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

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02690

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COUNSEL: Work-Product

HEARING REQUESTED: NO

### APPLICANT'S REQUEST

The portion of his Nonjudicial Punishment (NJP) under Article 15, Uniform Code of Military Justice (UCMJ), with reduction of rank to the grade of staff sergeant (E-5), in the Regular Air Force (RegAF), be set aside and his rank be restored to the grade of technical sergeant (E-7) with an effective date of 30 Nov 22.

### APPLICANT'S CONTENTIONS

While on active duty, he made a momentary serious and bad decision and as a result he was demoted from technical sergeant to staff sergeant (E-5). However, the punishment was extreme and the demotion caused his active duty career to be cut short as he was forced to leave the active duty due to high year tenure (HYT) and the Air Force has since changed HYT rules for staff sergeants (E-5). Additionally, when he was questioned by his commander, he was not read his Miranda rights and it was only after being questioned he was told that adverse administrative actions would follow.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

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

On 21 May 14, the applicant was notified of his commander's intent to impose NJP on him pursuant to Article 15, for two specifications of dereliction of duty, in violation of Article 92, *Failure to obey order or regulation*, UCMJ. Specifically, on or about 20 Apr 14 and on or about 10 May 14, he was derelict in the performance of his duties in that he willfully failed to maintain a two-person integrity work center for his entire shift, as it was his duty to do so.

On 27 May 14, the applicant consulted a lawyer, waived his right to court-martial, and submitted a written response.

On 2 Jun 14, the applicant's commander finalized his decision and found that the applicant committed one or more of the offenses alleged. For these violations the commander imposed the punishment of a reprimand and a reduction to the grade of staff sergeant (E-5) with a new date of rank (DOR) of 2 Jun 14.

On 4 Jun 14, the applicant elected not to appeal the decision.

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Controlled by: SAF/MRB

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Limited Dissemination Control: N/A

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On 6 Jun 14, the applicant acknowledged that this action would be filed in his Unfavorable Information File (UIF) and on that same date the servicing staff judge advocate (SJA) found the record to be legally sufficient.

On 9 Apr 17, according to the applicant's DD Form 214, *Certificate of Release or Discharge from Active Duty*, he was honorably discharged in the grade of staff sergeant (E-5), with the narrative reason for separation: Completion of Required Active Service. He was credited with 15 years, and one (1) day of active service.

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 set aside his NJP and restore his rank to technical sergeant (E-6) with an effective DOR of 30 Nov 22. On 2 Jun 14, the applicant received NJP for violating Article 92, UCMJ, by being derelict in his duties by failing to be at work for the entirety of his shift on multiple occasions between 20 Apr 14 and 10 May 14. According to the reprimand on his AF Form 3070A, *Record of Nonjudicial Punishment Proceedings (AB thru TSgt)*, he "violated the standards he was entrusted to uphold by failing to work his assigned shift and maintain two-person crew integrity in a secure facility." The reprimand further states that he "continued to misuse the trust" that his leadership had placed in him.

Although he argues he was not advised of his "Miranda" rights, this office believes he is referring to his rights pursuant to Article 31(b), UCMJ. Miranda rights are similar to 31(b) rights, but they only apply to civilian criminal trials. As he provides no additional facts, it can not be established when this alleged lack of rights advisement took place, or which statement he made as a result. Narrowing the alleged statement is important because the general rule is that if 31(b) rights were not advised, then at court-martial the military judge may exclude the resulting statements made by the accused. However, that does not mean that a court-martial conviction would automatically be invalidated since other facts could have led to the guilty finding. Applying that rule to the present case, we reach three conclusions:

First, the allegation that the Air Force failed to give a 31(b) warning is factually incorrect as a review his AF Form 3070A, paragraph 1.f. clearly shows the applicant was advised on his 31(b) rights.

Second, he does not specify which statement resulted from the alleged failed 31(b) advisement and how material that statement was to the NJP findings and punishment.

Third, and most importantly, 31(b) does not apply to NJP proceedings. The *Manual for Courts-Martial*, Part V, Section 4c(3) clearly states: "The Military Rules of Evidence, other than with respect to privileges, **do not apply** (emphasis added) at nonjudicial punishment proceedings." This means that any statement, even if there was no rights advisement, was allowed to be considered by the NJP authority.

A thorough review of the case finds he was offered NJP proceedings; he consulted with an attorney and presented a written presentation for the NJP authority's consideration; he accepted the NJP actions and furthermore he declined to appeal the findings and punishment. The

commander did not abuse his discretion in administering the NJP, finding the applicant committed the offenses as alleged, or imposing punishment. 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 NJP. After consulting with counsel, the applicant could have demanded court-martial in lieu of NJP and presented evidence before a jury of his peers. He opted against doing so.

Based on the documentation provided and analysis of the facts, there is insufficient evidence of an error or injustice.

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 18 Nov 22 for comment (Exhibit D), but has received no response.

## **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/JAJ1 and finds a preponderance of the evidence does not substantiate the applicant's contentions. While the applicant contends that his punishment was extreme and disproportionate, the Board notes that he clearly accepted the Article 15 and elected not to demand trial by court martial or to appeal his commander's NJP decision. The Board finds that the NJP action and resulting punishment were neither arbitrary nor capricious and fell well with the commander's authority and that the evidence presented does not demonstrate an error or injustice warranting the removal of either the NJP, the reduction in grade, or show that they were inaccurate as written or unjust. Therefore, the Board recommends against correcting the applicant's records.

## **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-2022-02690 in Executive Session on 10 Jan 23:

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Panel Chair

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Panel Member

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Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 7 Oct 22.

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

Exhibit C: Advisory Opinion, DAF/JA, dated 17 Nov 22.

Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 18 Nov 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.

4/15/2025

X

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Board Operations Manager, AFBCMR

Signed by:

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