

## RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-02625

XXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

### APPLICANT'S REQUEST

His military personnel record be amended to:

a. Upgrade his general (under honorable conditions) discharge to an honorable or medical discharge.

b. Reverse his \$20,000.00 accrued debt. (**applicant notified of his failure to exhaust lower administrative remedies**).

### APPLICANT'S CONTENTIONS

His initial agreement for separation was a medical discharge with his medical squadron on base. The doctor at the time suggested this is probably the best course of action considering the underlying medical issues. Unbeknownst to him, he was never out-processed properly. So not only was he never out-processed, but he was also penalized and accrued over \$20,000.00 in debt which created a financial hardship on his family. He is looking to be reinstated to a medical discharge or, at the very least, an honorable discharge and to have the debt reversed.

In support of his request for clemency, the applicant provides excerpts from his military medical records, a copy of the HQ USAF/RE congressional response, 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 Reserve (AFR) senior airman (E-4).

According to the Point Credit Accounting and Reporting System (PCARS) report, the applicant last performed duty for pay/points for one inactive duty training period the morning of 1 Jun 13.

On 6 Sep 13, according to AF Form 469, *Duty Limiting Condition Report*, provided by the applicant, he had duty and mobility restrictions and received a code 31 [illness or injury will be resolved within 31-365 days], with an expiration date of 6 Sep 14. On that same date, according to AF Form 422, *Notification of Air Force Member's Qualification Status*, provided by the applicant, he had a potentially disqualifying condition in accordance with Air Force Instruction (AFI) 48-123, *Medical Examinations and Standards*, notated on AF Form 469. The [applicant] may not participate in any pay or point gaining activities until the disqualifying condition has been removed or an approved waiver is received from AFRC/SGP. Any inactive duty for training which is missed due to this medical limitation will be considered excused. Members will be excused from any type of military duty requirements until the profile has been finalized by AFRC/SGP or removed. Restrictions expired on 6 Sep 14.

On 7 Nov 13, according to Standard Form 600, *Chronological Record of Medical Care*, provided by the applicant, he was no longer with the XXX FW/MXS. He had moved out of the state and was pending discharge, per his unit supervisor.

On 28 Aug 14, according to Standard Form 600, provided by the applicant, an attempt was made to contact the applicant. There was no answer, and a voicemail was left. Per the unit supervisor, the applicant called regarding the status of his medical board. There was no pending medical case for the applicant. The medical squadron was contacted on 7 Nov 13 and informed the applicant was pending discharge and had moved out of state. There was no further contact with the medical squadron or the applicant.

According to multiple XXX MXS/CC memoranda, Subject: Reserve Participation, and AF Forms 40A, *Record of Individual Inactive Duty Training*, the applicant was recorded as having unexcused absences for the following Unit Training Assemblies (UTA):

- 3 Oct 15 – 4 Oct 15 (four training periods)
- 6 Nov 15 – 8 Nov 15 (six training periods)
- 1 Apr 16 – 3 Apr 16 (six training periods)
- 13 May 16 – 15 May 16 (six training periods)
- 15 Oct 16 – 16 Oct 16 (four training periods)

On 16 Jan 17, the applicant's commander recommended the applicant be involuntarily discharged from the AFR, under the provisions of AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*. The specific reason for the action was Unsatisfactory Participation, as identified in paragraph 3.13.2.

On 24 Mar 17, the Staff Judge Advocate found the discharge action legally sufficient.

On 30 Mar 17, the discharge authority directed the applicant be discharged for Unsatisfactory Participation, with a general (under honorable conditions) service characterization.

On 14 Apr 17, according to Reserve Order XXXX, dated 30 Mar 17, the applicant received a general (under honorable conditions) discharge.

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

## **POST-SERVICE INFORMATION**

On 10 Jan 24, the Board sent the applicant a request for post-service information, including a standard criminal history report from the Federal Bureau of Investigation; however, he has not replied.

## **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 10 Jan 24, the Board staff provided the applicant a copy of the liberal consideration 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.

AFI 36-3209, Chapter 3 – *Administrative Separation or Discharge of ANG or USAFR Enlisted Members*, Section 3D – *Involuntary Separation*:

3.13. *Reasons for Separation.* A member may be separated for convenience of the government for the following reasons. Prior to involuntary separation or discharge under this section, the notification procedure in Chapter 4, Section 4B, of this instruction will be used.

3.13.2. *Unsatisfactory Participation.*

3.13.2.1. Do not use these reasons if a member is in entry level status. Members of the selected Reserve who have not fulfilled their statutory military service obligation under Title 10 U.S.C., Section 651, and whose participation has not been satisfactory may be:

3.13.2.1.1. Discharged for unsatisfactory participation when the commander concerned has determined that the individual has no potential for useful service under conditions of full mobilization. Member may be discharged when the member has accumulated nine or more unexcused absences from UTA within a 12-month period. Service characterization will be determined by using the criteria in Attachment 2.

AFI 36-2254, Volume 1, *Reserve Personnel Participation*, dated 26 May 10, Chapter 1 – *Standards, Training and Retired Categories, and Participation Requirements*:

1.2. *Satisfactory Participation.* Each member must ensure that all general requirements and category requirements in Table 1.1 are met. A Reserve member is responsible for contacting their unit commander or supervisor as soon as the member becomes aware that he or she will not be able to attend a unit training assembly (UTA) or IDT. A member is also responsible for maintaining their current address and telephone number with the unit and Military Personnel Flight (MPF).

## **AIR FORCE EVALUATION**

AFRC/SGO recommends granting the request for a medical discharge. Based on the documentation provided by the applicant and analysis of the facts, there is evidence of an error. The applicant had a medical condition which did not meet retention standards as noted in the submitted documentation.

On 11 Dec 12, a Line of Duty (LOD) was initiated for "Displacement of intervertebral disc, site unspecified, without myelopathy." The case notes treatment for the condition began on 20 Sep 12

when the applicant was on orders for more than 30 days. He underwent cervical spine surgery on 19 Nov 12. The LOD was found Existed Prior to Service - LOD Not Applicable; Not In the Line of Duty (NILOD) on 29 Jul 13. The medical reason behind the NILOD finding was based on the magnetic resonance imaging noting congenital and degenerative changes without any acute findings. The imaging showed congenital spinal stenosis aggravated by degenerative changes thus supporting the condition existed prior to service with no evidence of service aggravation.

In Jul 13, the Reserve Medical Unit (RMU) discussed cervical spine issues with the applicant mentioning he should be placed on a code 37 [Medical defect/condition requires MEB or PEB processing] and stated an Initial Review in Lieu of (IRILO) would be initiated. No IRILO was submitted to AFRC/SGO; however, the applicant submitted a Narrative Summary, dated 5 Oct 13, noting ongoing cervical spine symptoms requiring medication and treatment. A 28 Aug 14 note from the RMU mentions the applicant asking about his "medical board." It was noted there was no medical case pending and references on 7 Nov 13 the applicant was pending discharge and had moved out of the state.

After review of submitted and available records, the applicant should have been placed on a code 37 in or around Sep 13. The Narrative Summary, dated 5 Oct 13, states the applicant was having neuropathic pain and was taking medications which would not meet retention standards in accordance with AFI 48-123, and the Medical Standards Directory. The IRILO should have been submitted to Air Force Reserve Command Physical Standards Division (AFRC/SGO) who then determines if the member is disqualified for further military service and if disqualified, whether the member should be further processed through the Medical Evaluation Board (MEB)/Integrated Disability Evaluation System (IDES) or the non-duty DES process. Department of the Air Force Manual 48-108, *Physical Evaluation Board Liaison Officer (PEBLO) Functions: Pre-Disability Evaluation System (DES) and Medical Evaluation Board (MEB) Processing*, dated 5 Aug 21, states an Air Reserve Command member must have an LOD determination for the disqualifying condition in order to be processed through the MEB/IDES which then determines military fitness and potential for further compensation.

The applicant did not have an In the Line of Duty (ILOD) determination and based on the applicant's continued symptoms and duty restrictions, he would have likely been disqualified by AFRC/SGO and likely found unfit for duty by the Physical Evaluation Board (PEB). If the PEB had agreed, the applicant would have been medically discharged one to two years after disqualified by AFRC/SGO.

The applicant does appear to have unexcused absences, which is a separate issue from the medical condition. It generally takes one to two years from the time a member has been coded a 37 until the case is finalized by the PEB. The applicant would have been medically discharged, not medically retired, as he would have not been evaluated by the IDES. AFRC/SGO recommends considering a medical discharge two years after the date of the Narrative Summary which would be approximately Oct 15.

The complete advisory opinion is at Exhibit D.

## **APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 30 Jul 24 for comment (Exhibit E) but has received no response.

## **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. While the Board notes the comments of AFRC/SGO in favor of granting the applicant a medical discharge, the Board believes a preponderance of the evidence fails to substantiate the applicant's contentions. While the Board agrees a fitness determination for the applicant's NILOD injury was appropriate, and there is no record one was initiated, the fitness determination process requires active participation by, and coordination with, the service member. Although there is no evidence the applicant was contacted regarding initiation of the fitness determination process, there is evidence, according to his non-participation records, that he did not remain in communication with his unit or maintain a current address and telephone number with his unit and MPF as required by AFI 36-2254V1. Under these circumstances, completing a fitness determination would not have been possible. Despite his contention that he was never out-processed properly, initiating termination of his AFR affiliation prior to leaving the state was his responsibility, and the applicant's availability and participation status were entirely within his control.

Additionally, it appears the applicant's discharge for Unsatisfactory Participation 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. In the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the evidence presented, and in the absence of post-service information/criminal history provided by the applicant, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's record.

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 (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2023-02625 in Executive Session on 8 Oct 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 9 Aug 23.  
Exhibit B: Documentary Evidence, including relevant excerpts from official records.  
Exhibit C: Letter, SAF/MRBC, w/atchs (Clemency Guidance), dated 10 Jan 24.  
Exhibit D: Advisory Opinion, AFRC/SGO, dated 19 Jul 24.  
Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 30 Jul 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.

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Board Operations Manager, AFBCMR