

*OpJAGAF 2019-12, BOARDS OF INQUIRY AND AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS, 21 March 2019*

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This is in response to a request for an opinion regarding a recent case before the Air Force Board for Correction of Military Records (BCMR). This request is based on the Secretary of the Air Force (SecAF) approving a Board of Inquiry's (BOI) recommendation to administratively discharge Applicant with an under other than honorable conditions (UOTHC) service characterization for fraternizing with her enlisted patient.

BACKGROUND

Applicant, a former Regular Air Force officer, served as a licensed psychiatrist in the Air Force. Applicant counseled personnel who were in the Air Force Alcohol and Drug Abuse Prevention Program. In 2014, Applicant began counseling an Airman with whom she entered into a personal relationship. Later, the Airman was arrested for driving while intoxicated on the way to Applicant's residence. Applicant assisted with the release of the Airman from police custody. Soon after his release from custody, the Airman committed suicide.

Air Force Office of Special Investigations initiated an investigation into the personal relationship between Applicant and the Airman. A BOI found Applicant was willfully derelict in her duties by failing to maintain an appropriate patient/provider relationship with the Airman, and knowingly fraternizing with the Airman. SecAF approved the BOI's recommendation to administratively discharge Applicant with a UOTHC discharge service characterization. Applicant submitted a petition to the BCMR alleging her administrative discharge record was in error or unjust and requested constructive service credit. Specifically, she alleged the Government erred by denying her request for continuance. In addition, she objected to the Government using evidence in her BOI that suggested she contributed to the Airman's death.

LAW AND ANALYSIS

*Did the government err in denying the defense request for a continuance and allowing the BOI to proceed three days after Applicant was released from a psychiatric hospital?*

No. In this case, the government did not deny Applicant's request; the Legal Advisor did. Respondent may request a delay in convening a BOI, normally not to exceed ten calendar days.<sup>1</sup> The Legal Advisor may grant the delay when denying the request would prejudice the rights of the respondent.<sup>2</sup> In addition, the Legal Advisor may grant additional delays after consulting with the show cause authority.<sup>3</sup> The rights of a respondent include: (1) to receive notice of the board

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<sup>1</sup> AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, paragraph 7.11.

<sup>2</sup> AFI 36-3206, paragraph 7.11.1.

<sup>3</sup> *Id.*

proceedings, specific allegations, and witnesses; (2) to request witnesses; (3) to be represented by counsel; and (4) to submit matters.<sup>4</sup>

Applicant submitted her first request for delay to the board hearing based on her recent release from an inpatient treatment facility. The Government opposed, and the Legal Advisor denied, this initial request. After Applicant voluntarily admitted herself into another in-patient care facility for mental health treatment, she made a second request, which the Legal Advisor granted. Applicant later made a third request, arguing the BOI was premature since it was possible a medical evaluation board might be initiated. The Government opposed this request arguing that proceeding with the BOI would not prejudice Applicant's rights cited above. The Legal Advisor ultimately denied this third request. We have determined the Legal Advisor's ruling was reasonable. Applicant failed to provide sufficient evidence showing that proceeding with the BOI as scheduled would infringe upon her rights, as Applicant was still able to receive notices, request witnesses, be represented by counsel and to submit matters on her behalf to the BOI.

*Was it legal error for the Legal Advisor to allow the Recorder to elicit testimony and argue Applicant caused the death of the Airman?*

No. Pursuant to AFMAN 51-507, oral or documentary evidence that is competent, relevant, material, and not unduly repetitious may be received. In resolving evidentiary matters, the Legal Advisor must consider: (1) the fact that administrative proceedings are not bound by the formal rules of evidence prescribed for trials by courts-martial; (2) the requirement for a full and fair hearing; (3) the requirement for an impartial determination by the board; (4) the requirement that there are adequate safeguards for truth; and (5) a party is entitled to conduct such cross-examination as may be required for a full and true disclosure of the facts.<sup>5</sup>

The Chief of Physician Career Management and Medical Retention Standards testified at the Applicant's BOI. Also a psychiatrist, he opined the following to a question the Recorder posed regarding why Applicant's medical privileges should be revoked: Applicant's "personal and professional misconduct resulted in the death or [sic] another airman."<sup>6</sup> Applicant's counsel objected to this testimony to which the Legal Advisor overruled. Applicant's counsel argued that any evidence provided to the BOI regarding the Airman's cause of death is either not relevant or "prejudicial." The Recorder argued Applicant's misconduct contributed to the Airman's suicide; thus, the BOI should hear evidence regarding that causal connection to assess whether Applicant should be discharged and what characterization of service she should receive.

The Legal Advisor concluded the facts and circumstances surrounding the Airman's death were relevant for the BOI to understand the entire scope of Applicant's misconduct, particularly as it

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<sup>4</sup> AFMAN 51-507, *Enlisted Discharge Boards and Boards of Officers*, paragraph 3.3.2.

<sup>5</sup> AFMAN 51-507, paragraph 5.6.

<sup>6</sup> Q: Speaking as a psychiatrist, why would privileges be recommended for revocation?

A: When someone has engaged in such egregious professional conduct that they cannot be trusted to be a physician any longer is when we would reach that point. There can be a secondary where whose skills have eroded to such a degree; for example, a surgeon who has Parkinson's disease or something like that, they wouldn't be able to practice. Although, generally, in that scenario, only the procedural things would be complete disability. But in this scenario, we have an airman whose personal and professional misconduct resulted in the death or [sic] another airman.

related to the board's decision on whether Applicant should be discharged and what her service characterization should be. Additionally, the Legal Advisor found there were adequate safeguards for the truth when he: (1) permitted the BOI to receive documentary evidence that may have been contrary to the argument offered by the Government; (2) provided Applicant's counsel an opportunity to cross-examine the witness; (3) and permitted Applicant's counsel to give an argument to the BOI regarding the evidence. It should also be noted that the Recorder in this case did not argue in closing argument that Applicant caused the death of a fellow Airmen.<sup>7</sup> Rather, the evidence was used solely to highlight why Applicant's medical privileges should be revoked and how without medical privileges, she should subsequently be discharged from the Air Force. Consequently, the Legal Advisor's decision to permit the testimony did not constitute legal error.

## CONCLUSION

In closing, the Legal Advisor did not error in denying Applicant's request for a continuance as the Applicant failed to show how the denial infringed on her rights associated with the board. In addition, it was not legal error for the Legal Advisor to permit testimony regarding the Airman's cause of death, as such evidence was relevant to determining whether the Applicant should be discharged and what service characterization she should receive.

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<sup>7</sup> Notably, the Recorder did not mention the Airman's cause of death during his closing statement or argue Applicant caused the Airman's death. Since no such argument from the Recorder exists, the portion of the question pertaining to argument the Recorder made was not addressed.