

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03349

XXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His nonjudicial punishment (NJP) be set aside and his grade of E-6 be restored.
2. His enlisted performance report for the period 1 Dec 21 thru 31 Jan 23, be removed from his record.

APPLICANT'S CONTENTIONS

The NJP was erroneous as a subsequent discharge board determined he did not violate one of the two charges for which he had received NJP. He should not have been punished so extremely. Due to the Article 15 having nonfactual information there should be forgiveness. The board stated the Article 120 did not happen. He did not disobey a direct order; he did not hear about it until he received the Article 15. This is a perfect example of African Americans getting punished more severely, especially when they did not commit the infractions.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 20 Jul 22, according to AF Form 3070B, *Record of Nonjudicial Punishment Proceedings (TSgt thru CMSgt)*, the applicant was reduced to the grade of SSgt (E-5) with a new date of rank of 20 Jul 22. The reduction in grade was due to violation of Article 92, sexually harassing six airmen and Article 120, touching the groin of an airman with his buttocks with an intent to gratify his sexual desire, without her consent.

On 1 Nov 22, according to an excerpt of the findings of the administrative discharge board, the applicant did not violate Article 120, UCMJ by touching the groin of an airmen with his buttocks with the intent to gratify his sexual desires without her consent.

On 19 Sep 23, according to a letter from the applicant's Area Defense Counsel, the applicant did not commit an Article 120 offense and any comments claiming he committed a sex offense should be removed from his EPR, and that portion of his Article 15 should be set aside.

On 7 Nov 23, according to the applicant's DAF Form 910, *Enlisted Performance Report (AB/Spc1 Thru TSgt)* for the period 1 Dec 21 thru 31 Jan 23, and memorandum dated 30 Oct 23, his Performance Report was referred to him in accordance with AFI 36-2406, *Officer and Enlisted Evaluations Systems*, paragraph 1.10 because it contained negative comments(s)/derogatory information. Specifically, the following comment: "Member accepted

Article 15 from the CC in violation of UCMJ Article 92 - Failure to obey” causes this report to be referred.

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

AIR FORCE EVALUATION

AF/JAJI recommends denying the application. There is no error or injustice in the 20 Jul 22 NJP. There is abundant evidence the applicant sexually harassed multiple female airmen in violation of Article 92, UCMJ. An investigation by the Air Force Office of Special Investigations revealed multiple instances of sexually harassing conduct, such as “dry humping” an office chair while moaning in front of a female coworker, holding a phallic object in front of a female coworker, and telling her to suck it, making sexual jokes in front of coworkers, etc.

Regarding the Article 120, UCMJ charge, even if the discharge board found the applicant did not commit the misconduct, such a finding does not impact the legal sufficiency of the commander’s determination at NJP. The applicant’s NJP was conducted pursuant to Article 15, UCMJ, and his administrative discharge hearing was conducted pursuant to DAFI 36-3208, *Administrative Separation of Airmen*. Each process is legally independent of the other, and the latter is not a review of an NJP that would change an NJP determination. Indeed, the applicant appealed his NJP, and appellate review found no basis to set aside the findings or punishment. Furthermore, an administrative discharge hearing follows different procedures and may have considered different evidence than the NJP proceeding. AF/JAJI is not aware of any rule stating a discharge board’s determination overrides a commander’s NJP. 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 C.

APPLICANT’S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 18 Mar 24 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 to warrant setting aside the NJP. The Board concurs with the rationale and recommendation of AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant’s contentions. In view of the foregoing, the Board finds no basis to recommend removing the contested EPR or to restore his grade to E-6. Accordingly, the Board recommends against correcting the applicant’s records.
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-2023-03349 in Executive Session on 13 Aug 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 22 Oct 23.
Exhibit B: Relevant excerpts from official records.
Exhibit C: Advisory Opinion, AF/JAJI, dated 8 Mar 24.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 18 Mar 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