



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-01825

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His official military personnel record be amended to reflect:

- A discharge characterization no less than general (under honorable conditions).
- Eligibility for Air Force Reserve retirement in the appropriate grade.

APPLICANT'S CONTENTIONS

As shown by his Air Force records, the applicant experienced a stellar career for approximately two decades. Things went awry during a time when he became involved with an enlisted female while he was serving as a commissioned officer. He faced two separate prosecutions related to his consensual relationship with her, that included an allegation of violating a no-contact order with her. The first trial was completed in Feb 03, and the second in Jan 04, after the applicant turned down nonjudicial punishment (NJP) under Article 15, Uniform Code of Military Justice (UCMJ), and demanded trial by court-martial for the same and other minor offenses. In the first court, his sole punishment consisted of a letter of reprimand. In the second court, he was convicted of violating the no-contact order and solely sentenced to a dismissal, a punitive charge for officers. Because of the dismissal, he cannot be retired from the Air Force Reserve.

The first conviction was not appealed as military law does not permit an appeal of a conviction where the only punishment is a letter of reprimand. Because the second court-martial conviction for violating the same no-contact order (on different dates) resulted solely in a dismissal, a punitive charge for officers, an appeal was automatic. The 2006 decision rendered by the Air Force Court of Criminal Appeals (AFCCA) denied relief based on a claim that the sentence to a dismissal was inappropriately severe as it denied him the right to receive his reserve retirement.

Upon being placed on appellate leave and to the present, the applicant has faced many challenges. Notably, on 6 Apr 12, he suffered a major injury when he attempted to commit suicide after experiencing years of depression over losing his Air Force career and losing his nursing license and ability to practice his cherished profession as a nurse. As a result of the permanent disability he suffers from, the Social Security Administration gave him a 100 percent disability rating.

In the event the applicant's dismissal is changed to a characterization of no worse than general (under honorable conditions), the next question is whether he qualifies for a reserve retirement. In his appeal of the second conviction, his appellate counsel argued he would, in fact, qualify for such. The applicant's record of service (apart from the military justice action) as reflected in his awards and decorations, officer performance reports, character letters, training records, educational achievements, and contributions to the civilian community is nothing short of

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exemplary. This outstanding service far outweighs the single misstep, violating a no-contact order in the midst of a consensual relationship he engaged in with a female enlisted member.

It is significant that the punishment adjudged in his first conviction for violating a no-contact order was only a letter of reprimand. When the second court-martial was convened, it was only after his chain of command initiated NJP under Article 15, UCMJ, for violating the same order that was the basis for the letter of reprimand, just on different dates before the first court-martial convened. Given this circumstance, the applicant could not have imagined that when he turned down the Article 15, the second court-martial could possibly lead to loss of his reserve retirement and his nursing career. The harsh sentence imposed in the second trial is inexplicable. The Board can bring at least some of his suffering to an end by granting the clemency he now seeks and, based upon his record of service, arguably deserves.

In support of his request for clemency, the applicant provides a personal declaration and copies of military kudos, numerous certificates of achievement, civilian certifications, character letters, and other documents related to his request for upgrade.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force captain (O-3).

On 13 Feb 03, according to General Court-Martial Order (GCMO) Number 01, dated 16 May 03, the applicant was arraigned at Brooks City-Base, Texas (TX) on the following offenses at a court-martial convened by the 311th Human Systems Wing:

Charge I: Article 92 (Guilty)

Specification: Did, at or near San Antonio, TX, and Key Largo, Florida (FL), and Boca Raton, FL, on divers occasions, between on or about 1 May 99 and on or about 31 May 01, violate a lawful general regulation, to wit: paragraph 5.1.3. of the Air Force Instruction (AFI) 36-2909, [*Professional and Unprofessional Relationships*], dated 1 May 99, by wrongfully dating and engaging in sexual relations with United States Air Force enlisted member [Work...]. Finding Guilty, except the words "and engaging in sexual relations with."

Charge II: Article 134 (Guilty)

Specification 1: Did, at or near Key Largo, FL, and Boca Raton, FL, on divers occasions, between on or about 10 Nov 99 and on or about 18 Nov 99, wrongfully commit an indecent act with [Work...], by engaging in sexual activity with her in the presence of another enlisted member. Finding: Not Guilty.

Specification 2: Did, at or near San Antonio, TX, on divers occasions, between on or about 1 Nov 98 and on or about 30 Nov 99, knowingly fraternize with [Work...], an enlisted person, on terms of military equality, to wit: socializing off-duty with [Work...] during ski trips and at [Work...] home, in violation of the custom of the United States Air Force that officers shall not fraternize with enlisted persons on terms of military equality. Finding: Guilty.

Additional Charge: Article 92 (Guilty)

Specification: Did, at or near Key Largo, FL, and Boca Raton, FL, on divers occasions between on or about 10 Nov 99 and on or about 18 Nov 99, violate a lawful general regulation, to wit: paragraph 5.1.4. of the AFI 36-2909, dated 1 May 99, by wrongfully sharing living accommodations, to wit: a hotel room, with a United States Air Force enlisted member, [Work...]. Finding: Guilty.

Second Additional Charge: Article 92 (Guilty)

Specification: Having knowledge of a lawful order issued by [Wo...], to not have contact with [Work...], an order which it was his duty to obey, did, at or near San Antonio, TX, on divers occasions between on or about 1 Feb 02 and on or about 27 Aug 02, fail to obey the same by having contact with [Work...]. Finding: Guilty.

The applicant was sentenced to forfeiture of \$500.00 pay per month (for 12 months), and a reprimand.

On 22 Jan 04, according to GCMO Number 2, dated 23 Apr 04, the applicant was arraigned at Brooks City-Base, TX on the following offenses at a court-martial convened by Headquarters, Aeronautical Systems Center:

Charge I: Article 92 (Guilty)

Specification: Having knowledge of two lawful orders issued by [Wo...], dated 14 Dec 01 and 10 Sep 02, to wit: not to have any contact with [Work...] in any manner except in the presence of his defense counsel in preparation for legal proceedings, orders which it was his duty to obey, did at or near San Antonio, TX, at divers times between on or about 28 Aug 02, and on or about 13 Feb 03, fail to obey the same. Finding: Guilty.

Charge II: Article 128 (Not Guilty)

Specification: Did, at or near San Antonio, TX, on or about 10 May 03, unlawfully touch [Work...] by pushing her against a dining room chair, shoving her against a coffee table, and grabbing both of her arms and wrists and pushing her against a wall. Finding: Not Guilty.

Additional Charge: Article 134 (Withdrawn after arraignment)

Specification: Did, at or near Brooks City-Base, TX, between on or about 1 May 01 and 21 Feb 02, procure [Work...] to commit perjury by inducing her to take a lawful oath at an investigation conducted pursuant to Article 32 of the UCMJ held on or about 20 Feb 02 and 21 Feb 02 that she, the said [Work...], would testify truthfully and to testify willfully, corruptly, and contrary to that oath in substance that [applicant] and [Work...] had not been involved in an unprofessional relationship and that she, the said [Work...], went to FL with [Work...] and that she slept in the same bed with [Work...], which testimony was upon a material matter, and which [applicant] and [Work...] did not then believe to be true. Finding: Withdrawn after arraignment.

Applicant was sentenced to dismissal.

On 23 Apr 07, according to GCMO Number 16, the [applicant's] sentence to dismissal from the service promulgated in GCMO Number 2, dated 23 Apr 04, has been finally affirmed and on 23 Apr 07, the Secretary of the Air Force approved the sentence and ordered the dismissal to be executed. [Applicant] ceases to be a member of the United States Air Force at 2400 hours, 11 May 07.

On 11 May 07, the applicant received a dismissal. His narrative reason for separation is “Court-Martial” and he was credited with 16 years, 5 months, and 22 days of total active service, and 7 years, 4 months, 6 days total inactive service.

For more information, see the excerpt of the applicant’s record at Exhibit B and the advisories at Exhibits E and F.

POST-SERVICE INFORMATION

On 22 Sep 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 3 Nov 23 and provided an FBI report. According to the report, the applicant has had no arrests since discharge. The applicant provided a personal declaration and character statements with his original application.

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 22 Sep 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.

AIR FORCE EVALUATION

AF/JAJI recommends denying the application. The applicant was court-martialed twice for conduct centering on his sexual relationship with an enlisted member. As the application contains a request for clemency as well as allegations of injustice in the second court-martial, presented is the totality of background information for the Board's consideration, including information beyond the allegedly unjust second court-martial.

Between Mar 98 and May 01, the applicant engaged in a sexual relationship with an enlisted member of the Air Force [Work...] who was not in his chain of command. Furthermore, he allegedly committed indecent acts with [Work...] by having sexual relations with her in the presence of another enlisted member. Additionally, between Nov 98 and Nov 99, he fraternized with [Work...] during ski trips and at [Work...]'s home. On 14 Dec 01, the applicant's commander issued him a no-contact order prohibiting contact with [Work...]. However, for a seven-month period between Feb 02 and Aug 02, he violated the order numerous times. On 10 Sep 02, his commander issued a second no-contact order.

Charges were referred to a general court-martial. The applicant requested to resign in lieu of trial, and his commander initially recommended approval; however, the commander changed his recommendation upon learning of the applicant's continued misconduct despite charges having been referred to court-martial. The applicant pled guilty to disobeying his commander's no-contact order; he pled not guilty to committing fraternization, and not guilty to committing indecent acts with [Work...]. He was found guilty of two charges of violating AFI 36-2909 (dating and sharing living accommodations) and one charge of fraternization. He was found not guilty of indecent acts and sentenced to a reprimand.

On 12 May 03, three months after the first court-martial, the now-civilian [Work...] filed a police report alleging the applicant physically assaulted her. She also filed a report with the district attorney's office, and later provided sworn statements to the applicant's commander, and the base legal office. She alleged the applicant pushed her against a dining room chair; shoved her against a coffee table in the living room; grabbed her arms and wrists with sufficient force to cause visible bruises; and pushed her into the wall of the washroom, causing her to strike her head and left shoulder. The police department took photographs of her injuries. In a sworn statement, [Work...] further revealed previously unknown information regarding the applicant's misconduct prior to the first court-martial. She alleged the applicant repeatedly violated his commander's second no-contact order, dated 10 Sep 02. She stated she was living with the applicant in his home during the timeframe the second no-contact order was in effect. Although the applicant asked [Work...] to move out in Oct 02, he continued visiting [Work...] at her mother's home every night during the Feb 03 court-martial and told her she could move back in after the trial ended.

On 16 May 03, the applicant's commander issued the third no-contact order, ordering the applicant to not have contact with [Work...]. On 23 May 03, [Work...] recanted her sworn statements regarding the assault and minimized the applicant's violation of the no-contact order but did not refute that he had contacted her during the time the order was in place. On 28 May 03, the district attorney's office transferred jurisdiction of the case to the Air Force.

The wing commander offered NJP pursuant to Article 15, UCMJ and on 9 Jun 03, the applicant refused NJP and demanded trial by court-martial. At trial before a general court-martial composed of a military judge alone, the court found him not guilty of assault ([Work...] had recanted her sworn statements) and guilty of failure to obey a lawful order by violating his commander's no-contact orders on divers occasions. The government withdrew the charge of inducing [Work...] to commit perjury. On 22 Jan 04, the court sentenced the applicant to dismissal.

The applicant's request for a discharge upgrade pertains to records resulting from a court-martial conviction and sentence. Consequently, pursuant to 10 U.S.C. § 1552(f), the Air Force Board for Correction of Military Records (AFBCMR) is limited to two types of action: (1) correction of a record to reflect an action taken by review authorities under the UCMJ; or (2) action on the sentence of a court-martial for purposes of clemency. Hence, AFBCMR corrections can merely reflect actions regarding a court-martial that were already taken by review authorities under the UCMJ (such as convening authority clemency or appellate corrections); or the AFBCMR can take action only on the sentence, but only on the basis of clemency and not on the basis of alleged legal error or injustice. After careful review, we find insufficient evidence of error regarding the first type of authorized correction. Furthermore, we find insufficient evidence of injustice that would warrant clemency regarding the second type of authorized correction.

The applicant's contentions are similar to those he already made during the appeal phase of his second court-martial and the AFCCA ruled against those arguments on 31 Mar 06. He argued that his sentence to a dismissal was inappropriately severe, that he was entitled to a retirement, and that the government's charges were baseless because the orders violations of the second court-martial occurred during the same period as the orders violation of the first court-martial. The AFCCA found the dismissal was not inappropriately severe given that this was his second court-martial, and that he "repeatedly and deliberately ignored two direct written orders from his commander" despite the first court-martial having already revolved around the same subject of the first no-contact order. Regarding retirement, the court noted counsel on each side disagree on how the applicant's combination of active duty and reserve service would affect his retirement benefits. Regarding the allegedly baseless charges, the AFCCA found the government had a good-faith belief the applicant committed the crimes for which he was charged and was within its rights to pursue them. The fact that [Work...] did not testify at the court-martial, thereby rendering her prior allegations inadmissible, did not render the charge itself baseless as alleged by the applicant.

Although the court did not decide on clemency as it lacks that authority, its analysis and conclusion apply to a clemency analysis as well. Furthermore, the advisor disagrees with the applicant's contention that he could not have imagined that when he turned down the Article 15, the second court-martial could lead to a loss of his reserve retirement. He consulted with his defense counsel prior to refusing NJP and demanding trial by court-martial. He was aware of the possible outcomes, contrary to his present allegation that he was unaware of the consequences. Regarding his contention that he committed no new offense after the first court-martial, the factual underpinnings of the second court-martial are that he was violating the no-contact order with impunity and visiting [Work...] even during the criminal trial for violating the very same no-contact order. That he was initially successful in hiding his misconduct at the time of the first trial does not immunize him from prosecution later and is insufficient grounds for clemency.

Finally, regarding the applicant's contentions about his good military service, the advisor notes [Work...] was also referred to trial by court-martial because of her role in the orders violation and obstruction of justice during the investigation into the applicant's misconduct and was ultimately administratively discharged. The applicant's repeated misconduct necessitated three no-contact orders and eroded good order and discipline in the command as a whole and in [Work...] in particular. Based on the totality of the applicant's history, the advisor does not find grounds for clemency.

The complete advisory opinion is at Exhibit E.

ARPC/DPTT recommends denying the application. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice because the applicant did not apply to be appointed into the Air Reserve Component to be afforded the opportunity to be transferred to the Reserve Retired List.

A review of the applicant's military personnel record shows he would be eligible for reserve retirement and pay upon age 60 in accordance with Department of the Air Force Instruction (DAFI) 36-3203, *Service Retirements*, paragraph 3.1.2., "Reserve Retirement Eligibility. 10 USC § 12731 establishes that ANG or AFR members must have at least 20 years of creditable years to qualify for a reserve retirement. (T-0) Members serving on AD who have completed 20 years of creditable years through a combination of AD and reserve service also qualify for a reserve retirement even though the member may not have enough total active military service to qualify for an AD retirement. Members on AD desiring a reserve retirement must resign (officers) or separate (enlisted) from the AC and request appointment to (officers) or entry into (enlisted) the ARC before a reserve retirement may be requested and approved. (T-1) Members must apply for reserve retired pay if the members have attained the eligibility age at which the member is eligible for and qualifies for reserve retired pay and have performed at least 20 creditable years. (T-1) A creditable year is defined as earning 50 points within an individual's established retention and retirement year per Air Force Manual (AFMAN) 36-2136, *Reserve Personnel Participation*, paragraph 2.3.2."

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 8 Nov 23 for comment (Exhibit G), and the applicant replied on 7 Dec 23. In his response, counsel contended the ARPC advisory opinion states the applicant qualifies for reserve retirement based on 20 years of creditable service, if otherwise qualified. This is the first official Air Force recognition of this fact. Neither advisory opinion engages in any attempt to fairly balance the quality of the applicant's service against the actual outcome of the second court-martial, i.e., being convicted of committing a single offense of violating a no-contact order. The applicant stands by the arguments and evidence presented in his application seeking clemency. Neither the second trial court judge or the AFCCA recognized that he would either qualify for reserve retirement if a dismissal had not been adjudged and approved. The ARPC recommendation for denial is based on the applicant's not having applied for retirement, but neglects to note an application would have been denied as a matter of law because of the dismissal.

To the extent the legal opinion equates seeking clemency with the sentence appropriateness standard used by the AFCCA, it should be ignored. Military appellate courts have recognized the important distinction between the sentence appropriateness standard and the clemency standard. Normally, these courts address the issue in terms of the power a convening authority possesses to

grant clemency. In this instance, the Board's power should be seen as commensurate with a convening authority's power.

The Board possesses tremendous power and broad discretion when considering clemency. When taking cases to the appellate courts, seeking relief at that level, the government routinely responds with an argument from *United States v. Pericas*. This prosecution argument likewise recognizes the AFBCMR's unique role and power as a convening authority in the Air Force. It also fairly comprehends the balancing of interests that is central to the clemency process. Counsel provides additional examples of clemency cases in support. Counsel is not arguing this Board can set aside findings. Their focus is solely on the power to grant clemency, and counsel believes they have provided adequate justification for granting relief.

The relief the applicant seeks is for the Board to set aside the dismissal so he can qualify to receive the reserve retirement he earned. According to ARPC opinion, assuming the absence of a dismissal no longer disqualifies him from receiving such a retirement, he asked the Board to take whatever action is needed to place the applicant in the position of resigning and applying for reserve retirement. They assume the Board has the power to take such action, whatever form it takes.

The applicant's complete response is at Exhibit H.

FINDINGS AND CONCLUSION

1. The application was timely filed. Given the requirement for passage of time, all clemency requests are technically untimely. However, it would be illogical to deny a clemency 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 10 U.S.C. § 1552(b).

2. The applicant exhausted all available non-judicial relief before applying to the Board.

3. After reviewing all Exhibits, to include the applicant's rebuttal, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationales and recommendations of AF/JAJI and ARPC/DPTT and finds a preponderance of the evidence does not substantiate the applicant's contentions. It appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the general court-martial's discretion. Nor was the discharge unduly harsh or disproportionate to the offenses committed. The applicant was issued three separate no-contact orders by his commander, yet his misconduct continued, even during the preparatory phase of his first court-martial. The applicant's request for resignation in lieu of trial was considered, and his commander initially recommended approval; however, upon learning of the applicant's continued misconduct, the commander changed his recommendation. While the applicant had sufficient service time for reserve retirement eligibility, his actions, which resulted in his dismissal, rendered him ineligible to apply for reserve retirement. In the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the evidence presented, 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-2023-01825 in Executive Session on 20 Mar 24:

Work-Product

, Panel Chair

Work-Product

Panel Member

Work-Product

Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 25 May 23.

Exhibit B: Documentary Evidence, including relevant excerpts from official records.

Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Clemency Guidance), dated 22 Sep 23.

Exhibit D: FBI Report, dated, 3 Nov 23.

Exhibit E: Advisory Opinion, AF/JAJI, dated 11 Oct 23.

Exhibit F: Advisory Opinion, ARPC/DPTT, w/atch, dated 2 Nov 23.

Exhibit G: Notification of Advisory, SAF/MRBC to Counsel, dated 8 Nov 23.

Exhibit H: Counsel's Response, dated 7 Dec 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.

4/2/2024

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