

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02376

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His under other than honorable condition (UOTHC) discharge be upgraded to honorable.

APPLICANT'S CONTENTIONS

The circumstances surrounding his discharge (UOTHC) were not supported by the accusing member. He completed three four-year terms, two of which were honorable. He is a veteran of Desert Storm and was deployed in support of the United States' efforts to liberate Kuwait. He has been a contributing member of society and deserves to be able to enroll/participate in post-military programs as a result of honorable service to his country. He realizes it has been more than 25 years since his separation; however, that does not erase the service to his country.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force staff sergeant (E-5).

On 8 Apr 93, according to DD Form 458, *Charge Sheet*, the following charges against the applicant were preferred to the Summary Court-Martial Convening Authority:

Charge I: Violation of the Uniform Code of Military Justice (UCMJ), Article 92

- Specification 1: In that [the applicant], who knew of his duties, at Lackland Air Force Base (AFB), Texas (TX), on divers occasions, from on or about 1 Oct 92 to on or about 8 Dec 92, was derelict in the performance of those duties in that he willfully failed to refrain from wrongfully making repeated and unwanted sexual advances towards [XXX], as it was his duty to do.

- Specification 2: In that [the applicant], who knew of his duties, at Lackland AFB, TX, on divers occasions, from on or about 5 Nov 92 to on or about 6 Nov 92, was derelict in the performance of those duties in that he willfully failed to refrain from wrongfully making repeated and unwanted sexual advances towards [XX], as it was his duty to do.

Charge II: Violation of the UCMJ, Article 107

- Specification: In that [the applicant] did, at or near Lackland AFB, TX, on or about 9 Feb 93, with intent to deceive, make to Special Agents [XX] and [XX], an official statement, to wit: that he did not place his penis in [XXX's] vagina on 15 Dec 92, or words to that effect, which statement was totally false, and was then known by [the applicant] to be so false.

Charge III: Violation of the UCMJ, Article 120

- Specification: In that [the applicant] did, at or near Lackland AFB, TX, on or about 15 Dec 92, rape [XXX].

Charge IV: Violation of the UCMJ, Article 134

- Specification: In that [the applicant], a married man, did, at or near Lackland AFB, TX, on or about 15 Dec 92, wrongfully have sexual intercourse with [XXX], a woman not his wife.

On 8 Jun 93, according to an applicant memorandum, Subject: Request for Discharge in Lieu of Trial by Court-Martial, the applicant requested discharge from the Air Force according to Air Force Regulation 39-10, *Administrative Separation of Airmen*, Chapter 4. The applicant stated he understood, if approved, he may be discharged UOTHC, he was aware of the adverse nature of such a discharge and the possible consequences, and he knew it may deprive him of veterans' benefits.

On 8 Jun 93, according to an AFLSA/ADC memorandum, Subject: Request for Discharge in Lieu of Trial by Court-Martial, the applicant's Area Defense Counsel (ADC) requested the applicant be discharged from the Air Force, in lieu of trial by court-martial, with a general service characterization.

On 10 Jun 93, according to a XXX MSS/CC memorandum, Subject: Request for Discharge in Lieu of Trial by Court-Martial, the commander, XXX Mission Support Squadron recommended approval of the ADC's request for discharge on behalf of the applicant, with a service characterization of UOTHC.

On 10 Jun 93, the Staff Judge Advocate found the discharge action legally sufficient.

On 25 Jun 93, the applicant received a UOTHC discharge. His Narrative Reason for Separation is "Req for Discharge in Lieu of Trial by Court-Martial" and he was credited with 11 years, 8 months, and 11 days of total active service.

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

POST-SERVICE INFORMATION

On 7 Mar 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 29 Sep 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

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness 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 7 Mar 23, 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.

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 Title 10, United States Code § 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. It appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. Nor was the discharge unduly harsh or disproportionate to the offenses committed. The applicant acknowledged in his request for discharge in lieu of trial by court-martial that he may be discharged with a UOTH service characterization, he was aware of the adverse nature of such a discharge and possible consequences, and he knew it may deprive him of veterans' benefits. In the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the serious nature of the charged offenses, the evidence presented, and in the absence of post-service

information 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-2022-02376 in Executive Session on 12 Sep 24:

, 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 24 Jul 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 7 Mar 23.
Exhibit D: FBI Report, dated, 29 Sep 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.

X

Board Operations Manager, AFBCMR