

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02160

XXXXXXXXXX

COUNSEL: XXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His nonjudicial punishment (NJP) under Article 15, Uniform Code of Military Justice (UCMJ), be expunged from his record or reduced to a Letter of Reprimand (LOR).

APPLICANT'S CONTENTIONS

When he was given the Article 15, he was told by the Area Defense Counsel (ADC) that he could dispute it and it would likely be reduced to LOR. However, as this happened just before the holiday season, he was told it would take two to three months, during which time he was forced to participate in the same activities as the pararescue indoctrination course candidates despite already graduating from the program. These activities included all-day long grueling physical training and water confidence training so intense that 90 percent of candidates wash out of the program. Given the options that he had: daily Special Operations selection level training, to include "drown proof" training, for two to three months; an LOR potential returned as an Article 15; and no hope, he feels he was unfairly compelled to accept the Article 15.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is an Air Reserve staff sergeant (E-5).

On 8 Dec 10, the applicant was notified of his commander's intent to impose NJP on him pursuant to Article 15, for one specification of "Military Property of the United States - Loss, Damage, Destruction, or Wrongful Disposition" under Article 108, UCMJ and for one specification of "Larceny and Wrongful Appropriation" under Article 121 of the UCMJ. Specifically, on or about 25 Oct 10, he did without proper authority willfully damage military property of the United States by breaking a door latch of a value at about \$1250.00 and steal merchandise from another person of a value of about \$245.00.

On 8 Dec 10, the applicant waived his right to court martial, indicated that he had consulted a lawyer and attached a written presentation in response to the NJP.

On 10 Dec 10, the applicant's commander finalized his decision and found that the applicant had committed one or more of the offenses alleged. For these violations the commander imposed the punishment of reduction in grade of Airman First Class (E-3), suspended through 9 Jun 10, after which time it would be remitted without further action unless sooner vacated; and forfeiture of \$961.00 pay per month for two months with the portion of the forfeiture in excess of \$961.00 pay per month for one month suspended through 9 Jun 10, after which time it would be remitted without further action unless sooner vacated.

On 10 Dec 10, the applicant decided not to appeal his commander's decision to impose NJP and acknowledged that this action will be filed in his Unfavorable Information File (UIF).

On 15 Dec 10, the servicing staff judge advocate (SJA) found the record to be legally sufficient.

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

AIR FORCE EVALUATION

DAF/JA recommends denying the applicant's request to expunge the Article 15 from his record or to reduce the NJP to a Letter of Reprimand. On 25 Oct 10, the applicant broke into a locked room by breaking the door latch and stole the property of another. His commander offered NJP in lieu of court martial, which the applicant accepted after consulting with an attorney. His commander found he committed the alleged crimes and punished him with a reduction in rank and forfeiture of pay for two months of which the rank and the second month of forfeiture of pay were suspended then remitted. The applicant declined to appeal and two levels of SJA review found the NJP to be legally sufficient.

After careful review, DAF/JA finds that the commander did not abuse discretion in administering the NJP, finding that the applicant committed the offenses alleged, or imposing punishment, and that the punishment imposed was within the permissible range for the applicant's offense.

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 Oct 22 for comment (Exhibit D), and the applicant replied on 31 Oct 22. In his response, the applicant contended he was unfairly compelled not to appeal the NJP action due to his unique circumstances at the Pararescue Indoctrination Course. He had just finished the course as a special operations trainee and was given the option of to either appeal and spend "at least 2 months, if not three months" enduring the daily grueling regime of physical training during the appeal process, or to walk away from the appeal and be spared the daily punishment. There was no malicious intent, or any intent at all to commit a crime. To appeal simply came at price of physical corporal punishment that was unfairly high and had it not been for the threat of this unnecessary daily physical training he would have appealed. For those reasons, he requests that his Article 15 be expunged from his record or reduced to a Letter of Reprimand.

The applicant's complete response is at Exhibit E.

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 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. While the applicant contends that he was unfairly compelled to accept the NJP action and that the Area Defense Counsel informed him that the Article 15 would likely be reduced to an LOR, the Board

notes that the applicant clearly accepted the Article 15 and elected not to demand trial by court-martial or appeal the commanders NJP decision. Furthermore, the Board finds the NJP action was within the commander's authority and the evidence presented does not demonstrate an error or injustice warranting removal of the NJP or show it was unjust or inaccurate as written. 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 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-2022-02160 in Executive Session on 6 Dec 22:

, Panel Chair
, Panel Member
, Panel Member

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

Exhibit A: Application, DD Form 149, dated 17 Jul 22.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, DAF/JA, dated 24 Oct 22.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 25 Oct 22.
Exhibit E: Applicant's Response to Advisory, 31 Oct 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.

X

Board Operations Manager, AFBCMR