



Work-Product

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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02900

Work-Product

COUNSEL: *Work-Product*

HEARING REQUESTED: YES

APPLICANT’S REQUEST

His bad conduct discharge (BCD) be upgraded to honorable with a narrative reason for separation of “Secretarial Authority.”

APPLICANT’S CONTENTIONS

He was discharged from the Air Force for a single act of indiscretion. He was young and regrets his decision to participate in the theft which led to his discharge. He now realizes his actions were immature and irresponsible. Even though his single act of indiscretion was found in violation of the Uniform Code of Military Justice (UCMJ) regulation this should not be enough to prevent him from obtaining an honorable discharge. Again, he admits to his mistake and if given the opportunity, would have corrected his behavior, and would have continued to serve honorably. Before his mistake, he served honorably and received many awards and praise. Since his discharge, he has been a model citizen and is gainfully employed working in the healthcare industry.

In support of his request for clemency, the applicant provided a personal statement and copies of military kudos, his post-service performance reviews and other certifications, college transcripts, his resume, photos, and other documents related to his request for upgrade.

The applicant’s complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 24 Feb 99, the applicant submitted a request for clemency to the convening authority asking for a disapproval of the sentence regarding a BCD stating with this disapproval, his commander would likely initiate an administrative discharge likely resulting in a general discharge which is more appropriate since he cooperated with the Office of Special Investigations (OSI) investigation and accepted responsibility for his actions.

On 10 Mar 99, the convening authority published Special Court-Martial Order (SCMO) Number [redacted]. The Order stated the applicant pled guilty and was found guilty of one charge and three specifications of conspiring with Senior Airman W----- and S----- to steal cash and property (Article 81) and pled guilty and was found guilty of one charge and two specifications of larceny of cash and property (Article 121). The applicant was sentenced to hard labor without confinement for three months, reduction to the grade of airman basic, and a BCD.

On 12 Oct 99, the convening authority published SCMO Number [redacted]. The Order stated the sentence promulgated in SCMO Number [redacted] was affirmed and the BCD will be executed. On this same day, the applicant received a BCD. His narrative reason for separation is "Court-Martial" and he was credited with 5 years, 10 months, and 4 days of total active service.

On 1 Dec 00, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge stating of the 13 individuals, only Senior Airman W----- and the <applicant> were court-martialed. The others involved received lesser punishments.

On 5 Apr 01, the AFDRB majority concluded the applicant presented no evidence to justify clemency. The board noted the applicant pled guilty to several serious crimes, any of which could justify a punitive discharge. In addition, he conspired to further these thefts and brought third parties into the crimes.

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

POST-SERVICE INFORMATION

On 15 Feb 23, 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 24 Feb 23 and provided an FBI report. According to the report, the applicant has had no arrests since discharge.

The applicant's complete response is at Exhibit D.

APPLICABLE AUTHORITY/GUIDANCE

This Board is without authority to reverse, set aside, or otherwise expunge a court-martial conviction. Rather, in accordance with Title 10, U.S.C., Section 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 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 (USD P&R) issued supplemental guidance 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 memorandum.

On 15 Feb 23, the Board staff provided the applicant a copy of the 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 finding insufficient evidence of error regarding the first type of authorized correction (corrections reflecting actions taken by the reviewing officials pursuant to the UCMJ), and insufficient evidence of injustice as alleged that would warrant clemency regarding the second type of authorized correction (action on only the sentence of the court-martial and solely for the purpose of clemency). The applicant's statement to the Board contains numerous phrases such as, "single act of indiscretion," and "this single incident," but the record shows otherwise. The applicant's criminal conduct was more than a single act, and it was more than a mere indiscretion. He not only stole property on eight occasions during the span of 13 months, but he also conspired with other airmen to do so and even obtained a job at the civilian department store to facilitate his crimes. Furthermore, he spoke about his thefts openly and solicited members of his squadron to join his criminal acts. The BCD is appropriate, and clemency is not warranted.

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 28 Sep 23 for comment (Exhibit F), and the applicant replied on 27 Oct 23. In his response, the applicant contends, through counsel, the Wilkie memo provides guidance to boards for applications based on pardons for criminal convictions to ensure fundamental fairness. Clemency refers to relief that is specifically granted from a criminal sentence. Clemency is not an absolution of criminal guilt, and it does not vacate or overturn any criminal conviction. Clemency is an act of leniency or mercy in moderating the severity of a punishment.

Before his misconduct, he had an exemplary career in the Air Force receiving numerous awards. He made poor decisions which would have ramifications for his entire life. His mother was unemployed at the time, and he was sending her money to help her. He did not have a surplus of cash and could not reasonably afford to do this. After being discharged, he returned home and started working for the community hospital which led to his 20-year pharmaceutical career. Since discharge, he has been an accomplished, motivated, and dynamic leader with experience in operations oversight, team leadership, innovative solutions, and multifaceted collaboration in fast-paced environments. He is a devoted father, brother, and friend. He is hard-working and dedicated to his passions, keeping God at forefront of life.

There is no question he made mistakes that exhibited extremely poor judgment. He committed and was convicted of larceny and conspiracy to commit larceny and as a result, was sentenced to a BCD. He has acknowledged his mistakes and has taken full accountability for them. He has complied with all sentences and punishments. The only remaining and continuous punishment is a BCD which he has held since 1999. It has been 25 years since he committed larceny, or any crime. In this time, he has shown the criminal acts are an aberration in his entire career and he has not engaged in any unlawful activity since his discharge from the Air Force. He believes a military upgrade will help him move on from his mistakes made 25 years ago.

The applicant's complete response is at Exhibit G.

FINDINGS AND CONCLUSION

1. The application was timely filed. Given the requirement for passage of time, all clemency and discharge upgrade requests are technically untimely. However, it would be illogical to deny such 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 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 and concurs with the rationale of AF/JAJI. Based on the available evidence of record, it appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. The applicant provided no evidence that would lead the Board to believe his service characterization was contrary to the provisions of the governing regulation, unduly harsh, or disproportionate to the offenses committed.

Nonetheless, in the interest of justice, the Board considered upgrading the applicant's discharge. In support of his request for an upgrade, the applicant provided photographs, his college transcripts, his post-service performance reviews, his resume, an FBI report with no evidence of arrests since his discharge, and personal statement. He admits to his mistake and states, if given the opportunity, would have corrected his behavior, and would have continued to serve honorably.

The Board contemplated the many principles included in the Wilke Memorandum to determine whether to grant relief based on an injustice or fundamental fairness; however, the Board does not find the evidence presented is sufficient to conclude the applicant's post-service activities overcame the misconduct for which he was discharged. This Board very carefully weighs requests to upgrade the character of a discharge and in doing so, considers whether the impact of an applicant's contributions to his or her community since leaving the service are substantial enough for the Board to conclude they overcame the misconduct that precipitated the discharge and whether an upgrade of the discharge would create a larger injustice to those who served honorably and earned the characterization of service the applicant seeks. While the applicant has presented some supporting documentation indicating he has apparently made a successful post-service transition, the Board does not find the documentation sufficient to conclude they should upgrade the applicant's discharge at this time. In this respect, the supporting evidence shows his success in his post-service career; however, this evidence does not provide his impact in the community and if the impact is so admirable the Board could conclude an upgrade of his discharge would not constitute an injustice to those who have earned this characterization of service.

The applicant retains the right to request reconsideration of this decision, which could be in the form of character statements or testimonials from community leaders/members specifically describing how his efforts in the community have impacted others. Should the applicant provide documentation pertaining to his post-service accomplishments and activities, this Board would be willing to review the materials for possible reconsideration of his request based on fundamental fairness. Therefore, the Board recommends against correcting the applicant's record.

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 DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2022-02900 in Executive Session on 9 Jan 24:

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Panel Chair

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, Panel Member

Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 17 Oct 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 15 Feb 23.

Exhibit D: FBI Report, dated, 24 Feb 23.

Exhibit E: Advisory Opinion, AF/JAJI, dated 26 Sep 23.

Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 28 Sep 23.

Exhibit G: Applicant's Response, dated 27 Oct 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.

3/7/2024

Work-Product

Board Operations Manager, AFBCMR

Signed by:

Work-Product