

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-01884

XXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXX
XXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His bad conduct discharge (BCD) be upgraded to an honorable discharge, with a narrative reason for separation of Secretarial Authority and corresponding separation code.

APPLICANT'S CONTENTIONS

According to applicant's counsel, his formative years were marked by a challenging upbringing, with parents who divorced shortly after his birth, necessitating his upbringing by his aunts and grandmother. These guardians imparted enduring values of trust and respectful treatment towards women, profoundly shaping the applicant's character. After high school, the applicant enlisted in the Air Force and dedicated 18 years to active military service. Counsel provided a detailed summary of the applicant's service.

Per counsel, on 31 Oct 94, the applicant went to a tanning salon before departing to a new duty station. The applicant accompanied a friend, who was employed at the salon, to the back where the tanning bed was located. They shared a hug, which was witnessed by the friend's boyfriend. Later that evening, the boyfriend called the police; however, when the prosecutor called the friend, she replied that she did not want to pursue anything, and the case was dismissed.

Counsel contended in 1999, the applicant was accused of rape and faced a general court-martial. During the court-martial, the prosecutor surprised the applicant and his defense counsel when he brought up an additional charge of assault on his friend from five years ago that was dismissed. At that time, the prosecutor from Cheyenne, who contacted the friend in 1994, was in hospice and unable to provide information. His defense attorney could not obtain evidence and witnesses from the police department in Cheyenne. The applicant pled not guilty to each of the three allegations against him. The court found the applicant not guilty of indecent assault and rape but found him guilty of the assault charge. He was sentenced to one year in confinement and a BCD. Counsel further contended, while in detention, the applicant was forced to fill and carry heavy sandbags and eat extremely fast. This harsh punishment resulted in permanent back problems and damage to his esophagus, which required major surgery. Additionally, the applicant's wife learned she was pregnant during his trial and gave birth while the applicant was confined.

Per counsel, the applicant was released in May 00, and his wife was ordered to report to duty in Germany by Sep 00. The applicant did not want to fight his conviction as it was severely impacting his family; therefore, he waived the review of his court-martial to accompany his wife and daughter. The applicant was ultimately given a BCD on 30 Nov 82¹ after 18 years of service.

In support of the applicant's request, counsel references the Board's jurisdiction under Title 10, United States Code § 1552 (10 USC § 1552) and Title 32, Code of Federal Regulations § 581.3.

¹ The applicant was separated with a BCD on 30 Nov 01.

Counsel also references Air Force Instruction 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, regarding timeliness, and Department of Defense Instruction 1332.28, *Discharge Review Board (DRB) Procedures and Standards*, regarding legal standards. Counsel further cites *Sofranoff v. United States* and *Stapp v. Resor* regarding the punitive nature of negative service characterizations. Addressing the matter of clemency, counsel recognized the Board's limited authority under 10 USC § 1553(a) with respect to discharge or dismissal adjudged by a court-martial.

According to counsel, a material error in discretion occurred during the applicant's court-martial. On a short-notice surprise, the prosecutor brought in an additional charge alleging, on 31 Oct 94, the applicant committed assault. The applicant was found guilty on this charge because the court did not allow the applicant's defense counsel a reasonable amount of time to prepare for the case, gather evidence, or try to look into any witnesses. Counsel contended it stands to reason if the defense counsel had more time to prepare the applicant's case, more resources to investigate the evidence, or had further discussed the case with opposing counsel, the applicant's case would have had a higher likelihood of success. The outcome would have been different, but instead, the applicant was placed in an unjustly disadvantageous position, and he lost his case due to the shortcomings of his counsel. Per counsel, this illustrates the equilibrium of fairness was disrupted during the court-martial proceedings, after which, the punishment of a BCD no longer seems just. The applicant faced a significant injustice as a result of time constraints, prosecutorial challenges, and investigative limitations. Counsel cites the Sixth Amendment, *United States v. Montalvo*, *United States v. Jones*, and the Manual for Courts-Martial (2012) in support.

Per counsel, the applicant has been stigmatized and harmed by his BCD and maintains that he and his family have suffered an injustice because his BCD resulted in a deprivation of benefits and a severely decreased quality of life. The applicant demonstrated strong skills, sincerity, and dedication during active duty. Counsel references excerpts from letters of support and character letters in support of these contentions.

In summation, counsel contended the applicant's case is marked by a grievous departure from the principles of justice and fairness that underpin our legal system. The denial of adequate time and resources for thorough case preparation, as enshrined in the Sixth Amendment and supported by legal precedent, has cast a shadow over the proceedings that led to the applicant's BCD. The implications of this injustice ripple beyond mere guilt or innocence, striking at the very heart of the accused's right to a robust defense. The testimonies of colleagues, superiors, and family members paint a vivid portrait of a dedicated, honorable individual whose potential has been stifled by the stain of an unjust discharge. The loss of benefits, opportunities, and quality of life suffered by the applicant and his family cannot be overstated. This case stands as a poignant reminder that the scales of justice must be held steady, and the duty to rectify material errors and injustices rests firmly upon the shoulders of this esteemed Board. The applicant's misconduct was merely a poor mistake for which the punishment he received is too harsh. He and his family have suffered from the stigma of his discharge status for nearly twenty years, which the applicant now seeks to correct. He has shown great restorative value to his character since his discharge by being a stay-at-home father and husband. The applicant has supported his community by giving his time to those in need. He has been punished for his mistakes in the service but continues to suffer the stigma of his BCD, despite working hard to better himself and create a strong future for himself and his family. The applicant will continue to suffer should this Board decline to consider the lengths he has taken to show such restorative value to his character.

In support of his request for a discharge upgrade, the applicant provides a personal statement, copies of military kudos, military certificates of achievement, character statements and letters of recommendation/support, 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 airman basic (E-1).

On 24 Sep 99, according to General Court-Martial Order (GCMO) Number XX, dated 17 Feb 00, the applicant was arraigned at court-martial for the following offenses:

- Charge I – Article 120. Plea: NG. Finding: NG.
 - Specification: In that [applicant] did, at or near Edwards Air Force Base (AFB), California (CA), on or about 8 Oct 98, rape [Ms. XX]. Plea: NG. Finding: NG.
- Charge II – Article 125. Plea: NG. Finding: G.
 - Specification: In that [applicant] did, at or near Edwards AFB, CA, on or about 8 Oct 98, commit sodomy with [Ms. XX] by force and without consent of the said [Ms. XX]. Plea: NG. Finding: G, except the words “by force and without consent of the said [Ms. XX].”
- Charge III – Article 134. Plea: NG. Finding: NG.
 - Specification: In that [applicant] did, at or near Edwards AFB, CA, on or about 8 Oct 98, commit an indecent assault upon [Ms. XX], a person not his wife, by digitally penetrating the said [Ms. XX's] vagina with his fingers, touching her right buttock, and kissing her ear and neck, with the intent to gratify his lust and sexual desires. Plea: NG. Finding: NG.
- Additional Charge – Article 134. Plea: NG. Finding: G.
 - Specification: In that [applicant] did, at or near Cheyenne, Wyoming, on or about 31 Oct 94, commit an indecent assault upon [Ms. XX], formerly [Ms. XX], a person not his wife, by attempting to kiss the mouth and neck of [Ms. XX], and then grabbing her breasts and buttocks with intent to gratify his lust and sexual desires. Plea: NG. Finding: G.

The applicant was sentenced to a reduction to the grade of airman basic (E-1), total forfeiture of all pay and allowances, confinement for one year, and a BCD. Only so much of the sentence as provides for a BCD, confinement for nine months, forfeiture of all pay and allowances, and reduction to airman basic (E-1) was approved, and except for the BCD, was executed.

On 12 Oct 99, according to AF Form 2098, *Duty Status Change*, the applicant's duty status changed from Present for Duty to Military Confinement – Sentenced to Prison/30 Days or More, effective 24 Sep 99.

On 30 Nov 01, according to GCMO Number XX, the sentence to a BCD, confinement for nine months, forfeiture of all pay and allowances, and reduction to the grade of airman basic (E-1), as promulgated in GCMO Number XX, dated 17 Feb 00, has finally been affirmed. Article 71(c)(1) having been complied with, the BCD will be executed. The sentence was adjudged on 24 Sep 99.

On 30 Nov 01, the applicant received a BCD. His narrative reason for separation is “Court-Martial” and he was credited with 18 years, 5 months, and 8 days of total active service.

On 16 May 25, according to a *President of the United States of America Certificate of Pardon*, provided by the applicant, he was pardoned by the Presidential Proclamation of 26 Jun 24. The pardon applies only to Charge II, Specification I of the court-martial conviction of 24 Sep 99, in violation of Article 125 of the Uniform Code of Military Justice (UCMJ).

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

POST-SERVICE INFORMATION

On 28 Aug 24, 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 4 Sep 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 28 Aug 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.

AIR FORCE EVALUATION

AF/JAJI recommends denying the application. Their review did not identify any information warranting clemency from a legal perspective.

On 24 Sep 99, a general court-martial comprised of officer members found the applicant, contrary to his pleas, guilty of consensual sodomy with Ms. XX in violation of Article 125, UCMJ, and guilty of indecent assault upon Ms. S.R., in violation of Article 134, UCMJ. The court-martial found the applicant not guilty of a rape allegation and an additional indecent assault allegation upon Ms. XX. The applicant was sentenced to a BCD, confinement for one-year, total forfeitures of all pay and allowances, and reduction to the grade of E-1. On 17 Feb 00, the convening authority granted clemency, reducing the confinement amount to nine months. The United States Air Force Court of Criminal Appeals affirmed the findings and sentence on 21 Jun 01.

The applicant claims he was falsely accused of sexual assault and “would like to plead to make amends.” He also claims the sexual assault charge came as a “last-minute surprise” as the civilian authorities decided not to prosecute it five years earlier, and the defense attorney was not able to obtain evidence or a witness to rebut it. This is re-iterated by the applicant’s attorney who indicated if the defense counsel had more time to prepare, more resources to investigate the evidence, or had further discussed the case with opposing counsel, the applicant’s case would have a higher likelihood of success. Counsel further argues “the applicant was placed in an unjustly disadvantageous position and lost his case due to the shortcomings of his counsel.” The applicant’s current attorney contends the injustice caused by time constraints, prosecutorial challenges, and investigative limitations is the primary justification for clemency in this case. Both the applicant and his attorney indicated he gave up his right to appeal his case for the good of his family². The applicant’s attorney uses his otherwise impressive military record, family support, and dedication as a father to demonstrate the material injustice of the adjudged BCD.

Because “[t]he applicant has the burden of providing evidence in support of their allegation(s) of an error or injustice,” DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, 4 Oct 22, paragraph 3.4.4, the AFBCMR is bound to draw every reasonable inference from the evidence in favor of the principals who resolved questions of fact and took the actions at issue. Deference is not blind as the AFBCMR can reverse an arbitrary or capricious decision for an abuse of discretion. *Roberts v. United States*, 741 F.3d 152, 158 (D.C. Cir. 2014) (reviewing decision of a military corrections board under an “unusually deferential application of the ‘arbitrary or capricious’ standard”).

The applicant’s request for a discharge upgrade pertains to records resulting from a court-martial conviction and sentence to a BCD. The AFBCMR and the Secretary of the Air Force have limited authority to correct court-martial records. Under 10 USC § 1552(f), the AFBCMR may extend its authority to correct a record to reflect an action taken by review authorities under the

² The applicant indicated he did not seek an appeal in order to move with his family, but this is a little misleading. The applicant did not elect to appeal his case to the Court of Appeals of the Armed Forces, a second level of appellate review. However, the applicant’s case was reviewed by the Air Force Court of Criminal Appeals, see *United States v. [Applicant]*.

UCMJ or take action on the sentence of a court-martial for purposes of clemency. The applicant does not request correction of a record to reflect an action taken by review authorities. Therefore, clemency on the applicant's sentence is the only option available for consideration.

The applicant claims he was falsely accused of sexual assault and gave up his rights to appeal. While it is not in the AFBCMR's purview to relitigate issues from the court-martial, the applicant's current attorney instead contends clemency should be granted due to defense counsel's performance and referral of charges that defense did not have adequate time to investigate. The applicant pled guilty and was convicted by a panel of officer members in a general court-martial. This forum also required that charges be investigated prior to referral through an Article 32 investigation. Every reasonable inference from the evidence in this case supports the presumption of regularity in the court-martial process.

Additionally, the United States Air Force Court of Criminal Appeals affirmed the applicant's findings and sentence on 21 Jun 01. While the court reviewed two claims raised by the applicant, neither were the arguments the applicant's attorney raises now. Notably, the court found "trial defense counsel proved to be an aggressive, and very effective, advocate for her client both at trial and post-trial. The defense has presented no evidence from which we could conclude that her representation of the appellant was chilled or that the proceedings were unfair."³ From all appearances, based on the issues raised at the appellate level, all charges against the applicant were preferred, referred, and tried appropriately. The final appellate review of the applicant's court-martial has been complete for some time now. The applicant has provided no additional evidence to support his petition for clemency.

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 on 6 Feb 25 for comment (Exhibit F), and the applicant replied on 10 Mar 25. In current counsel's response, she contends the advisory opinion author concluded, "[O]ur review did not identify any information warranting clemency from a legal perspective." However, the advisory opinion also acknowledged the applicant's thorough application and acquiesced to the Board's authority to grant clemency in the form of a discharge upgrade. In the instant case, the applicant references the Department of Defense policy changes to that end. Counsel references excerpts from the Wilkie Memo and character letters provided by the applicant in support.

Additionally, counsel contended Presidential Proclamation 10780, dated 26 Jun 24, grants a full, complete, and unconditional pardon to all persons convicted under Article 125, UCMJ. The proclamation applies to convictions incurred between 31 May 51 and 26 Dec 13 and is, therefore, applicable in the instant case. Further, the advisory opinion erroneously stated the applicant pled guilty; however, the applicant did plead not guilty to all charges brought against him. If this inaccuracy was considered as any part of the basis for the advisory opinion's position, it should be disregarded by the Board.

Counsel concluded it has been more than 23 years since the applicant's discharge, and in the intervening years, he has remained a law-abiding citizen and devoted father and husband. The applicant's post-conviction conduct, character references, and length of time since discharge, are all factors the Board should consider. Further, the applicant's BCD was premised in part on the conviction for formerly prohibited acts under Article 125, UCMJ, which are now pardoned. Accordingly, his request for clemency is not only justified, but appropriate.

³ *U.S. v. [Applicant]*

The applicant's complete response is at Exhibit F.

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 10 USC § 1552(b).
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, to include the rebuttal response, the Board concludes the applicant is not the victim of an error or injustice. 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. The requirement that charges be investigated prior to referral through an Article 32 investigation, and every reasonable inference from the evidence presented, supports the presumption of regularity in the court-martial process. Regarding the advisory opinion erroneously reflecting the applicant pled guilty prior to conviction, the Board determined it was an obvious typographical error and should have reflected "not guilty" based on the advisory opinion earlier referencing the applicant was found guilty "contrary to his pleas."

Additionally, the Board finds no evidence the sentence of the military court was improper or that it exceeded the limitations set forth in the UCMJ. While the applicant contended he did not seek an appeal to the Court of Appeals of the Armed Forces in consideration of his family, the applicant's case was reviewed by the United States Air Force Court of Criminal Appeals and the findings and sentence were affirmed. Furthermore, the applicant's contention of defense counsel shortcomings was contradicted by the United States Air Force Court of Criminal Appeals, and therefore, is not compelling. The Board did consider the pardon granted the applicant for Charge II, Specification, violation of Article 125, UCMJ, and based its decision, in part, on the remaining guilty finding for the additional charge of indecent assault in violation of Article 134, UCMJ. The Board also considered upgrading the discharge based on clemency, in accordance with the Wilkie Memo; however, given the evidence presented and the seriousness of the offense committed, found no basis to do so. Therefore, the Board recommends against correcting the applicant's records.

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-2024-01884 in Executive Session on 18 Jun 25:

, 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 30 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), Undated.
- Exhibit D: FBI Report, dated, 17 Jul 24.
- Exhibit E: Advisory Opinion, AF/JAJI, dated 30 Jan 25.
- Exhibit F: Notification of Advisory, SAF/MRBC to Counsel, dated 6 Feb 25.
- Exhibit G: Counsel'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.

X

Board Operations Manager, AFBCMR