

ADMINISTRATIVE DISCHARGE

Administrative Discharge

We have reviewed the attached case file and find it legally sufficient to administratively discharge Respondent, pursuant to Air Force Instruction (AFI) 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, paragraph 3.6.4 (serious or recurring misconduct punishable by military or civilian authorities) with an under honorable conditions (General) service characterization. The Air Force may seek recoupment of a prorated portion of Respondent's aviator continuance pay bonus, but such action would require additional processing and is not appropriate in this case.

Factual Background

Respondent is a 39-year-old non-probationary regular officer and senior C-130 pilot assigned to Base X, with 14 years military service. He was commissioned through the Reserve Officer Training Program (ROTC) on 23 May 1998. His total active military service date (TAFMSD) is 1 June 1998. Respondent's personnel record also shows an active duty service date (AFSD) of 22 June 2013 due to an aviator continuance bonus.

On 1 November 2009, Respondent met his estranged wife and her parents in the parking lot of a shopping mall in order to exchange custody of his infant son pursuant to a court custody order. During the exchange, Respondent became verbally aggressive with his former father-in-law. When his wife exited her father's car, Respondent attempted to restrain her. The wife's father approached Respondent to intervene on behalf of his daughter. Respondent punched him in the face at least once causing him to fall to the pavement rendering him temporarily unconscious. Respondent also assaulted his wife, causing her to fall to the ground. The wife's father suffered a broken nose, fractured eye socket and a concussion. The wife's injuries included a broken arm, twisted ankle and facial cuts requiring suturing.

Respondent was arrested at the crime scene by the local police on charges of aggravated assault, a second degree felony under State Y law, and released on bond. On 20 May 2010, Respondent was indicted by a grand jury on felony charges of aggravated assault in violation of State Y Penal Code section 22.02(a)(1), a second degree felony punishable by not less than two years and no more than twenty years in prison and fine not to exceed \$10,000. *See* State Y Penal Code Ann. §§ 22.02(a)(1) & 12.01 (effective 1 September 2009).

On 9 September 2011, Respondent entered guilty pleas to two counts of second-degree assault in the District Court, State Y pursuant to a plea agreement with the District Attorney's Office. The Assistant District Attorney (ADA) assigned to Respondent's case accepted a plea without an active prison sentence after consulting with the victims. Upon recommendation of the ADA, the District Court entered an order of deferred adjudication contingent on Respondent's successful completion of 10 years "community supervision"—the maximum allowed by State Y statute. Under State Y Law, a court may order deferred adjudication based on findings that substantiate the defendant's guilt. *See* State Y Penal Code Ann. § 42.12 (2011). Under deferred

adjudication, the court defers entry of a conviction pending the defendant's completion of the term of supervision. If the defendant successfully completes the ordered supervision, the charge(s) are dismissed without a conviction. *Id.*

Respondent married his wife on 28 May 2007. Respondent's former wife has stated that Respondent was verbally abusive throughout the marriage, but escalated into physical violence after their son was born in and around August 2008. An incident in State Z in March 2009 was recounted by family friends. On that occasion, Respondent became angry during a shopping trip, berated his wife in public and threatened to "f__" her up when they got home. Respondent left the mall with Respondent's wife. Respondent drove up in the parking lot near the vehicle in which his wife was departing with their friends and four children. He continued his tirade by beating on his own car, breaking a window and causing other damage. Respondent's behavior caused his wife to fear for her safety. After this incident, Respondent's wife let him to live with her parents because she was afraid that Respondent would harm her. Respondent and his wife attempted counseling, but that stopped after a session in which their counselor became concerned about Respondent's behavior. Respondent wished to reconcile his marriage, but his wife filed for divorce.

Respondent's military record reflects that he was an outstanding pilot, winning prestigious pilot and pilot instructor awards in 2006 and 2007. With the exception of the rating period encompassing his arrest in November 2009, Respondent had the highest possible ratings on his officer evaluation reports. His personnel records reflect four deployments and 663 combat hours.

However, one of Respondent's former squadron commanders testified that there were several occasions in which he counseled Respondent for his lack of "professionalism," including an incident where he was disrespectful towards office staff and another wherein he failed to accept responsibility for failing to adequately complete an inspection checklist. The Squadron Commander observed that Respondent "was very poor in accepting responsibility and physically tended to get quite angry about it." Many other officers who worked with Respondent attested to his good character, outstanding aviator skills and dedication to duty. Respondent's immediate commander at the time of the discharge action testified that Respondent was an excellent pilot and he "like[d] him personally as an individual," but that his "anger management issues have become too great in order for his continued service in the Air Force."

Case Processing

On 23 August 2011, the Numbered Air Force Commander—the Show Cause Authority (SCA)—initiated Respondent's administrative discharge under paragraph 3.6.4 of AFI 36-3206.¹

¹ Respondent's Squadron Commander in November 2009 testified that he decided not to initiate discharge action against Respondent until the matter was adjudicated by State Y's courts. The Squadron Commander's replacement assumed command of the Squadron in mid-2011 and recommended that the Numbered Air Force Commander initiate discharge action against Respondent based on the alleged conduct because he believe that Respondent's continued presence in his squadron posed a risk to good order and discipline.

Respondent acknowledged receipt of the Notice to Show Cause Memorandum on 29 August 2011. On 23 September 2011, Respondent submitted a written response to the proposed discharge action through his counsel asking to be retained in the Air Force and arguing that State Y court's deferred adjudication is tantamount to a finding of not guilty. After fully considering these matters, the SCA ordered that a Board of Inquiry be convened to make findings as whether there is a basis for Respondent's discharge as alleged in the notice. If a basis is found, the BOI was also instructed to make recommendations as to whether Respondent should be discharged from the Air Force and, if separated, the characterization of Respondent's service as honorable, General or UOTHC. *See* AFI 36-3206, paragraph 7.3 *et seq.*

The BOI was convened at Base X on 1 and 2 December 2011.² Respondent was represented by military counsel and retained civilian counsel. The BOI heard testimony from ten Government witnesses and seven Respondent witnesses. Respondent made an unsworn statement before the BOI in which he outlined his military career and explained the circumstances leading up to the assaults on 1 November 2010. Respondent claimed that he did not intend to strike his father-in-law, but was reacting to his touch during a heated argument with his wife. Respondent denied intentionally punching his wife, lifting her and throwing her to the ground or kicking her while she was on the ground. He claimed that he pushed her away and his momentum caused him to fall on top of her as she hit the ground.

The Board was instructed that "serious misconduct" is defined as "[a]ny misconduct punishable by military or civilian authorities;" including misconduct if punished under the Uniform Code of Military Justice (UCMJ) could result in confinement for six months or more." *See* AFI 36-3206 Attachment 1 at 47. The parties stipulated and the legal advisor instructed the BOI that Respondent's conduct, if proved, was so punishable under the UCMJ.

The legal advisor also instructed the BOI that it was to make separate findings as to each allegation of misconduct from the evidence presented based on a preponderance of the evidence standard. He also explained the difference between the three types of discharge—honorable, General or UOTHC—and the consequences attendant on each. The parties did not request and the legal advisor did not instruct the BOI with respect to recoupment.

The BOI found by a preponderance of the evidence that Respondent did assault his wife on 1 November 2009 causing fractures to her arm, scars on her face, and a sprain of her ankle. However, it did NOT find that Respondent placed his wife in a headlock, throw her to the ground, or kick her. The BOI also found that Respondent assaulted his wife's father by punching him in the face; fracturing his eye socket, breaking his nose and causing a concussion. The BOI recommended that Respondent be separated from the Air Force with a General discharge.

In response to the BOI's recommendation, Respondent's military counsel submitted a memorandum urging that Respondent's military record justifies an honorable discharge. On 14 March 2012, the SCA considered Respondent's additional submission, but recommended that Respondent be discharged from the Air Force with a General service characterization.

² Respondent waived the 30 day notice required under AFI 36-3206, paragraph 7.3.1.

Case Analysis

AFI 36-3206, paragraph 3.6.4 provides that serious or recurring misconduct by military or civilian authorities is a basis for discharge. The BOI convened at Base X found that Respondent did assault both his wife and her father on 1 November 2009 causing serious, if not grievous, bodily injuries.

As noted above, AFI 36-3206 defines “serious misconduct” as that which is punishable under the UCMJ by confinement for six months or more. Article 128, UCMJ, punishes assault consummated by a battery and aggravated assault in which grievous bodily harm is intentionally inflicted. *Manual for Courts-Martial (MCM)* at IV-98-103 (2008). The maximum punishment for assault consummated by a battery is six months confinement; aggravated assault is punishable by up to five years confinement. *Id.* According to the testimony of State Y’s ADA who prosecuted Respondent’s civilian case, Respondent entered a guilty plea in State Y state court admitting to aggravated assault and would have received an active prison sentence, but for the plea bargain that resulted in deferred adjudication with 10 years community supervision. The maximum term of imprisonment under State Y law for a second degree aggravated assault is 20 years. State Y Penal Code § 12.01 (2009). Therefore, the evidence presented to the BOI more than establishes a basis for discharge under AFI 36-3206, paragraph 3.6.4.

It is Department of Defense (DoD) policy to administratively separate commissioned officers who do not “[m]eet rigorous and necessary standards of duty, performance, and discipline.” *See* DoD Instruction 1332.30, *Separation of Regular and Reserve Commissioned Officers*, paragraph 4(c)(1). While Respondent’s skills as a pilot are not in doubt, his ability to lead as an officer has been irreparably compromised not only by the serious misconduct found by the BOI, but his demonstrated inability to control his temper both on duty and at home. Moreover, as his Squadron Commander testified, Respondent’s presence in the Air Force as a field grade officer found guilty of aggravated assault—whether domestic or otherwise—creates a double standard for lower ranking members whose conduct under similar circumstances would justify administrative separation or more serious discipline.

Paragraph 3.1 of AFI 36-3206 provides that three service characterizations are available for an administrative discharge based on misconduct: honorable, General, and UOTHC. AFI 36-3207, *Separating Commissioned Officers*, paragraph 1.7.1.2 states that an honorable service characterization is the highest service characterization and is normally appropriate “when the basis for discharge pertain solely to pre-commissioning activities under AFI 36-3206, Chapter 3.” An honorable discharge is warranted when a member has generally met Air Force standards or is otherwise so meritorious that any other type of discharge would be inappropriate. *Id.* A General discharge is appropriate when a member’s service has been honest and faithful, but significant negative aspects of conduct or performance outweigh the positive aspects of a member’s military record. AFI 36-3207, paragraph 1.7.2. A commissioned officer’s service may be characterized as UOTHC if his military record does not warrant a General discharge. AFI 36-3207, paragraph 1.7.3.

The evidence presented to the BOI in this case amply supports its General discharge recommendation. While Respondent's misconduct was egregious and his "officership" was sometimes lacking due to his inability to control his emotions, he was an accomplished pilot, who flew over 600 combat hours and served four overseas deployments. He was decorated for his service in Iraq and many who served with him still laud his military service.

Errors and Irregularities

Respondent's personnel records show that he has an unfulfilled active duty service commitment through 22 June 2013 due to "Aviator Cont" which appears to indicate payments under the Aviator's Continuation Pay Program (ACP). Under AFI 36-3004, *Aviator's Continuation Pay (ACP) Program*, paragraph 1.1 *et seq.*, certain rated officers are eligible for ACP if they meet all requirements and agree to an active duty service commitment. ACP payments are annually throughout the period of the agreement. The amount of the ACP payment depends on the authorized ACP rates outlined in applicable fiscal year implementation messages. AFI 36-3004, paragraph 1.6.2 provides that ACP payments are suspended when an officer is suspended from aviation service and/or his or her security clearances are revoked. Table 1.1 of AFI 36-3004, provides that ACP payments based on involuntary completion of the ACP contract are recouped from military pay after an anniversary payment is made and any further scheduled payment is not made.

The file reflects that Respondent was removed from flying duties and his security clearance was revoked shortly after his arrest in State Y in November 2009. These actions would have made him ineligible for future ACP payments and subjected him to recoupment of any ACP payments made in FY 2009. The notification of discharge memorandum in this case properly includes notice that the Government could seek recoupment of a proportional amount of any bonus paid to Respondent. However, the record is devoid of any mention of when ACP payments were made or whether they were recouped in the two years in which Respondent was performing non-rated duties before he was placed on excess leave on or about 14 March 2012. The legal review by the Numbered Air Force/JA does not mention recoupment, including whether there is any ACP debt owing or if Respondent waived any objection to recoupment action.

Recoupment

As noted above, recoupment may be appropriate in this case but there is insufficient evidence to determine whether ACP has been previously recouped or if any debt remains. AFI 36-3206, paragraph 4.32.1 provides that the Air Force normally requires recoupment of a portion of educational assistance, special pay or bonus money when officers separate before the period of active duty they agreed to serve. AFI 36-3206, paragraph 3.7 states that recoupment is appropriate if an officer is involuntarily separated for reasons which include misconduct. In cases where a BOI is appointed, the SCA shall refer any dispute as to the debt to the BOI. *See* AFI 36-3206, paragraph 4.32.2.

Title 37, United States Code, Section 303a(e) states that in the absence of Secretarial excusal, a person who receives a bonus or similar benefit conditioned upon the fulfillment of specified service requirements must repay to the United States any unearned portion of the benefit if that member fails to satisfy the service requirements. Paragraph 4.32.2.1 of AFI 36-3206 states that an officer is subject to recoupment if the Secretary directs involuntary separation for any reason listed in Chapters 2 or 3 of the instruction.

Recoupment at this point would require that Respondent be notified of the recoupment action, provided with documentation supporting the amount to be recouped and the right to dispute the validity of the debt before an officer appointed to conduct the inquiry. *See* AFI 36-3206, paragraph 4.32.3.

However, even if all of the ACP payments made to Respondent have not already been recouped, his military record—including his performance of duty in scheduling for his flying squadron—indicates that the Air Force has had use of Respondent's pilot skills even though he has been grounded. Moreover, Respondent's exemplary performance for over 10 years prior to the misconduct, his combat service and his awards and decorations clearly demonstrate Respondent earned his pay for many years. Recoupment and the necessary additional processing should be balanced against Respondent's military record, his 13 years of service and that less than one year that remains of Respondent's unfulfilled military obligation.

Conclusions

There are no significant errors or irregularities that prejudice Respondent's substantive rights. The discharge is legally sufficient to support Respondent's administrative discharge for serious misconduct punishable by military and civilian authorities pursuant to paragraph 3.6.4 of AFI 36-3206. Additionally, we concur with the BOI and Numbered Air Force Commander that a General service characterization is warranted in this case. Finally, while proportional recoupment is authorized, for the reasons stated herein it is appropriate to waive recoupment in light of the additional processing required and Respondent's exemplary military service prior to his misconduct.