the basis of alleged legal error or injustice. After careful review, AF/JAJI finds insufficient evidence of error regarding the first type of authorized correction. Regarding the second type of authorized correction on the basis of clemency, we find the applicant's long history of misconduct does not support a discharge upgrade.

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 22 Feb 24 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 discharge upgrade requests under fundamental fairness or clemency are technically untimely. However, it would be illogical to deny a discharge upgrade 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 USC § 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 applicant was tried by a general court-martial for failure to go, wrongful appropriation, stealing property over \$100.00, and disobeying an order and was sentenced to a bad conduct discharge, confinement for 6 months, forfeiture of \$500.00 pay per month for 6 months, and a reduction in grade to airman basic (E-1), on 28 May 92. He was afforded due process under Article 71(c), UCMJ, and his sentence was affirmed and executed in accordance with GCMO Number 20, dated 18 Mar 94.

In the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the evidence presented, and the extensive post-discharge criminal history provided by the applicant, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's record.

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 DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2022-01844 in Executive Session on 9 Jul 24:

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Panel Chair

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Panel Member

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Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 6 Apr 22.

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

Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Clemency Guidance), dated 27 Oct 22.

Exhibit D: FBI Report, dated, 18 Oct 23.

Exhibit E: Advisory Opinion, AF/JAJI, dated 6 Feb 24.

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

9/25/2024

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