

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: BC-2012-01128
COUNSEL: NONE
HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

His records be corrected to show that his injuries were In Line of Duty (LOD), rather than Not In Line of Duty (NILOD).

APPLICANT CONTENDS THAT:

His injury [sic] occurred while he was on active duty and the investigating officer found it to have occurred ILOD. The Department of Veterans Affairs (DVA) also found his injury to be ILOD.

In support of his request, the applicant provides a copy of his DD Form 261, *Report of Investigation Line of Duty and Misconduct Status*, a copy of the Investigating Officer (IO) Memorandum, and a copy of his DVA Rating Decision.

His complete submission, with attachments, is at Exhibit A.

STATEMENT OF FACTS:

On 31 Dec 10, the applicant attended a party and was drinking on the night of his injuries. His blood alcohol content (BrAC) was 0.116 over an hour after the incident occurred. He sustained injuries to his left and right hands caused by a mortar style firework blowing up in his hands. He had surgery to repair his left hand and his right hand had to be amputated.

The applicant's DD Form 261, dated 17 Aug 11, Remarks Section 10.g. reflects that the IO found him ILOD. The remarks section reflects that "although alcohol was a factor, I do not believe it to be intemperate. I did not find a preponderance of evidence that proves A1C S injuries were due to his own misconduct." Item 21 states, "I do not concur with the IO findings and recommendation. I find that [applicant's] conduct on 31 Dec 10 constituted willful neglect IAW AFI 36-2910. Therefore, I find him not in the line of duty."

AFI 36-2910, *Line of Duty (Misconduct) Determination*, states, "[a]n injury incurred during the intemperate use of alcohol should be found to be 'due to misconduct' if it is proven that the intemperate use of alcohol was the proximate cause of the injury." Additionally, the instructions states, "[u]nexploded ammunition or other objects, firearms, and highly flammable liquids are inherently dangerous and their handling necessitates a high degree of care. Tampering with, attempting to ignite, or otherwise handling such objects in disregard of their dangerous qualities is strong evidence of misconduct."

The remaining relevant facts pertaining to this application are contained in the letter prepared by the appropriate office of the Air Force, which is at Exhibit C.

AIR FORCE EVALUATION:

AFPC/JA recommends denial and states that the applicant has failed to establish any injustice. In this respect, the applicant believes that an injustice occurred because his injury happened while on active duty and the IO found him ILOD. While both of these contentions are true, the LOD instruction provides that the approving authority will make the final determination. The question is whether the finding constitutes an injustice. It is unfortunate that the applicant lost his right hand, but it also might be considered unfair in layman's terms that the IO found him ILOD while the approving authority found him NILOD. However, the approving authority is lawfully permitted to make that determination and based on the facts that determination was appropriate.

In addition, such determination was found to be legally sufficient by their office, as it was rooted in a reasonable application of the law to the facts. Accordingly, when applying the provisions of the law to the fact that the applicant was under the influence of a substantial amount of alcohol when he handled the mortar-type firework, and he disregarded the warning and foreseeable consequences of mishandling fireworks, the approving authority concluded the applicant was NILOD - Due to Own Misconduct. For this reason, JA does not find that the circumstances rise to a level that "shocks the sense of justice" within the meaning of the law.

The complete JA evaluation is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

A copy of the Air Force evaluation was forwarded to the applicant on 18 May 12 for review and comment within 30 days. As of this date, this office has received no response.

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 office of primary responsibility and adopt its rationale as the basis for our conclusion that the applicant has not been the victim of an error or injustice. Therefore, in the absence of evidence to the contrary, 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 issue 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.

The following members of the Board considered AFBCMR Docket Number BC-2012-01128 in Executive Session on 10 Jan 13, under the provisions of AFI 36-2603:

The following documentary evidence for Docket Number BC-2012-01128 was considered:

- Exhibit A. DD Form 149, dated 19 Mar 12, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFPC/JA, dated 8 May 12.
- Exhibit D. Letter, SAF/MRBR, dated 18 May 12.

Panel Chair