

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2023-04014

XXXXXXXXXXXX

**COUNSEL:** XXXXXXXXXXX

**HEARING REQUESTED:** YES

### APPLICANT'S REQUEST

His under other than honorable conditions (UOTHC) discharge be upgraded to honorable.

### APPLICANT'S CONTENTIONS

Per counsel, the applicant enlisted in the Air Force where he served in support of Operation DESERT CALM as a Fire Protection Apprentice. He served a total of 3 years and 23 days before his discharge on 13 Oct 95. On 28 Aug 95, the applicant was charged with two specifications of obtaining services under false pretenses under Article 134 of the Uniform Code of Military Justice (UCMJ). The charges alleged between 25 Sep 94 and 22 Feb 95, the applicant used the phone number of his then suitemate to make personal phone calls totaling \$678.00. At the time, the applicant did not have any prior record of disciplinary actions against him. The case was referred to trial by special court-martial on 29 Aug 95. On 21 Sep 95, the applicant requested a discharge in lieu of trial by court-martial. The applicant paid restitution to the phone company and to his fellow airman for having to put a call-block on his phone. On 2 Oct 95, the wing commander recommended the applicant's request for discharge in lieu of trial by court-martial be accepted and the applicant be discharged UOTHC. The discharge authority approved the recommendation on 5 Oct 95. The applicant was officially discharged on 6 Oct 95<sup>1</sup> with a service characterization of UOTHC, the narrative reason for separation was "triable by court-martial, and his separation code was KFS [in lieu of trial by court-martial].

In support of the applicant's request, counsel provided excerpts from Title 10, United States Code § 1552 (10 USC § 1552), Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, and Under Secretary of Defense for Personnel and Readiness (USD P&R) memorandum, Subject: Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determination, dated 25 Jul 18 (Wilkie Memo).

Specifically, the Wilkie Memo lists several specific factors that should be considered in determining whether relief is warranted based on clemency. These factors include: 1) aggravating and mitigating facts; 2) positive or negative post-conviction conduct; 3) severity of misconduct; 4) length of time since misconduct; 5) acceptance of responsibility; 6) the degree to which the requested relief is necessary for the applicant; 7) evidence of rehabilitation; and 8) character references or letters of recommendation. According to counsel, in the applicant's case, ample evidence supporting these factors indicate relief is in the interest of clemency.

First, a mitigating fact is other than his off-duty conduct, which unfortunately led to his discharge, the applicant's performance evaluations were very good. Counsel provided excerpts from the applicant's performance evaluations in support. Second, the applicant's post-conviction conduct has been exemplary. Since his discharge, the applicant has completed his college degree and has a successful career as a Department of Defense civilian employee. Following his discharge, the applicant was able to return to his unit as a civilian employee and currently serves as a Fire

---

<sup>1</sup> The applicant was discharged from the Air Force on 13 Oct 95.

Department captain. Third, the severity of his misconduct, the length of time since the applicant's misconduct, and the applicant's acceptance of responsibility indicate relief is in the interest of clemency. The severity of the applicant's misconduct, which is commonly referred to as "theft of services," was not as severe as many of the forms of misconduct committed by service members who are ultimately retained by the military or are given a positive characterization of service following discharge. Notably, there was no violence or illegal substance abuse involved in the misconduct, and the victim was quickly made whole for his loss.

Further, the applicant's misconduct and discharge from the Air Force occurred in 1995, approximately 27 years ago. Moreover, he has accepted responsibility for his actions. At the time of the investigation, the applicant admitted to his misconduct, and paid restitution to the victim in the case. As stated in the Wilkie Memo, it is consistent with military custom to "favor second chances in situations in which individuals have paid for their misdeeds."

In support of his request for a discharge upgrade, the applicant provides a personal statement, copies of military performance evaluations, a Federal Bureau of Investigation (FBI) Identity History Summary Check, and multiple character references.

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 28 Aug 95, according to DD Form 458, *Charge Sheet*, the applicant was charged with:

- Violation of Article 134, UCMJ:

- Specification 1: In that [the applicant], United States Air Force, XX Civil Engineering Squadron (XX CES), Vandenberg Air Force Base (AFB), California (CA), did, at or near Vandenberg AFB, CA, on divers occasions, between on or about 25 Sep 94 and on or about 12 Oct 94, with intent to defraud, falsely pretend to Microwave Communications Incorporated (MCI) he was authorized to use telephone services of [another airman], then knowing the pretenses were false, and by means thereof did wrongfully obtain from [the other airman] and MCI telephone services, of a total value of about \$23.00, to wit: long distance telephone services.

- Specification 2: In that [the applicant], United States Air Force, XX CES, Vandenberg AFB, CA, did, at or near Vandenberg AFB, CA, on divers occasions, between on or about 22 Nov 94 and 22 Feb 95, with intent to defraud, falsely pretend to American Telephone and Telegraph (AT&T) he was authorized to use telephone services of [another airman], then knowing the pretenses were false, and by means thereof did wrongfully obtain from [the other airman] and AT&T telephone services, of a total value of about \$655.00, to wit: long distance telephone services.

The case was referred to trial by special court-martial on 29 Aug 95.

On 21 Sep 95, according to an applicant memorandum, Subject: Request for Discharge in Lieu of Trial by Court-Martial, the applicant requested he be discharged from the Air Force in accordance with AFI 36-3208, *Administrative Separation of Airmen*, Chapter 4, in lieu of trial by court-martial.

On 28 Sep 96, according to a XX CES/CC memorandum, Subject: Response to Request for Discharge under AFI 36-3208, Chapter 4, *United States v. [applicant]*, the applicant's commander recommended the applicant's request for discharge in lieu of trial by court-martial be approved.

On 2 Oct 95, the Staff Judge Advocate found the discharge action legally sufficient, and on this same date, according to a XX SW/CC memorandum, Subject: Request for Discharge under AFI 36-3208, Chapter 4, *United States v. [applicant]*, the applicant's wing commander recommended the applicant's request for discharge in lieu of trial by court-martial be accepted and he be discharged UOTHC.

On 5 Oct 95, according to a XX AF/CC memorandum, Subject: Request for Discharge in Lieu of Trial by Court-Martial – [applicant], the applicant's request for discharge in lieu of trial by court-martial under AFI 36-3208, Chapter 4, was approved, with the applicant's discharge characterized as UOTHC, and the charges referred against the applicant on 29 Aug 95 withdrawn.

On 13 Oct 95, the applicant received an UOTHC discharge. His narrative reason for separation is "Triable by Court-Martial" and his separation code is KFS. The applicant was credited with 3 years and 23 days of total active service.

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

### **POST-SERVICE INFORMATION**

On 5 Apr 24, the Board sent the applicant a request for post-service information and advised the applicant he was required to provide an 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 23 Apr 24 and provided an FBI report. According to the report, the applicant has had no arrests since discharge.

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 5 Apr 24, the 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.

## **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 USC § 1552(b).
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 the victim of an injustice. While the Board finds no error in the original discharge process, the Board recommends relief based on clemency. In accordance with paragraph 7 of the Wilkie Memo, the Board considered the length of time since discharge, recent character references, post-service job history, and the lack of any civil infractions since discharge. Therefore, the Board recommends the applicant's records be corrected as indicated below.
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 pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show on 13 Oct 95, he was discharged with service characterized as honorable, and a separation code and corresponding narrative reason for separation of JFF (Secretarial Authority).

## **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-2023-04014 in Executive Session on 14 Jan 25:

- , Panel Chair
- , Panel Member
- , Panel Member

All members voted to correct the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 23 Apr 24.

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

Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Clemency Guidance), dated 5 Apr 24.

Exhibit D: FBI Report, dated, 10 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.

X

---

Board Operations Manager, AFBCMR