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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02829

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COUNSEL: Work-Product

HEARING REQUESTED: YES

APPLICANT’S REQUEST

His under other than honorable conditions (UOTHC) discharge be reversed and he be returned to active duty.

APPLICANT’S CONTENTIONS

The administrative discharge board’s findings and recommendation and the separation authority’s discharge of him from service were based on violations of regulations and due process resulting in an error and injustice.

The applicant’s complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force technical sergeant (E-6).

On 28 May 19, the applicant’s commander recommended the applicant be discharged from the Air Force, under the provisions of AFI 36-3208, *Administrative Separation of Airmen*, paragraph 5.5, Sexual Assault.

On 6 Jan 20, the Staff Judge Advocate (SJA) found the administrative discharge board’s recommendation the applicant be separated with an UOTHC legally sufficient.

On 31 Jan 20, the SJA found the discharge action legally sufficient. On this same date, the discharge authority directed the applicant be discharged for Sexual Assault with an UOTHC service characterization. Probation and rehabilitation was not authorized.

On 14 Feb 20, the applicant received an UOTHC service characterization discharge. His narrative reason for separation is “Misconduct (Serious Offense)” and he was credited with 16 years, 2 months, and 6 days of total active service.

On 20 Jun 23, the AFBCMR Board staff sent a memorandum to counsel (Exhibit C) advising the video evidence submitted with the initial application could not be accepted. Counsel was asked to present the additional evidence in the correct format to have it considered with the case.

On 17 Jul 23, counsel submitted the information from the video in the correct format (Exhibit A). However, counsel contends the supplementation is incomplete and prejudicial to the applicant’s case review since much of the import of the undisclosed video evidence is the observable

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characteristics (e.g., apparent confusion of the accuser, slurring of her words, confused and unreliable reasoning and relation of the events, etc.), not just the text of what was said.

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

AIR FORCE EVALUATION

AF/JAJI recommends denying the application to reverse the administrative discharge board hearing's decision based on any legal error, concluding there is insufficient evidence to demonstrate a material error or injustice. First, the applicant contends the government failed to discover to defense counsel a second police body camera video containing exculpatory statements of the complaining witness against him, violating due process of law, and constituting a material error or injustice. Although the government had an obligation to provide the second police body camera video to the applicant's defense counsel, he provided no evidence with his request showing this failure was more than an unintentional oversight.

The applicant does not allege the video shows that the victim recants her allegations, states her allegations were fabricated, or states the sexual encounter was consensual. The applicant has the burden of providing evidence in support of their allegation of an error or injustice; however, he has provided no evidence showing the fact finder would have reached a different conclusion, had they seen the second body camera video, or had the defense counsel had access to the video in preparation of the applicant's case. Next, the applicant contends the unchecked testimony of his squadron commander constituted unlawful command influence as well as materially prejudiced the fairness of the hearing through inadmissible testimony. He essentially argues his squadron commander's testimony, in and of itself, unlawfully influenced the Board in their findings and recommendations, because of his authority, rank, and command position. However, the applicant provided no evidence of his squadron commander directly or indirectly coercing or influencing the Board, a military tribunal. His testimony, rank or position does not per se, automatically equate to unlawful command influence. In resolving evidentiary matters at an administrative discharge board, the legal advisor must consider the requirement for a full and fair hearing and the requirement for adequate safeguards for truth. If the legal advisor allowed the squadron commander in question to testify, it is presumed they considered the requirements for a full and fair hearing and adequate safeguards for truth. Also, the applicant contends the admission of unreliable hearsay violated his due process rights and Air Force regulations. Hearsay evidence is admissible at an administrative discharge board proceeding provided the legal advisor determines it is probative and bears indicia of reliability; that is, there are guarantees of trustworthiness to admit the hearsay evidence. There is no requirement the legal advisor document on the record, their inner thoughts concerning each piece of evidence received and admitted. If the legal advisor allowed the witness in question to testify to the statements of others, it is presumed they found the testimony to be both probative and reliable. Finally, the applicant contends the evidence presented in the administrative discharge board hearing was legally and factually insufficient to meet the government's burden for a basis to separate. Applicant essentially argues the evidence presented at the administrative discharge board hearing was conflicting, confusing, inadmissible, and unlawfully influenced. The standard of proof in administrative discharge board proceedings is preponderance of the evidence, which means "when it is more likely than not that events have occurred as alleged." There is no requirement to prove any allegation beyond a reasonable doubt. The applicant, in exercising his right to an administrative discharge board hearing, accepted this lower standard of proof. The findings and recommendations of the Board must be supported by a preponderance of the evidence and be with the concurrence of a majority of the voting members of the Board. The Board considered testimony and evidence presented during the hearing and were in the best position to evaluate the information available to them to support their findings and recommendations. The separation authority, in making his decision to direct the applicant's

discharge with an UOTHC service characterization, was in the best position to evaluate the Board’s findings and recommendations and make a decision within his authority. The AFBCMR scope of review does not involve relitigating the evidence presented at the administrative discharge board hearing. The applicant’s contention appears to be no more than a disagreement with the Board’s findings and recommendations, and the separation authority’s decision to direct discharge with an UOTHC service characterization.

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 counsel on 23 Jun 23 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 AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant’s contentions. Based on the available evidence of record, it appears the discharge was consistent with the substantive requirements of the discharge regulation. The applicant has provided no evidence that would lead the Board to believe the discharge board hearing’s decision was contrary to the provisions of the governing regulation, unduly harsh, or disproportionate to the offenses committed. 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 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-2022-02829 in Executive Session on 25 Aug 23:

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 Oct 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.

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Exhibit C: Notification to Applicant, dated 20 Jun 23.

Exhibit D: Advisory Opinion, AF/JAJI, dated 21 Jun 23.

Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 23 Jun 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.

11/20/2024

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Board Operations Manager, AFBCMR

Signed by: *Work-Product*

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