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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-01623

Work-Product

COUNSEL:

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HEARING REQUESTED: YES

APPLICANT'S REQUEST

His administrative demotion from technical sergeant (E-6) to staff sergeant (E-5) be revoked and he receives the difference in pay had it not been for the administrative reduction in grade.

APPLICANT'S CONTENTIONS

The applicant through counsel contends that although he was involved in a serious motorcycle accident, the accident was caused by a foreign object in the road rather than alcohol. He only consumed approximately three alcoholic beverages over a seven-hour period prior to the accident. He was not intoxicated, nor was he feeling the effects of the alcohol which he had consumed several hours before the accident. The friend he was riding with when the accident occurred, has indicated he began to pour alcohol over the applicant to assess the location and severity of the applicant's wounds. Additionally, while his friend was cleaning his wounds, he, unknowingly consumed two beers while lying on the side of the road awaiting the arrival of the ambulance. Studies have concluded that there is a risk of ethanol being absorbed into the bloodstream if damaged skin is washed with surgical spirits. As such, when his blood was drawn at the hospital, it is more likely than not his Blood Alcohol Content (BAC) was inflated resulting in him being over the legal limit was due to his friend washing his wounds with alcohol to assess the severity of his injuries as he was neither under the influence nor otherwise impaired.

Moreover, the applicant's counsel argues in an attached legal brief the decision to administratively demote the applicant is clearly inconsistent with the intent of AFI 36-2502, *Enlisted Airman Promotion/Demotion Programs*, and there are substantial questions regarding the propriety of the demotion considering this was the first time in his entire career that the applicant was involved in an alcohol related incident. In addition, the applicant's overall service history, to include his continued dedication to mission accomplishment following the accident provides a sufficient basis for the Board to conclude an injustice has occurred.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

According to documentation provided by the applicant:

On 16 Feb 21, he was issued a Letter of Reprimand (LOR), dated 10 Feb 21, by his Squadron Commander (SQ/CC) for violation of Article 111, UCMJ, *Drunken or Reckless Operation of Vehicle*, for a motorcycle accident that occurred on 11 Oct 20 when it was determined

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CUI Categories: Work-Product

Limited Dissemination Control: N/A

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he had a BAC of 0.16. On 19 Feb 21, after reviewing the applicant's written response, the SQ/CC determined his final decision stands as written and will be filed in the applicant's Unfavorable Information File (UIF).

According to *Administrative Demotion of Airman Memorandum*, dated 7 Apr 21, the applicant was notified by the SQ/CC that he was recommending to the Group Commander (GP/CC), the demotion authority, he be demoted to the grade of E-5, stating his entire military record was considered in making the decision and the reason for the demotion is AFI 36-2502, paragraph 6.3.4, specifically, that on or about 11 Oct 20, the applicant did, within [city] , [redacted], physically control a motor vehicle while his BAC was 0.08 percent or greater.

On 12 Apr 21, the applicant provided an initial response and indicated he had consulted with counsel, requested a personal hearing before the SQ/CC and submitted a written statement. On 15 Apr 21, after a personal appearance by the applicant and reviewing all written and oral matters, the SQ/CC determined the demotion to the grade of E-5 is appropriate and submitted matters to the demotion authority (GP/CC).

On 26 May 21, the GP/CC, after a legal review found sufficient basis to demote, determined that demotion is appropriate and demoted the applicant to the grade of E-5 with a new date of rank of 25 May 21.

On 3 Jun 21, the applicant elected to appeal the decision and submitted a written statement to the GP/CC who forwarded the legal review, and all matters to the appellate authority (Wing Commander (WG/CC)).

On 9 Jun 21, the WG/CC, denied the appeal.

On 1 Jun 23, according to DD Form 214, *Certificate of Release or Discharge from Active Duty*, dated 31 May 23, the applicant was honorably retired in the grade of staff sergeant (E-5).

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

APPLICABLE AUTHORITY/GUIDANCE

Department of the Air Force Instruction 36-2502, *Enlisted Airman Promotion and Demotion Programs*, 16 Apr 21, Chapter 6, *Administrative Demotion of Regular Air Force (REGAF) Airmen*:

6.1. *Demotions*. Do not use administrative demotions when it is more appropriate to take actions specified by the Uniform Code of Military Justice.

6.1.4. If the commander has sufficient reason to initiate demotion action, use the entire military record in deciding whether demotion is appropriate.

6.1.5. When appropriate, give Airmen an opportunity to overcome their deficiencies before demotion action is initiated. Commanders should maintain supporting documentation of all rehabilitation and probationary actions.

6.2. Who Can Demote. 6.2.1. The group commander, or equivalent level commander, may demote MSgts and below. Equivalent level commander is defined as a senior officer in the grade

of colonel. **Note:** Higher levels of command may also demote, but group commander is the lowest level of authority. 6.2.3. The appellate authority is the next higher-level commander.

6.3. Reasons to Demote. 6.3.4. Failure to fulfill Responsibilities. Airmen may be demoted for failing to fulfill Airman, noncommissioned officer, or SNCO responsibilities under Air Force Handbook (AFH) 36-2618, *The Enlisted Force Structure*.

6.4.2. Demotion Authority: The demotion authority can take additional grade reductions other than the initiating commander's recommendation. Request a written legal review from the servicing legal office before deciding the demotion. Return the entire case file to the Airman's servicing MPF.

6.5. How to Process an Appeal. The MPF forwards the case to the demotion authority for review. The demotion authority can reverse the previous decision and restore the Airman's original grade or forward the case to the appellate authority without comment. If the appellate authority approves the appeal, the appellate authority directs the MPF to restore the Airman's previous grade and revoke demotion orders.

DAFI 51-202, *Nonjudicial Punishment*, 4 Jan 22, 3.4. *Standard of Proof*. The burden of proof to be utilized for imposition of nonjudicial punishment, to include adjudication of any appeal, shall be a preponderance of the evidence.

DAFI 36-2907, *Adverse Administrative Actions*, 14 Oct 22, 1.1. Overview. Adverse administrative actions are intended to improve, correct, and instruct subordinates who violate established Department of the Air Force (DAF) standards whether on or off duty. Misconduct generally should be addressed at the lowest possible level, as soon as possible, to ensure an Airman's or Guardian's career is not negatively affected unnecessarily. The decision to utilize these quality force management tools should be based primarily on two factors: the nature of the incident and the previous disciplinary record of the Airman or Guardian. In deciding what type of action to take, consider the seriousness of the Airman's or Guardian's departure from established standards. Additionally, adverse administrative action should be used as part of a progressive discipline process; however, there is no requirement to issue a lower-level action to address an Airman's or Guardian's first instance of misconduct. Some misconduct warrants a more severe form of action or action from higher in the chain of command.

AIR FORCE EVALUATION

AFPC/DPMSSM recommends denying the request. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice. The applicant was administratively demoted to the grade of E-5 within the guidance of DAFI 36-2502, paragraph 6.4.2, as the GP/CC reviewed and considered a written judge advocate legal review which affirmed a legally sufficient basis existed to demote the applicant. The applicant appealed the demotion action but was denied by the appellate authority.

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 31 Jul 23 for comment (Exhibit D) but has received no response.

ADDITIONAL AIR FORCE EVALUATION

AFPC/JA recommends denying the request. The applicant asserts through counsel that he was not intoxicated at the time of his motorcycle accident and was therefore improperly demoted for failure to fulfill his NCO responsibilities in violation of DAFI 36-2502. The applicant admits while out for a ride on his motorcycle with his neighbor, he consumed three drinks over the course of the day and asserts that around midnight, when returning home a piece of rubber was kicked up, striking his motorcycle which caused him to lose balance and hit the pavement. He further asserts he has no recollection of the events that occurred immediately following the accident. His blood was collected at the hospital pursuant to a warrant and revealed his BAC was 0.164 percent. He was subsequently administered an LOR from his SQ/CC for operating his motorcycle while intoxicated. After receiving his LOR, his neighbor (riding partner) was interviewed by his defense team. In that interview, his neighbor reportedly stated that immediately following the accident, the applicant was bleeding profusely, so he grabbed beers from his own motorcycle to wash off the blood to assess the applicant's injuries. Further, he claimed the applicant was incoherent at the time and grabbed the beers from him and started drinking, consuming at least two beers during the 15 – 20 minutes they waited on the side of the road for arrival of the paramedics. It is worth noting the neighbor did not sign an affidavit attesting to this version of events, rather, the defense paralegal signed an affidavit attesting the neighbor told him this is what occurred. His SQ/CC upheld the LOR, and the servicing legal office reviewed the LOR, the administrative demotion action, and the accompanying responses and found the actions to be legally sufficient under the law and policies. On 26 May 21, the GP/CC demoted the applicant from technical sergeant (E-6) to staff sergeant (E-5).

10 USC 1552, *Correction of military records: claims incident thereto*, governs the BCMR process and Federal courts have consistently defined “injustice” within the meaning of the statute as that behavior or action that rises to a level that shocks the conscience. (See *Sawyer v. United States*, 18 Ct.Cl.800 (1989)). This is a tough standard which requires more than merely deciding that action taken might have a negative impact on the applicant. In this case, the applicant asserts he suffered an injustice and deserves relief for four reasons.

First, he asserts that the preponderance of the evidence standard has not been met in this case. He contends it is more likely than not that he was under the legal limit at the time of his accident and his BAC level raised when his neighbor (riding partner) washed his wounds with beer and when he drank two beers while waiting for the paramedics. He relies on his neighbors' statements and a paragraph from a 2008 article from the Journal of Occupational Medicine and Toxicology addressing the absorption of alcohol through the skin. Even if the Board finds his account creditable, the question before the Board is whether the applicant suffered an *injustice that shocks the conscious* because the GP/CC did not. The statement made by the neighbor was not provided to the police or medical professionals at the time of the accident, nor did he sign an affidavit attesting to its truth. Rather, the statement was collected by his defense counsel in response to him being issued an LOR. Further, the research article cited discusses the BAC of an accident victim who had 33 percent of their body washed with a “surgical spirit” and he provided no additional information that demonstrates the scientific similarities between his case and the case he cites such as; Are the alcohol concentrations the same between the beer that was allegedly poured and the surgical spirits used to wash the patient? Was the same amount of his body impacted as was the patients? Was the process of pouring sufficiently similar to surgical washing? Without answers to these questions and others it is reasonable that the WG/CC found the applicant more likely than not under reported the amount of alcohol he consumed and was intoxicated above the legal limit

at the time of the accident. Furthermore, his neighbor did not corroborate the applicant's assertion that he only consumed three beers leading up to the accident in the defense's affidavit.

Second, he asserts his demotion, under DAFI 36-2502 for failure to fulfill his NCO responsibilities, was improper because his service record and resiliency during the administrative demotion process indicates he is otherwise a stellar NCO and points to his service record and several character letters in support of this assertion. While DAFI 36-2502, paragraph 6.1.4, does require the commander to consider the entire military record in determining whether demotion is appropriate, it is not the only factor. In this case, the demotion authority found by a preponderance of the evidence, the applicant drove while intoxicated with a BAC of 0.164 and suffered serious injuries as a result. Under these circumstances, it would be reasonable and *not* a gross injustice for even the most highly decorated Airman to face demotion for such a serious offense.

Third, he asserts he was not given an opportunity to overcome his deficiencies before demotion action was taken in accordance with DAFI 36-2502, paragraph 6.1.5. He points to the fact that he was issued an LOR and was demoted three months later. However, this argument is lacking as it fails to consider two important points:

1. While one purpose of administrative action is rehabilitation, in accordance with DAFI 36-2907, paragraph 1.1, another purpose is to serve as progressive discipline because some behavior even in the first instance deserves a more severe form of action.
2. The argument does not consider the LOR and administrative demotion were used in concert as an accountability tool to address misconduct over which the State of Arizona had jurisdiction.

Fourth, he asserts the demotion action was in contravention of policy because generally demotions are reserved for relatively minor offenses and the appropriate course of action based on the seriousness of the offense would have been to initiate nonjudicial punishment or court-martial. He is correct, in accordance with DAFI 36-2502, paragraph 6.1, administrative demotions should *not* be used when actions under the UCMJ are more appropriate. However, in this case the State of Arizona had not relinquished jurisdiction over the case and therefore, UCMJ actions were not permitted without Secretary of the Air Force approval.

The GP/CC, the demotion authority, took the steps they deemed appropriate within the parameters of jurisdictional authority to further good order and discipline. Issuance of a LOR and an administrative demotion to a member who was found more likely than not to have been operating a vehicle with a BAC of 0.164 should not reasonably be considered an injustice that shocks the conscious as contemplated by 10 USC 1552.

Therefore, based on the aforementioned discussion, AFPC/JA recommends the Board deny his request.

The complete advisory opinion is at Exhibit E.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 4 Jan 24 for comment (Exhibit F), and the applicant replied on 5 Apr 24. In his response, the applicant contended there is no reason to question the credibility of the paralegal's affidavit. In addition, his friend provided an

affidavit and unequivocally indicated he only saw the applicant consume three beers over the course of the day and also indicated he poured several beers over the applicant in order to wash out the applicant's wounds and identify the source of the bleeding. While the applicant is unable to provide an estimate regarding the percentage of his body that had open wounds/road rash, medical records indicated that such area was extensive. Given his consumption of three beers, the pouring of no less than two beers over his wounds, and his consumption of two beers while in shock laying on the side of the road, makes it more likely than not he was under the legal limit prior to the time of his accident and his BAC was inflated due to the actions resulting immediately after the accident. As such, his demotion should be overturned as it proposes he was intoxicated at the time of the accident and leaves no ability for the Board to consider the possibility that his BAC was inflated by actions taken post-accident. Furthermore, his demotion should be overturned as the LOR presumes, he was intoxicated at the time of the accident and simultaneously ignored his service history and clear rehabilitative potential as demonstrated by his performance following receipt of the LOR.

The applicant's complete response is at Exhibit G.

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. After thoroughly reviewing this application and the applicant's response to the advisory opinions, the Board concurs with the rationale and recommendation of both AFPC/DPMSSM and AFPC/JA and finds a preponderance of the evidence does not support the applicant's contentions. The applicant contends he was not intoxicated at time of his motorcycle accident and his inflated BAC is the result of an innocent ingestion post-accident due to his riding partner pouring beer over his wounds along with him "unknowingly" consuming two beers awaiting arrival of the ambulance. The Board disagrees. Specifically, the applicant admits to consuming alcoholic beverages in the hours prior to the accident; however, the Board finds it improbable his BAC of 0.164 was the result of his riding partner "washing his wounds" and "unknowingly" consuming two beers while waiting on the ambulance to arrive. Therefore, the Board finds it more likely than not, the applicant's accident was caused by his consumption of alcohol and decision to operate a vehicle while under the influence in contravention of Article 111, UCMJ. The applicant contends the demotion authority failed to consider the totality of the circumstances surrounding his motorcycle accident, to include the cause of the accident; his overall service history and was in contravention to policy. Again, the Board disagrees. Specifically, prior to recommending the applicant be administratively demoted to the grade of SSgt (E-5), as noted in the *Administrative Demotion of Airmen Memorandum*, dated 7 Apr 21, the initiating commander (SQ/CC) was concerned about the applicant's behavior during this current enlistment, and in making this decision, considered the applicant's entire military record, to include written and oral matters prior to initiating the demotion action to the demotion authority IAW AFI 36-2502. Therefore, the Board finds the demotion action was well within the commander's jurisdictional limits and authority to further good order and discipline. Finally, the Board notes the applicant displayed poor judgement, lost a level of credibility to lead airmen, and failed to epitomize the culture, care, and respect expected of noncommissioned officers. Therefore, the Board recommends against correcting the applicant's records.

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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 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-2023-01623 in Executive Session on 9 Jul 24:

Work-Product Panel Chair

Work-Product Panel Member
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All members voted against correcting the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 15 May 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPMSSM, dated 26 Jul 23.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 31 Jul 23.
- Exhibit E: Advisory Opinion, AFPC/JA, dated 15 Dec 23.
- Exhibit F: Notification of Advisory, SAF/MRBC, 3 Jan 24.
- Exhibit G: Applicant's Response, w/atchs, dated 5 Apr 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.

4/28/2025

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Board Operations Manager, AFBCMR

Signed by: Work-Product

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