

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-01365

XXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His Record of Nonjudicial Punishment (NJP) Proceedings be set aside.

His promotion to the grade of Senior Airman (SrA) be restored and he receive the appropriate back pay and allowances.

APPLICANT'S CONTENTIONS

The NJP he received on 25 May 22 was erroneous. An administrative discharge board found no basis for his discharge and recommended he be retained on active duty. The standard of proof in a discharge board is by a preponderance of the evidence (the same standard used in upholding NJP), meaning more likely than not the misconduct was either committed or not committed. An independent panel of members reviewed the allegation and determined it did not meet the legal standard, or it did not happen. As a matter of fundamental fairness, he is seeking relief.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman first class (E-3).

On 13 May 22, according to AF Form 3070A, *Record of Nonjudicial Punishment Proceedings (AB thru SSgt)*, the applicant was notified his commander was considering whether to punish him under Article 15, Uniform Code of Military Justice (UCMJ) for violation of Article 92, making inappropriate sexual comments between 12 Dec – 13 Dec 21. The applicant consulted with a lawyer, waived his right to court-martial and accepted NJP proceedings. On 2 Jun 22, the applicant submitted an appeal and on 10 Jun 22, his appeal was denied. On 12 Jun 22, the commander found the applicant committed the offense alleged and imposed punishment consisting of reduction to the grade of A1C, with a new date of rank (DOR) of 25 May 22.

On 25 May 22, according to Special Order **Work-Product**, dated 16 Jun 22, the applicant was demoted from the grade of SrA to A1C.

On 14 Jul 22, according to information provided by the applicant, the commander notified him he was recommending his discharge from the Air Force for Minor Disciplinary Infractions, in accordance with (IAW) AFD 36-32, *Military Retirements and Separations*, and DAFI 36-3211,

Military Separations, Chapter 7, Reasons for Involuntary Separations, under the provisions of paragraph 7.3.8. The reasons for this action were:

a. On or about 13 Dec 21, the applicant was derelict in the performance of his duties in that he negligently failed to obey Air Force Instruction 1-1, *Air Force Standards*, paragraph 2.2, as it was his duty to do. For this misconduct, he received NJP, dated 29 Dec 21.

b. On or about 13 Dec 21, the applicant did, without proper authority, willfully damage military property of the United States by throwing an Apple iPad on the ground, of a value of about \$1,000.00 or less. For this misconduct, he received NJP, dated 29 Dec 21.

c. Between on or about 12 Dec 21 and on or about 13 Dec 21, the applicant, who should have known his duties, was derelict in the performance of those duties in that he negligently failed to obey Department of the Air Force Instruction 36-2710, paragraphs 2.1 and 2.4.1, *Equal Opportunity Program*, by making inappropriate sexual comments to an airman first class, as it was his duty to do. For this misconduct, he received NJP, dated 25 May 22.

On 14 Jul 22, the applicant was advised of his rights and acknowledged receipt of the Notification of the Board Hearing memorandum.

On 15 Dec 22, according to an email provided by the applicant, his area defense counsel emailed the commander inquiring if he would be willing to set aside the applicant's NJP for sexual harassment that was offered on 13 May 22, based on the findings of the members at the discharge board. On 29 Dec 22, the commander decided the NJP would stand.

On 7 Feb 23, a staff judge advocate, signing "For the Commander" approved the recommendation of the board to retain the applicant.

On 27 Feb 23, the applicant submitted a formal Article 138 complaint stating he was wronged by his commander for denying his request to set aside an Article 15 that had been found by a jury of his peers, to have no basis.

On 13 Mar 23, according to the applicant's response to his formal complaints under Article 138, UCMJ, provided by the applicant, the commander reviewed the applicant's complaint and found he was not eligible for Article 138 review IAW AFI 51-505, *Complaints of Wrongs Under Article 138, UCMJ*, paragraph 1.3.3.8.1. The applicant was informed to petition the Air Force Board for the Correction of Military Records for any discrepancies he believes may be a part of his military record. His complaint under Article 138, UCMJ, was dismissed.

On 2 May 23, per DAF Form 910, *Enlisted Performance Report*, the applicant received a referral performance report because he received an Article 15 for failure to uphold standards IAW AFI 36-2710, *Equal Opportunity Program*.

Effective 3 Feb 24, the applicant's DD Form 214, *Certificate of Discharge or Release from Active Duty* indicates he was honorably discharged in the grade of A1C (E-3) after serving seven years, five months and four days of active duty. His narrative reason for separation is "Completion of Required Active Service."

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

AIR FORCE EVALUATION

AFPC/DPMSSM recommends denying the applicant's request to set aside the record of NJP Proceedings. There is no evidence of an error or injustice. The applicant's Article 15 dated 13 May 22 is not in his military personnel official record; however, the demotion order is. IAW the National Defense Authorization Act, Title 10 USC Section 615(a)(3), the Article 15 meets the requirements of adverse information. The applicant does not state the Article 15 was not IAW AFI 36-2907, *Adverse Administrative Actions*. The applicant's commander issued an AF Form 3070A (Article 15) based on the preponderance of evidence IAW AFI 36-2907. The Article 15 mentioned was not able to be in the applicant's records and therefore the request cannot be granted for removal. Although the applicant contends the allegations are false, DPMSSM cannot provide any input on that matter.

The complete advisory opinion is at Exhibit C.

AFPC/DPMSPSPP recommends denying the applicant's request to be reinstated to the grade of SrA. There is no evidence of an error or injustice. The applicant met with the administrative discharge board. The board found no basis for discharge as it pertained to the applicant damaging military property and making inappropriate comments to a member of opposite sex. Independent panel members reviewed the allegation and determined that either it did not meet the legal standard, or it did not happen. The applicant's defense counsel requested the commander set aside NJP for sexual harassment based on the findings of the members at the discharge board. AFI 51-202, *Nonjudicial Punishment*, paragraph 5.7 and its subparagraphs, require "unusual circumstances" to exist to set aside the NJP and advises commander to speak with their servicing staff judge advocate (SJA). The applicant's commander stated he spoke with the legal team, the issuing commander, and reviewed the evidence and decided the NJP would stand. Without the removal of the NJP, the reduction to the grade of A1C stands with a DOR of 25 May 22.

The complete advisory opinion is at Exhibit D.

AF/JAJI recommends denying the application. JAJI found the commander did not abuse his discretion by administering the NJP on 25 May 22, finding the applicant committed the offense as alleged, imposing punishment, or denying the set aside request. At an unknown date, an administrative discharge board convened. JAJI does not have a record of any portion of the proceedings, and can only rely on the recitation of the proceedings as presented in the applicant's request for NJP set aside, his Article 138, UCMJ complaint, and his BCMR application. According to the applicant's area defense counsel's summary of the administrative discharge hearing in his NJP set aside request, the discharge board "found no basis for discharge." Even if the discharge board found it was not shown the applicant committed the alleged misconduct at issue, such a finding does not impact the legal sufficiency of the NJP. Indeed, appellate review of the NJP was conducted and the applicant was denied relief. The administrative discharge hearing follows different procedures and may have considered different evidence than the NJP

proceeding. JAJI are aware of no rule that an administrative discharge board's determination would override a commander's determination that an offense was committed during a disciplinary proceeding. Even assuming the discharge board found different facts than the NJP authority, the applicant presents a mere difference of opinion between the commander and the administrative discharge board, not a legal error.

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 9 Jan 24 for comment (Exhibit F) 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 recommendations of AFPC/DPMSSM, AFPC/DPMSP, and AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant's contentions. 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-2023-01365 in Executive Session on 10 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, w/atchs, dated 24 Apr 23.
Exhibit B: Relevant excerpts from official records.
Exhibit C: Advisory Opinion, AFPC/DPMSSM, dated 11 Jul 23.

Exhibit D: Advisory Opinion, AFPC/DPMSPP, dated 24 Jul 23.

Exhibit E: Advisory Opinion, AF/JAJI, dated 9 Jan 24.

Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 9 Jan 24.

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