

## **RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2023-00691

XXXXXXXXXXXX

**COUNSEL:** NONE

**HEARING REQUESTED:** NO

### **APPLICANT'S REQUEST**

His official military personnel record be amended to reflect a 15-year retirement (plus one year for a total of 16 years).

### **APPLICANT'S CONTENTIONS**

He is requesting a discharge correction due to a COVID-19 vaccine refusal. It was his intention to continue serving proudly until his 20 years time in service were completed, but instead he was unfairly coerced with nonjudicial punishment (NJP) and the threat of a general discharge by his squadron commander and the wing judge advocate, unless he submitted a voluntary separation application in order to receive an honorable discharge. His commander indicated that he would retract the applicant's NJP after his voluntary separation was approved. His supporting documentation shows an email chain where the judge advocate asks his commander if the voluntary application was approved so he can "close the case on my end" indicating the judge advocate had an open case for a punitive general discharge against him.

The initial voluntary separation application was submitted in late 2021, requesting a date of separation of 1 Apr 22, with the listed reason on the application as "Refusal of COVID-19 Vaccine." It was erroneously denied by the Air Force Separations section due to manpower. The second application was ultimately approved for a date of separation of 1 Dec 22. Had he not volunteered to separate, he would have received a general discharge which would have complicated his post-service employment opportunities. Thankfully, his honorable status allowed him to secure his current employment and continue serving the Air Force as a civilian contractor.

The applicant's complete submission is at Exhibit A.

### **STATEMENT OF FACTS**

The applicant is an honorably discharged Air Force technical sergeant (E-6).

According to XXth Medical Group memorandum (undated) to the (UNIT), provided by the applicant, he did not meet the criteria for a medical temporary exemption from the COVID-19 vaccine and should follow the Medical Treatment Facility protocols to schedule his immunization once instructed by his commander.

On 4 Oct 21, the Commander, [UNIT] (UNIT/CC) issued the applicant a Letter of Counseling (LOC), provided by the applicant, for refusal to obtain the COVID-19 vaccination on 24 Sep 21, violating a direct order from his commanding officer, a criminal offense punishable under Article 92 of the Uniform Code of Military Justice (UCMJ). The applicant also provided a copy of his 6 Oct 21 response to the LOC.

On 28 Feb 22, according to UNIT/CC memorandum to the applicant, Subject: Order to Receive Mandatory COVID-19 Vaccine, provided by the applicant, he was ordered to receive an initial dose of the COVID-19 vaccine with full licensure approval from the FDA and provide proof by 4 Mar 22. Additionally, he was ordered to receive the second dose of the same vaccine and provide proof by 18 Mar 22. The applicant also provided a copy of his 1 Mar 22 response to the order.

On 7 Mar 22, the UNIT/CC issued the applicant a Letter of Reprimand (LOR), provided by the applicant, for refusing to obtain the COVID-19 vaccine by 4 Mar 22, violating a direct order from his commanding officer, a criminal offense punishable under Article 92, UCMJ. The applicant also provided a copy of his 8 Mar 22 response to the LOR.

On 1 Dec 22, the applicant was furnished an honorable discharge, with Narrative Reason for Separation: Miscellaneous/General Reasons, Separation Code: KND [Miscellaneous/General Reasons], and was credited with 16 years, 5 months, 5 days active service.

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

### **APPLICABLE AUTHORITY/GUIDANCE**

Public Law 102-484 (Fiscal Year 1993 National Defense Authorization Act), Section 4404, Temporary Early Retirement Authority (TERA):

(a) PURPOSE - The purpose of this section is to provide the Secretary of Defense a temporary additional force management tool with which to effect the drawdown of military forces through 1995.

(3) During the active force drawdown period, the Secretary of the Air Force may:

(A) apply the provisions of section 8911 of title 10, United States Code, to a regular or reserve commissioned officer with at least 15 but less than 20 years of service by substituting 'at least 15 years' for 'at least 20 years' in subsection (a) of that section; and

(B) apply the provisions of section 8914 of such title to an enlisted member with at least 15 but less than 20 years of service by substituting 'at least 15' for 'at least 20'.

On 23 Jan 23, the Secretary of the Air Force issued a memorandum rescinding the mandatory COVID-19 vaccination. In addition, it states, "No individuals currently serving in the Department of the Air Force shall be separated solely on the basis of their refusal to receive COVID-19 vaccination if they sought an accommodation on religious, administrative, or medical grounds. The Department of the Air Force will update the records of such individuals to remove any adverse actions solely associated with denials of such requests, including letters of reprimand. The Department of the Air Force will cease any ongoing reviews of current Service members religious, administrative or medical accommodation requests solely for the exemption from the COVID-19 vaccine or appeals of denials of such requests. Former Department of the Air Force Service members may petition the Air Force Discharge Review Board and Board for Correction of Military Records to individually request a correction to their personnel records, including records regarding characterization of their discharge. Additional guidance on implementation of the memorandum will be forthcoming, as needed."

### **AIR FORCE EVALUATION**

AFPC/DPMSSR recommends denying the applicant's request for a 15-year retirement. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice.

At the time of the applicant's separation, he had 16 years, 5 months, and 5 days active service, which is insufficient service under Title 10, United States Code, Section 9314 (10 USC § 9314) for regular retirement. 10 USC § 9314, *Twenty to Thirty Years: Enlisted Members*, allows an enlisted member who meets the basic eligibility criteria for retirement, 20 years Total Active Federal Military Service, to request retirement.

The Temporary Early Retirement Authority (TERA) was available in law from Oct 92 to Sep 02, and reinstated in law on 31 Dec 11; however, TERA was not in effect when the applicant voluntarily separated from active duty. When offered by the Secretary of the Air Force during periods of force management, separation/retirement is only available to overage Air Force Specialty Codes and grades.

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 26 Sep 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 AFPC/DPMSSR and finds a preponderance of the evidence does not substantiate the applicant's contentions. TERA was not in effect at the time of the applicant's separation, and when offered by the Secretary of the Air Force during periods of force management, separation/retirement is only available to overage Air Force Specialty Codes and grades. Consequently, the option to retire early vice voluntarily separate was not available. 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 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-2023-00691 in Executive Session on 20 Dec 23:

, Panel Chair  
, 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 27 Feb 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory opinion, AFPC/DPMSSR, dated 10 May 23.
- Exhibit D: Notification of advisory, SAF/MRBC to applicant, dated 26 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.

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Board Operations Manager, AFBCMR