



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-02495

Work-Product

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His uncharacterized Entry Level Separation (ELS) be upgraded to honorable or general (under honorable conditions).

APPLICANT'S CONTENTIONS

He joined active duty military during an active time of war, specifically Operation IRAQI FREEDOM and Operation ENDURING FREEDOM. In requesting a discharge upgrade he is drawing upon legal case precedent to support his position. His separation resulted from government downsizing, beyond his control, despite honorable service. With the Supreme Court's decision in *Harmon v. Brucker*, it has been settled that the character of discharge must be determined solely on the basis of the member's performance during the current enlistment. Also see *Murray v. United States*, 154 ct. cl. 185. He requested upgrade of his discharge status to allow eligibility for federal benefits.

In support of his request for clemency, the applicant provides a character reference.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman basic (E-1).

On 15 Oct 07, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of Air Force Instruction (AFI) 36-3208, *Administrative Separation of Airmen*, paragraph 5.22.. The specific reasons for the action were:

a. [The applicant], who knew or should have known of his duties at or near Work-Product Air Force Base (AFB), Texas (TX), on or about 23 Sep 07, was derelict in the performance of those duties in that he failed to refrain from attempting to leave the limits of Work-Product AFB, TX while in Phase I, as it was his duty to do. For this misconduct, he received a Letter of Counseling (LOC) on 27 Sep 07.

b. [The applicant] did, at or near Work-Product AFB, TX, on or about 24 Sep 07, violate a lawful general instruction, to wit: AFI 36-2618, *The Enlisted Force Structure*, paragraph 3.1.3., by failing to exhibit professional behavior, military bearing, respect for authority, the highest standards of dress and appearance, and exemplary standards of on- and off-duty performance by

AFBCMR Docket Number BC-2023-02495

Work-Product

Controlled by: SAF/MRB

Work-Product

Limited Dissemination Control: N/A

POC: SAF.MRBC.Workflow@us.af.mil

slouching in a chair in the break room, his foot occupying another, while talking on the phone. For this misconduct, he received an LOC on 24 Sep 07.

c. [The applicant], who knew or should have known of his duties, at or near [Work-Product] AFB, TX, on or about 10 Sep 07, was derelict in the performance of those duties in that he failed to refrain from sleeping in class, as it was his duty to do. For this misconduct, he received a Letter of Reprimand (LOR) on 10 Sep 07.

d. [The applicant] did, at or near [Work-Product] AFB, TX, on or about 6 Sep 07, without authority, failed to go at the time prescribed to his appointed place of duty, to wit: Health and Wellness check. For this misconduct, he received an LOC on 6 Sep 07.

e. [The applicant], who knew or should have known of his duties, at or near [Work-Product] AFB, TX, on or about 27 Aug 07, was derelict in the performance of those duties in that he failed to refrain from sleeping in class, as it was his duty to do. For this misconduct, he received an LOC on 28 Aug 07.

On 17 Oct 07, the Staff Judge Advocate found the discharge action legally sufficient.

On 19 Oct 07, the discharge authority directed the applicant be discharged under the provisions of AFI 36-3208, paragraph 5.22., with an ELS.

On 22 Oct 07, the applicant received an ELS with an Uncharacterized character of service. His narrative reason for separation is "Entry Level Performance and Conduct" and he was credited with five months and eight days of total active service.

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

POST-SERVICE INFORMATION

On 7 Nov 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 25 Apr 24 and provided an FBI report. According to the report, the applicant has had no arrests since discharge. The applicant also provided additional character references.

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 7 Nov 23, Board staff provided the applicant a copy of the clemency guidance (Exhibit C).

Department of Defense Instruction (DoDI) 1332.14, *Enlisted Administrative Separations*:

Enclosure 2 – *Definitions*.

E2.1.4. *Entry Level Status*. Upon enlistment, a member qualifies for entry-level status during (1) the first 180 days of continuous active military service or (2) the first 180 days of continuous active service after a service break of more than 92 days of active service. A member of a Reserve component who is not on active duty or who is serving under a call or order to active duty for 180 days or less begins entry level status upon enlistment in a Reserve component. Entry level status for such a member of a Reserve component terminates as follows: (a) 180 days after beginning training if the member is ordered to active duty for training for one continuous period of 180 days or more; or (b) 90 days after the beginning of the second period of active duty training if the member is ordered to active duty for training under a program that splits the training into two or more separate periods of active duty. For the purposes of characterization of service or description of separation, the member's status is determined by the date of notification as to the initiation of separation proceedings.

Enclosure 3, Attachment 2 – *Guidelines on Separation and Characterization*.

E3.A2.1.3.3. *Uncharacterized Separation*

E3.A2.1.3.3.1. *Entry-Level Separation*

E3.A2.1.3.3.1.1. A separation shall be described as an Entry-Level Separation if separation processing is initiated while a member is in entry-level status, except in the following circumstances:

E3.A2.1.3.3.1.1.1. When characterization Under Other than Honorable Conditions is authorized under the reason for separation (Part 1) and is warranted by the circumstances of the case; or

E3.A2.1.3.3.1.1.2. The Secretary concerned, on a case-by-case basis, determines that characterization of service as Honorable is clearly warranted by the presence of unusual military duty.

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.

3.16. *Separation without Service Characterization:*

3.16.1. *Entry Level Separation (ELS).* Members are in entry level status during the first 180 days of continuous active military service or the first 180 days of continuous active military service following a break of more than 92 days of active service. ARC Only: For members of the ARC who have not completed 180 days of continuous active military service and are not on active duty, entry-level status begins upon enlistment in the ARC (including a period of assignment to a delayed entry program). For example, a member may be at fault when offered BMT dates and refuses them all and a member may not be at fault when no seats are available for the member to attend. Entry-level status ends 180 days after beginning a period of initial active duty training. Thus, a member may be in entry-level status for more than 180 days after enlistment. The date of notification is used to determine the member's status. If the member is in entry level status when initiating the separation action, it should be described as an entry level separation unless:

3.16.1.2. If the SecAF determines, that characterization as honorable is clearly warranted by unusual circumstances of personal conduct and performance of military duty, the separation authority forwards a recommendation for an honorable characterization to AFPC/DP2SSR, 550 C Street West, Suite 11, JBSA-Randolph AFB TX 78150-4713. For ARC personnel send to HQ ARPC/DPTTS, Buckley AFB, CO 80011-9502, via applicable electronic system for review and further processing.

3.16.1.3. Use an honorable characterization if the reason for separation is:

3.16.1.3.1. A change in military status in accordance with Section 4A.

3.16.1.3.2. For the convenience of the government in accordance with

Section 13D.

3.16.1.3.3. For disability in accordance with AFI 36-3212; or

3.16.1.3.4. Directed by the SecAF in accordance with paragraph 3.2.

AIR FORCE EVALUATION

AFPC/DP2SSR recommends denying the application. Based on review of the applicant's request, there is no error or injustice in the discharge processing.

Airmen are in entry level status during the first 180 days of continuous active military service. The DoD determined if a member served less than 180 days continuous active service, it would be unfair to the member and the service to characterize their limited service. To grant relief would be contrary to the criteria established by DoDI 1332.14.

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 for comment (Exhibit F), and the applicant replied. In his response, the applicant provided an undated statement of record from the executive director of HATSOFF. In his statement, the executive director, on behalf of the applicant, acknowledged the reference to DoDI 1332.14 and the rationale for discharging service members with less than 180 days of continuous active service with an uncharacterized discharge; however, they believe the applicant's situation merits special consideration under DAFI 36-3211, section 3.16.1.2. as his conduct and performance during his service fall within the "unusual circumstances" thereby justifying an honorable discharge. Additionally, the applicant's discharge circumstances could potentially align with criteria noted in section 3.16.1.3..

The principle of fairness, fundamental to military justice, should guide the review of his application. His commitment and service, though short in duration, deserve an equitable assessment that truly reflects his individual circumstances, conduct, and contributions. Also to be considered is the long-term impact of an uncharacterized discharge on a veteran's life. It can significantly affect a veteran's ability to reintegrate into civilian life, access veteran's benefits, and find meaningful employment.

The applicant's complete response is at Exhibit G.

FINDINGS AND CONCLUSION

1. The application was timely filed. Given the requirement for passage of time, all discharge upgrade requests under fundamental fairness or clemency are technically untimely. However, it would be illogical to deny a discharge upgrade 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 Title 10, United States Code § 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 rationale and recommendation of AFPC/DP2SSR and finds a preponderance of the evidence does not substantiate the applicant's contentions. The applicant did not perform more than 180 days continuous active military service and was in entry level status. The type of separation and characterization of service was in accordance with DoDI 1332.14.

Additionally, it appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. Nor was the discharge unduly harsh or disproportionate to the offenses committed. Further, no evidence of unusual circumstances was provided by the applicant that would support the requested special consideration under DAFI 36-3211. 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-2023-02495 in Executive Session on 22 Aug 24:

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

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

- Exhibit A: Application, DD Form 149, w/atch, dated 2 Aug 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 7 Nov 23.
- Exhibit D: Applicant's Response, w/atchs, dated 25 Apr 24.
- Exhibit E: Advisory Opinion, AFPC/DP2SSR, dated 23 May 22.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, undated.
- Exhibit G: Applicant's Response, w/atchs, undated.

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.

9/6/2024

Work-Product

Work-Product

Board Operations Manager, AFBCMR
Signed by: USAF

AFBCMR Docket Number BC-2023-02495