

RECORD OF PROCEEDINGS  
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: BC-2012-00657

COUNSEL: NONE

HEARING DESIRED: YES

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APPLICANT REQUESTS THAT:

His military record be corrected as follows:

1. His 20 December 2006, non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ), be removed.
2. Item 24, character of service, on his DD Form 214, *Certificate of Release or Discharge from Active Duty*, be amended to change the characterization of his service from under honorable conditions (general) to honorable.
3. He be returned to either the Regular Air Force, Air Force Reserves or Air National Guard in order to retire.
4. He be retired in the grade of Captain (O-3) for length of service.
5. He be retired under the Career Status Bonus Redux Program.
6. Item 28, reason for discharge, on his DD Form 214, be changed from misconduct to service met for retirement.

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APPLICANT CONTENDS THAT:

Violation of his Fourth Amendment rights during the discovery procedures resulted in violation of his Fifth Amendment right for due process. "Prejudicial and irregularities" of the case were the result of bad faith in the discharge proceedings with all parties involved. Slanderous and cruel statements were written falsely and used against him in the discharge proceedings. The presiding officer of the Article 32 hearing acted in bad faith.

During the 18 March 2006 interrogation interview the investigating officers illegally seized evidence he had torn and crumbled up that was not his official or unofficial statement. The officers demanded he give them his property (the torn and crumbled statement) because the JAG officer told them to take it. The decision to punish him was made on the basis of an illegally obtained confession to which he did not agree. The

evidence used in the Article 15 UCMJ proceeding was illegally obtained, tainted and should have been excluded from the Article 15 authority's consideration of his case.

In support of his request, the applicant provides a thirteen-page personal statement with attachments.

The applicant's complete submission, with attachments, is at Exhibit A.

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STATEMENT OF FACTS:

The applicant is a former commissioned officer of the Regular Air Force who served from 1 March 2001 through 21 September 2007. He was progressively promoted to the rank of Captain (Capt), (O-3), with an effective date of 2 March 2005.

On 20 September 2006, the applicant's commander offered him nonjudicial punishment proceedings under Article 15 UCMJ for one specification of a violation of Article 112a, wrongful use of marijuana, between on or about 7 February 2006 and on or about 8 March 2006. The applicant consulted counsel, waived his right to trial by court-martial and accepted the Article 15 proceedings. He elected to make a written presentation but did not request a personal appearance before the commander. On 30 September 2006, the commander determined the applicant did commit the offense and the applicant was charged under Article 15 UCMJ. The applicant's imposed punishment was a reprimand and forfeiture of \$2, 620.00 per month for two months. Forfeitures in excess of \$2, 120.00 pay per month for two months were suspended until 29 March 2007, after which time it would be remitted without further action, unless sooner vacated. The applicant did not appeal the commander's decision. The Article 15 proceedings were reviewed and determined to be legally sufficient.

On 20 November 2006 the applicant's commander recommended the wing commander consider administrative discharge action against the applicant with an Under Other Than Honorable Conditions (UOTHC) characterization of service, under the provisions of AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, chapter 3, paragraph 3.6.3., illegal drug use. The recommendation was found to be factually and legally sufficient and on 14 December 2006, a Show Cause Authority (SCA) was appointed. On 19 December 2006, the SCA initiated discharge proceedings against the applicant under the provisions AFI 36-3206, chapter 3, paragraph 3.6.3. The applicant acknowledged receipt of the Notification of Show Cause Action on 5 January 2007. On 16 January 2007, the applicant submitted a conditional waiver of Board of Inquiry (BOI) hearing in accordance with AFI 36-3207, *Separating Commissioned Officers*, paragraph 2.30. In the requested waiver the applicant

acknowledged his rights to present his case before an administrative discharge board, be represented by military counsel, and submit statements in his own behalf to be considered by the administrative discharge board and the separation authority. The applicant offered a conditional waiver of his right to a board hearing contingent upon the Secretary of the Air Force approving no less than an under honorable conditions (general) characterization of service. After a thorough review of the case file, the SCA recommended the applicant's conditional waiver of BOI be accepted and he be separated with an under honorable conditions (general) service characterization.

Subsequent to the case being found legally sufficient to support the SCA's recommendation the applicant was discharged from active duty with an under honorable conditions (general) characterization of service and a narrative reason for separation of misconduct and a separation code of GKK. He was credited with 6 years, 6 months, and 21 days of active duty service.

The applicant submitted an appeal for upgrade of his discharge and change of the narrative reason for discharge to the Air Force Discharge Review Board (AFDRB). He was offered and declined a personal appearance before the AFDRB, with counsel. On 4 February 2011, the AFDRB found neither evidence of record nor that provided by the applicant substantiated an inequity or impropriety that would justify a change of his discharge. The DRB concluded that the discharge was consistent with the procedural and substantive requirements of the discharge regulation and was within the discretion of the discharge authority and that the applicant was provided full administrative due process. In view of the forgoing findings the Board further concluded there was no legal or equitable basis for upgrade of discharge, and determined the applicant's discharge should not be changed. On 21 March 2011, the applicant was advised that since his case was denied by the AFDRB he had the right to appeal to the Air Force Board for Correction of Military Records (AFBCMR).

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AIR FORCE EVALUATION:

AFLOA/JAJM recommends denial. JAJM states the applicant argues that the underlying Article 15 was based on evidence illegally obtained and should therefore, be set-aside; as the Article 15 was the basis for the administrative discharge, the administrative discharge should be upgraded to an honorable discharge in the form of the retirement he would have earned, had he been allowed to serve out the remaining term of service.

The applicant alleges injustice in that, when apprehended for a random, positive urinalysis and interviewed by the Air Force

Office of Special Investigation (AFOSI), he drafted a written confession that he then decided against and crumpled up. He alleges that on the advice of a judge advocate, the AFOSI investigator retrieved the crumpled up, written confession against his will. While the applicant alleges the confession was illegally obtained, he does not allege error in how the Article 15 was processed. The Military Rules of Evidence, other than with respect to privileges, do not apply at nonjudicial punishment proceedings. The commander offering the nonjudicial punishment is free to consider any relevant matter regarding the alleged crime. Conversely, if the applicant determines the rules of evidence would operate to provide a more favorable portrayal of the facts and circumstances surrounding the alleged misconduct, his recourse would be to turn down an offer for an Article 15 and demand a trial by court martial and proof beyond a reasonable doubt.

The applicant does not make a compelling argument that the Board should overturn the commander's original, nonjudicial punishment decision on the basis of injustice. The applicant elected the Article 15 forum, where the Military Rules of Evidence do not apply to exclude otherwise relevant information for the commander's consideration. Moreover, there was sufficient, relevant evidence available to the commander, notwithstanding the applicant's written confession, to support the commander's conclusion in the Article 15 action. The applicant willingly chose the Article 15 forum, as opposed to a trial by court-martial, and at the time the commander made his finding of guilt and imposed punishment, the applicant elected not to appeal the decision to a higher authority. Therefore, the commander's ultimate decision is firmly based on the evidence of the case and the punishment decision was well within the limits of the commander's authority and discretion. The applicant has not shown a clear error or injustice.

The complete AFLOA/JAJM evaluation is at Exhibit C.

AFPC/DPSOS recommends denial. DPSOS states the applicant's case file supports the characterization of discharge as under honorable conditions (general). An honorable discharge is appropriate when an applicant's military record warrants the highest or best type of discharge. An under honorable conditions (general) discharge is appropriate when an applicant's military record is not sufficient to warrant an honorable discharge, but is not negative enough to warrant an under other than honorable conditions (UOTHC) discharge. A UOTHC discharge is appropriate when an applicant's military record warrants the least favorable service characterization. Based on the documentation on file in the master personnel records, the discharge was consistent with the procedural and substantive requirements of the discharge regulation and was within the discretion of the discharge authority to include the characterization of discharge. The applicant did not submit any

evidence or identify any errors or injustices in the discharge processing.

The complete AFPC/DPSOS evaluation is at Exhibit D.

AFPC/DPSOR recommends denial. DPSOR states they conducted an extensive review of the information received, along with the applicant's records and found evidence to indicate the applicant was afforded every opportunity to make an election for Career Status Bonus (CSB) during the normal election period. According to the military personnel database system (MilPDS) and Defense Finance and Accounting System (DFAS) the applicant elected CSB on 21 March 2006 and was paid a lump sum of \$30,000 on 31 July 2006. Based on the documentation on file in the master personnel records, applicant's characterization of service will not up be upgraded. Therefore, the applicant will not be given the opportunity to retire under the CSB Redux Program.

The complete AFPC/DPSOR evaluation is at Exhibit E.

AFPC/JA recommends denial. AFPC/JA states they concur with the AF/JAJM and AFPC/DPSOS advisories. The applicant's allegation that his waiver request and his general discharge are illegal because of the taint of the illegal confession is spurious. The exclusionary rule regarding the inadmissibility of an illegally obtained confession applies only to criminal proceedings not Article 15 punishments or administrative discharge proceedings. This allegation is totally without merit. Moreover, the basis for the initiation of AFI 36-3206 discharge was drug usage as established by the urinalysis results, not applicant's confession. Finally, as with the Article 15, had applicant wanted to litigate this or any issue relevant to his pending administrative discharge, the proper avenue was to raise his challenges at a Board Of Inquiry. Instead, after consultation with his defense counsel, he chose to waive such a board in return for a general discharge.

The applicant's conditional waiver offer resulted in an agreement in which both the applicant and the government agreed to forgo the dynamics of a hearing where all the facts and legal issues could have been fully developed and adjudicated in favor of the settled prospect of an administrative disposition that guaranteed the applicant a general rather than an UOTHC discharge and which the applicant obviously believed to be in his best interest at that time. The AFBCMR should not allow the applicant to use his waiver request to halt the established administrative process to determine factual and legal issues, and thereafter, under the guise of an allegation of unfairness, engage in one-sided litigation (the government not being a party in this action) of the same matters before the BCMR in contravention of the offer accepted in good faith by the Air Force.

Regarding his allegation that bad faith caused prejudicial and irregularities of the case, the applicant essentially reiterates in another form the arguments discussed above. Needless to say, the applicant has failed to allege and prove any specific acts of bad faith on the part of any Air Force official that prejudiced his case. Moreover, allegations relating to the behavior of the Investigating Officer in an Article 32, UCMJ hearing are irrelevant to the legal sufficiency of the Article 15 punishment and administrative discharge proceedings. The same is true of his claim of slanderous statements regarding homosexuality; the basis for the Article 15 and the discharge had nothing to do with homosexuality and was limited to drug use. For the reasons stated in this and the other advisories, we conclude that the applicant has failed to prove by material and relevant evidence any error or injustice in his application.

The complete AFPC/JA evaluation is at Exhibit F.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Copies of the Air Force evaluations were forwarded to the applicant on 29 May 2012 for review and comment within 30 days (Exhibit G). To date, this office has not received a response.

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THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Insufficient relevant evidence has been presented to demonstrate the existence of error or injustice. We took notice of the applicant's complete submission in judging the merits of the case; however, we agree with the opinion and recommendation of the Air Force offices of primary responsibility and adopt their rationale as the basis for our conclusion that the applicant has not been the victim of an error or injustice. Therefore, we find no basis to recommend granting the relief sought in this application.
4. The applicant's case is adequately documented and it has not been shown that a personal appearance with or without counsel will materially add to our understanding of the issues involved. Therefore, the request for a hearing is not favorably considered.

THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

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The following members of the Board considered this application BC-2012-00657 in Executive Session on 11 September 2012, under the provisions of AFI 36-2603:

Panel Chair  
Member  
Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 31 January 2012, w/atchs.
- Exhibit B. Applicant's Master Personnel Records
- Exhibit C. Letter, AFLOA/JAJM, dated 30 March 2012.
- Exhibit D. Letter, AFPC/DPSOS, dated 5 April 2012.
- Exhibit E. Letter, AFPC/DPSOR, dated 25 April 2012.
- Exhibit F. Letter, AFPC/JA, dated 16 May 2012.
- Exhibit G. Letter, SAF/MRBR, dated 29 May 2012.
- Exhibit H. Report of Investigation (withdrawn).

Panel Chair