

## **RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2023-01609

XXXXXXXXXXXXXX

**COUNSEL:** XXXXXXXX

**HEARING REQUESTED:** NO

### **APPLICANT'S REQUEST**

His official military personnel record be amended to:

- a. Upgrade his general (under honorable conditions) discharge to an honorable discharge.
- b. Change his Narrative Reason for Separation from Misconduct to Secretarial Authority.
- c. Change his Reentry Code from 2B to R-1.

### **APPLICANT'S CONTENTIONS**

Per counsel, the applicant served honorably and without serious incident for the vast majority of his Air Force career. On 20 Nov 99, he received nonjudicial punishment (NJP) for violating Article 86, Uniform Code of Military Justice (UCMJ), for failure to report to a prescribed appointment. As a result, he received a reduction in grade to airman (E-2), a punishment that was suspended and remitted.

On or about 16 Mar 04, the applicant was arrested by the Midwest City Police Department of Midwest City, Oklahoma (OK), for having committed the offense of discharging a firearm into a building and aggravated assault. He took full responsibility for his actions that day and his charges were amended and downgraded to aiding in the use of a weapon to commit a felony, for which he pled guilty on 5 Feb 05. He received a five-year deferred sentence and was ordered to pay court costs and 100 hours of community service.

On 24 May 04, the Air Force completed a Report of Investigation into the applicant and the matter of communicating a threat. The investigation states the applicant was arrested for aggravated assault and discharge of a firearm. The Report of Investigation did not contain any reference to the amended reduction of charges for the applicant.

The applicant received a Notification Memorandum of a Recommendation for Separation on or about 31 May 05, from his commander, due to his guilty plea. On or about 6 Oct 05, he was notified of an administrative separation board hearing regarding his above-referenced guilty plea. On or about 19 Oct 05, an administrative discharge board was conducted to determine whether to discharge the applicant due to a commission of a serious offense; other offenses under provisions of Air Force Instruction (AFI) 36-3208, *Administrative Separation of Airmen*, Chapter 5, Section 5H, paragraph 5.52.. The administrative discharge board found the applicant committed a felony and recommended he receive a general (under honorable conditions) discharge with one-year probation; however, his commander denied the board's recommendation.

In support of his application, counsel's argument included information regarding Air Force Board for Correction of Military Records (AFBCMR) jurisdiction, timeliness, and legal standard. Counsel contended the applicant's command made errors in fact and discretion regarding his discharge from the Air Force. The applicant was open and honest about his actions on the night he was arrested; however, his command unduly considered charges he was not tried for, along with the charges he was convicted of when determining his discharge. The sole reason for his discharge was the civilian allegations against him for aggravated assault and discharge of a

firearm. These charges were later reduced and amended to aiding in the use of a weapon to commit a felony. The applicant pled guilty to his reduced and amended charges on 18 Feb 05, yet at his administrative discharge board, the charges of discharging a firearm into a dwelling and aggravated assault were considered as they were the arresting charges. The board was held on 19 Oct 05, seven months after the civilian charges were reduced and amended. Although the administrative discharge board did reference the reduced charge of aiding in the use of a weapon to commit a felony, the consideration of charges for which he was not tried is overtly prejudicial. The applicant received a deferred sentence and was not facing any time in prison, yet his command did not consider the leniency even the civilian jurisdiction provided to him. His command held him accountable for unfounded civilian charges.

In his response to a Letter of Reprimand (LOR), dated 13 May 05, where it was erroneously alleged the applicant violated Article 134 of the UCMJ discharging a firearm under such circumstances as to endanger human life, the applicant clarified he was only convicted of aiding in the use of a weapon to commit a felony. Further, he explained not only did he not discharge the firearm, but another person also admitted to doing so. The applicant only pled guilty to the lesser amended charge because he was assured by his attorney at the time it would not affect his military career.

The applicant has been victimized and prejudiced by his general (under honorable conditions) discharge from the Air Force. He has been unjustly labeled as an airman with misconduct issues that rendered him unfit for continued service in the Air Force, all predicated on a mischaracterization of his civil offense. Despite serving honorably for the vast majority of his Air Force career, he has been stigmatized and harmed by his general (under honorable conditions) discharge, which various courts have recognized. "Since the vast majority of discharges from the armed forces are honorable, the issuance of any other type of discharge stigmatized the ex-serviceman. It robs him of his good name. It injures his economic and social potential as a member of the general community." *Sofranoff v. United States*, 165 Ct. Cl. 470 (Ct. Cl. 1964). "There can be no doubt that a military discharge on other than honorable grounds is punitive in nature, since it stigmatizes the serviceman's reputation, impedes his ability to gain employment and is in life, if not in law, prima facie evidence against the serviceman's character, patriotism and loyalty." *Stapp v. Resor*, 314 F. Supp 475, 478 (U.S.D.N.Y. 1970). The unambiguous language of these decisions demonstrates the mentality of how individuals view an other than honorable discharge outside the military.

The applicant's behavior and actions on the night in question are emblematic of an airman suffering from a momentary lapse in judgment and being in the wrong place at the wrong time. Counsel provided an accounting of awards and recognitions received by the applicant, as well as reference to his enlisted performance reports, in support.

Since being discharged from the Air Force, the applicant has excelled in his civilian life, receiving college degrees, and is currently employed as a Department of Defense Army civilian IT specialist. In May 10, the State of Oklahoma expunged the applicant's criminal record, effectively erasing the same conviction that led to the applicant's separation. If the civilian authority which adjudicated the underlying offense sees no meritorious reason to maintain the records and conviction of the applicant, then the Air Force cannot either and must upgrade his discharge status. As seen through his letters of support, he has proven he led a successful, positive, and exemplary life before and since his discharge. The applicant's chain of command made a factual and discretionary error by giving him an unduly harsh characterization of service based on mischaracterized charges. Furthermore, he has demonstrated his ability to drive through adversity which he learned in the Air Force and has persevered to contribute positively to his community. He has demonstrated rehabilitation and continues to bring value to the country as a model citizen.

In support of his request for clemency, the applicant provides copies of civilian arrest report, court proceedings/plea agreement, and order of expungement; Air Force Office of Special Investigation (AFOSI) Report of Investigation; excerpts from the applicant's military human resources record; excerpt from Administrative Discharge Board Hearing Record of Proceedings; Bachelor of Science diploma; Associates of Applied Science diplomas; security clearance eligibility email; and character references.

The applicant's complete submission is at Exhibit A.

## **STATEMENT OF FACTS**

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

On 16 Mar 04, the applicant was arrested by the Midwest City Police Department, Midwest City, OK for aggravated assault and discharge of a firearm.

According to *AFOSI Report of Investigation*, dated 24 May 04, the applicant was the subject of an investigation into communication of a threat, with the period of report 17 Mar 04 – 19 Mar 04.

On 18 Feb 05, according to District Court of Oklahoma County, State of Oklahoma, Plea of Guilty and Summary of Facts, the applicant pled guilty, under a plea agreement, to the amended charge of aiding and abetting in the use of a weapon to commit a felony. He received a five-year deferred sentence, 100 hours community service, and ordered to pay court costs.

On 13 May 05, the applicant's commander issued him an LOR, provided by the applicant, citing his 16 Mar 04 arrest for aggravated assault and discharge of a firearm, the 23 Mar 04 felony count of discharging a firearm into a dwelling charged by the Oklahoma County District Attorney's Office, and his Feb 05 plea of guilty to aiding and abetting use of a weapon to commit a felony. The applicant provided an undated response to the LOR.

On 19 Oct 05, according to Administrative Discharge Board Record of Proceedings, Findings and Recommendation, the board found the applicant did aid and abet the use of a weapon to commit a felony, and a punitive discharge would be authorized for the same or a closely related offense under the Manual for Courts-Martial. The board recommended the applicant be discharged from the Air Force with service characterized as general (under honorable conditions) and recommended the discharge be suspended for a period of Probation and Rehabilitation pursuant to AFI 36-3208, Chapter 7.

In an undated memorandum, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFI 36-3208, paragraph 5.52.3. The commander did not recommend Probation and Rehabilitation according to Chapter 7. The specific reasons for the action were:

a. On or about 16 Mar 04, [the applicant] was arrested for aggravated assault and discharge of a firearm. After further investigation, he was charged with a felony count of discharging a firearm into a dwelling.

b. On or about 5 Feb 05, [the applicant] pled guilty in a civilian court to aiding and abetting use of a weapon to commit a felony. He received a five-year deferred sentence, ordered to pay court costs, and 100 hours of community service. This is documented in an LOR, dated 13 May 05.

On 2 Nov 05, the Staff Judge Advocate found the discharge action legally sufficient.

On 7 Nov 05, the discharge authority directed the applicant be discharged under the provisions of AFI 36-3208, paragraph 5.52.3., Commission of a Serious Offense: Other Serious Offenses, with a general (under honorable conditions) service characterization. Probation and rehabilitation were considered and denied.

On 14 Nov 05, the applicant received a general (under honorable conditions) discharge. His Narrative Reason for Separation is "Misconduct", his Separation Code is "GKQ" [Misconduct (Serious Offense)], his Reentry Code is "2B" [Separated with a general or under other than honorable conditions discharge], and he was credited with 8 years, 8 months, and 28 days of total active service.

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

## **POST-SERVICE INFORMATION**

On 13 Jul 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 Aug 23 and provided an FBI report. According to the report, the applicant has had no arrests since discharge. The applicant also provided character statements, certificates, and other documentation in support of his request 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 13 Jul 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.

## **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, the Board concludes the applicant is not the victim of an error or injustice. 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. The administrative discharge board considered all facts surrounding the applicant's arrest, to include his plea agreement in return for an amended charge. While the civilian court chose to defer sentencing for a period of five years, with the deferred sentence eventually expiring and subsequently expunged upon request by the applicant, it does not negate the facts. The applicant admittedly engaged in the serious misconduct which influenced the character of his service. In the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the evidence presented and the serious nature of the applicant's admitted misconduct, 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-2023-01609 in Executive Session on 18 Jun 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 14 Dec 22.

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

Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 13 Jul 23.

Exhibit D: FBI Report, dated, 25 Aug 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.

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Board Operations Manager, AFBCMR