



Work-Product

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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-00589

Work-Product

COUNSEL: NONE

AKA Work-Product

HEARING REQUESTED: NO

APPLICANT’S REQUEST

1. His grade be restored to senior airman (E-4).
2. His nonjudicial punishment (NJP) be removed (added with his rebuttal).

APPLICANT’S CONTENTIONS

The AFBMCR corrected his general (under honorable conditions) discharge to a medical retirement. As a result, he believes it appropriate to restore his grade to senior airman, the highest grade held at the time of his initial temporary disability retired list (TDRL) order. Since the AFBMCR determined there was an injustice, this implies they disagreed with the NJP action and subsequent reduction of two grades. Additionally, the applicant points out he enlisted at the grade of airman first class and never held a grade below that. The grade currently listed on his DD Form 214, *Certificate of Release or Discharge from Active Duty*, may influence any type of retiree pay or compensation to which he is entitled.

Furthermore, the applicant brings to the Board’s attention, the SAF/MRBP advisory opinion from his previous case. Specifically, the following two statements:

1. “Additionally, we find that these two statements, combined with the curious timing of the NJP (days after the applicant’s disability retirement orders were published) and its severity (demotion by two grades for failure to follow up on outstanding travel vouchers) troublesome and, taken together, believe they constitute sufficient evidence to conclude that it was at least as likely as it was not that NJP and subsequent administrative discharge were motivated by a desire to deprive the member of disability retirement benefits.”

2. “...we believe the BCMR should consider granting the following relief: a. Remove the NJP imposed and restoration of all rights and privileges. Note that we are not the OPR [office of primary responsibility] for NJP actions, but base this recommendation on our belief that the NJP action was disproportionate to the circumstances. Correct the records to reflect that the applicant was not furnished a general (under honorable conditions) discharge, but was instead transferred to the TDRL in accordance with the orders published on 03 Feb 16.”

The applicant’s complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a permanently disability retired Air Force airman (E-2).

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On 5 Feb 13, according to DD Form 4, *Enlistment/Reenlistment Document - Armed Forces of the United States*, the applicant entered the Regular Air Force at the grade of airman first class (E-3).

On 2 Jun 15, the applicant was promoted to the grade of senior airman (E-4).

On 3 Feb 16, according to Special Order **Work-Product**, the applicant was placed on the TDRL in the grade of E-4 with compensable percentage for physical disability of 30 percent, effective 28 May 16.

On 16 Feb 16, the applicant was offered NJP action pursuant to Article 15, Uniform Code of Military Justice (UCMJ) by his commander for dereliction in the performance of his duties by failing to send follow up emails weekly to members who had outstanding travel vouchers. For this misconduct, the applicant was reduced from the grade of E-4 to the grade of E-2, with a new date of rank of 29 Feb 16.

On 23 Mar 16, the applicant's commander recommended the applicant be discharged from the Air Force under the provisions of AFPD 36-32, *Military Retirements and Separations*, and AFI 36-3208, *Administrative Separation of Airmen*, for minor disciplinary infractions. The specific reasons for the action were as follows:

a. On 30 Jul 14, he failed to go to mandatory physical training at the prescribed time and on 30 Jun 14, he left work early without approval. As a result, he received a letter of reprimand (LOR), which was used to establish an unfavorable information file (UIF).

b. On 8 Dec 15, he failed to go to his appointed place of duty for snow removal. As a result, he was issued a LOR which was used to establish an UIF and control roster.

c. Between 1 Nov 15 and 2 Feb 16, he was derelict in the performance of his duties when he negligently failed to send follow up emails weekly to members who had outstanding travel vouchers. As a result, he received NJP action pursuant to Article 15, UCMJ, a reprimand and was reduced to the grade of E-2.

On 23 Mar 16, the discharge action was found legally sufficient.

On 24 Mar 16, the discharge authority approved the recommendation.

On 31 Mar 16, the applicant's discharge was deferred pending the outcome of the required dual-action processing by the Secretary of the Air Force Personnel Center (SAFPC) and on the same date, according to Special Order **Work-Product** the applicant's placement on the TDRL was rescinded.

On 20 May 16, SAFPC determined that it was more appropriate for the applicant to be administratively discharged, finding no nexus between his unfitting medical condition and his misconduct.

On 14 Jun 16, the applicant was discharged for minor disciplinary infractions and furnished a general (under honorable conditions) character of service discharge.

On 14 Jul 21, the AFBCMR reviewed the applicant's request (AFBCMR Docket Number 2020-03450) for a medical retirement or an upgrade to his discharge to honorable. While a majority of the panel voted against correcting the record and recommended denial of any relief, the Secretary's

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delegee (SAF/MRB) concluded the applicant was the victim of an error or injustice and directed the following corrections to the applicant's records:

a. He was not administratively discharged on 14 Jun 16, but was relieved from active duty on 28 May 16 and placed on the temporary disability retired list (TDRL), effective 29 May 16, in the grade of airman (E-2).

b. On 29 Sep 17, he was removed from the TDRL and permanently retired for physical disability in said grade, with a combined compensable disability rating of 30 percent.

According to Special Order Number [Work-Product], dated 2 Nov 22, the applicant was relieved from active duty effective 28 May 16 and placed on the TDRL in the grade of E-2, effective 29 May 16 with compensable percentage for physical disability of 30 percent.

According to Special Order Number [Work-Product], dated 11 Nov 22, the applicant was removed from the TDRL and retired in the grade of E-2, effective 29 Sep 17 with a compensable percentage for physical disability of 30 percent.

On 14 Nov 22, the applicant was issued a new DD Form 214 reflecting he was retired at the grade of E-2 with narrative reason for separation of "Disability, Temporary IDES".

For more information, see the excerpt of the applicant's record at Exhibit B and the advisories at Exhibits C, E and H.

APPLICABLE AUTHORITY/GUIDANCE

Title 10 United States Code Section 1372 (10 U.S.C. § 1372): *Grade on retirement for physical disability: members of armed forces.* A member is entitled to be retired in the grade to which he or she would have been promoted had it not been for the physical disability for which he or she is retired.

AFI 36-3212, *Physical Evaluation for Retention, Retirement and Separation*, paragraph 5.12 (Grade on Retirement). Unless entitled to a higher retired grade under some other provision of law, service members permanently retired for disability or placed on the Temporary Disability Retired List (TDRL) retire in the highest of the following grades (10 U.S.C. § 1372): (1) The grade in which the service member is serving on the date placed on the TDRL or on the date permanently retired for disability; (2) Service members who are retired on or after 23 Sep 96 may be retired in the regular or reserve grade to which they had been selected and would have been promoted, had it not been for the physical disability for which they were retired. (10 U.S.C. § 1372 was amended effective 23 Sep 96).

According to paragraph 5.13 (Grade on Discharge), the discharge grade will be the higher of the following: (1) *Grade in Which Serving.* The grade the service member is serving at time of discharge; (2) *Higher Grade Determined by SecAF [Secretary of the Air Force].* A grade in which the service member served satisfactorily on active duty, as determined by the SecAF, pursuant to 10 U.S.C. § 1212; or (3) *Grade to Which Promoted.* The Fiscal Year 2002 National Defense Authorization Act amended 10 U.S.C. § 1212 to authorize separation with severance pay in the grade which a service member would have been promoted, had it not been for the physical disability.

AFI 36-3202, *Certificate of Release or Discharge from Active Duty (DD Form 214/5 Series)*. The DD Form 214 is a document used to separate an airman from the Regular Air Force or Air Reserve Component airmen from active duty. It provides an accurate and complete summation of active

duty service at the time of transfer, release, discharge, or change of component or status while on active duty.

DD Form 214, *Certificate of Release or Discharge from Active Duty*, Personnel Services Delivery Guide, Section E, Table 5 (How to Prepare the DD Form 214). The active duty grade held at the close out date of the DD Form 214 will be placed in item 4a (Grade or Rank).

AIR FORCE EVALUATIONS

AFPC/DPMSPP recommends denying the application. Two advisory opinions were completed; the first opinion contained administrative and factual errors. A supplemental advisory was accomplished and corrected the errors. AFPC/DPMSPP indicated the applicant's demotion was addressed in his previous BCMR case **Work-Product** but no recommendation to restore his grade or remove the NJP was made with the recommendation to remove the NJP imposed and restoration of all rights and privileges. In accordance with AFI 36-3208, *Administrative Separation of Airmen*, paragraph 5.49, the applicant was demoted due to several disciplinary events that took place during his enlistment. The applicant states that it was implied that all NJP should be removed; however, the applicant's official personnel and pay records would not reflect the restored TDRL grade due to demotion prior to placement on the TDRL.

The complete advisory opinions are at Exhibits C and E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATIONS

The Board sent a copy of the advisory opinions to the applicant on 10 Apr 23 and 19 Apr 23 for comment (Exhibits D and F), and the applicant replied on 29 Apr 23. In his response, the applicant agreed with the proposed directive language and amended his request by adding removal of his NJP. He contended the NJP and reduction in grade resulted from inequity and an unethical motive and abuse of power to deprive him of a medical retirement through any contrived and legal means. It was determined there was sufficient evidence of inequity in his last case where the AFBCMR upgraded his character of service to honorable and granted him a medical retirement. The LORs issued to him early in his enlistment and included in the basis for his discharge may be considered under liberal consideration (Kurta memorandum) and mitigate his misconduct. In his previous case, the Psychological Advisor indicated, "this Psychological Advisor has reviewed all available records and finds there is sufficient evidence in his service treatment records to support the applicant's contention of a nexus between his mental health condition and his behaviors leading to his misconduct and discharge." In support of his request, the applicant provided additional supporting evidence to include the SAFPC and Psychological advisory opinions from his previous case and four character letters.

The applicant's complete response is at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION

SAF/MRBP (SAF Personnel Council) recommends granting the application. The applicant's original AFBCMR request did seek relief on the NJP or demotion. Now that the AFBCMR found a basis to correct his records on the medical retirement, the applicant believes the AFBCMR must have disagreed with the NJP and demotion and, as such, his record should be further corrected to remove the NJP and demotion. To clarify, the AFBCMR did not make this determination. The AFBCMR, by majority vote, recommended denial of any relief. It was SAF/MRB who, after consideration of the recommendation of the AFBCMR, determined the applicant was the victim of an error or injustice and directed the noted corrections to the applicant's records.

Nevertheless, SAF/MRB opines the applicant has a fair point that if the decision authority found the NJP and demotion was an error or injustice, the NJP and demotion should be removed from the applicant's records. However, in thoroughly reviewing the AFBCMR Record of Proceedings (ROP), to include the rationales included in both the minority opinion and in the SAF/MRB decision, it is not clear the decision was based on disagreement with the NJP and demotion. While the SAF/MRB advisory raises concerns about the NJP and demotion and directly suggests the AFBCMR consider relief on this point, it is not clear if the AFBCMR or SAF/MRB did so. Instead, the reviewed rationales cite "inequities in the discharge" as the basis of SAF/MRB's decision to correct the record to reflect disability retirement.

Therefore, because this issue is not directly addressed in the original case, SAF/MRB recommends the Board directly consider the matter of whether the NJP and demotion represent an error or injustice. For the reasons noted in the original advisory, it is believed it is as likely as it is not the command was motivated to deprive the applicant of disability benefits when the applicant was furnished the NJP demotion and that the NJP was essentially the "last straw" that led to the command's decision to pursue administrative discharge. The Board has already concluded the administrative discharge represents an error or injustice. Should the Board also conclude there is preponderant evidence the NJP and demotion represents an error or injustice, the Board should recommend removing them from the applicant's record.

In the alternative, should the Board be unable to come to this conclusion, SAF/MRB recommends the Board consider correcting the applicant's record to reflect that competent authority determined the highest grade satisfactorily served by the applicant was senior airman (E-4), which would result in his record being corrected to reflect he retired in said grade. Had the applicant originally been retired for physical disability, SAFPC would have conducted an enlisted grade determination (EGD) on the applicant to establish his retired grade.

As the applicant's record has been corrected to reflect he was retired for physical disability, SAF/MRBP had the Air Force Personnel Board (AFPB) review the case to develop a recommendation for their advisory opinion. After a thorough review of the available evidence, the AFPB concluded had the applicant been duly referred to SAFPC for consideration on the EGD in real time, the AFPB would have determined the applicant's service in the grade of senior airman (E-4) was satisfactory under the provisions of 10 U.S.C. 1372 and DAFI 36-3212, *Physical Evaluation for Retention, Retirement and Separation*, and he would have been transferred to the TDRL and ultimately permanently retired in said grade.

SAF/MRBP opines the evidence indicates the NJP and demotion represent an error or injustice and recommend the NJP and demotion be removed from the applicant's record, resulting in his transfer to the TDRL and subsequent permanent retirement for physical disability in the grade of E-4. However, should the Board not agree, there is sufficient evidence to support the Board correct the applicant's records to reflect the applicant served satisfactorily in the higher grade of senior airman (E-4).

The complete advisory opinion is at Exhibit H.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the additional advisory opinion to the applicant on 7 Jan 24 for comment (Exhibit I), 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 the victim of an error or injustice. While the Board notes the recommendation of AFPC/DPMSPP against correcting the record, the Board concurs with the rationale and recommendation of SAF/MRBP and finds a preponderance of the evidence does substantiates the applicant’s contentions. Specifically, the Board is persuaded by the available evidence his NJP and demotion represent an injustice. Therefore, the Board recommends correcting the applicant’s records.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show the nonjudicial punishment, initiated on 16 Feb 16, which demoted him from the permanent grade of senior airman (E-4) to airman (E-2), effective 29 Feb 16, be declared void and expunged from his records.

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-2023-00589 in Executive Session on 12 Mar 24:

- Work-Product Panel Chair
- Work-Product Panel Member
- Work-Product Panel Member

All members voted to correct the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 14 Feb 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPMSPP, dated 5 Apr 23.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 10 Apr 23.
- Exhibit E: Advisory Opinion, AFPC/DPMSPP, dated 19 Apr 23.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 19 Apr 23.
- Exhibit G: Applicant’s Response, w/atchs, dated 29 Apr 23.
- Exhibit H: Advisory Opinion, SAF/MRBP, dated 19 Apr 23.
- Exhibit I: Notification of Advisory, SAF/MRBC to Applicant, dated 29 Apr 23.
- Exhibit J: AFBCMR Case Work-Product, dated 13 Sep 22.

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.

11/7/2024

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Signed by: Work-Product