

SECOND ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXXXX

DOCKET NUMBER: BC-2002-02778-4

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

The Board reconsider his request for the following:

1. His bad conduct discharge (BCD) be upgraded to general (under honorable conditions).
2. His grade be restored to staff sergeant (E-5).

RESUME OF THE CASE

The applicant is a former Air Force airman basic (E-1) that was discharged with a BCD on 2 Oct 98.

On 20 Jan 11, the Board considered and denied his request to set aside his court-martial conviction and given a new trail, be given an honorable discharge, and be retired in the grade of chief master sergeant (E-9). The Board noted it was without authority to reverse, set aside, or otherwise expunge a court-martial conviction. Rather, in accordance with Title 10, U.S.C., Section 1552 (f), actions by this Board are limited to corrections to the record to reflect actions taken by the reviewing officials and action on the sentence of the court-martial for the purpose of clemency. The Board found no evidence which indicated the applicant's service characterization, which had its basis in his court-martial conviction and was a part of the sentence of the military court, was improper or that it exceeded the limitations set forth in the Uniform Code of Military Justice (UCMJ). The Board considered the applicant's overall quality of service, the court-martial conviction which precipitated the discharge, the seriousness of the offenses to which convicted, and the documentation pertaining to the applicant's post-service activities. Based on the evidence of record, the Board concluded clemency was not warranted.

On 27 Sep 11, the Board reconsidered and denied his request for a discharge upgrade. The Board again reviewed the evidence presented but remained unconvinced the applicant was a victim of an error or injustice. The Board stated, as previously noted, the applicant's BCD which was part of the sentence he received following conviction by general court-martial for six specifications of accepting or soliciting bribes totaling over \$70,000.00; one specification of impersonating an agent of superior authority; four specifications of extortion; four specifications of larceny of currency, the property of the United States, totaling over \$20,000.00, four specifications of violating an Air Force Regulation by soliciting or accepting gifts from contractors; and two specifications of conspiracy to commit larceny, all in violation of various Articles of the UCMJ. In the interest of

justice, the Board considered upgrading the applicant's appeal based on clemency, noting while the applicant provided a voluminous submission describing his accomplishments since leaving the service, remained unconvinced the seriousness of his misconduct was overcome by his post-service activities. The Board acknowledged his accomplishments since his discharge but were not compelled to correct the existing record.

On 29 Jan 13, the applicant submitted another application for a discharge upgrade. On 17 Sep 14, the AFBCMR staff closed the applicant's case stating they carefully examined his request for reconsideration but found no new relevant evidence to present to the Board noting uncorroborated personal observations or additional arguments on the evidence of record are not adequate grounds for reopening a case.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letters and Records of Proceedings at Exhibits I, L, and N.

On 20 Nov 20, the applicant requested reconsideration of his request for a discharge upgrade and a grade restoration. He contends, through counsel he suffered from Post-Traumatic Stress Disorder (PTSD) at the time of his alleged offenses and continues to suffer to this day and it is very likely any misconduct on his part was a result of PTSD. He would like to be considered under liberal consideration based on this new evidence. He would also like to be considered under clemency guidance since he has been serving his community selflessly since being released from prison. His non-profit organization assists individuals who have been convicted of felonies to become contributing members of society. His counsel again contends he was falsely accused of the offenses. His court-martial had two major legal errors which led to his guilty verdict. The deposition officer was improperly appointed due to bias and the applicant's defense counselors were not focused on his defense but were instead focused on their romantic affair.

In support of his reconsideration request, the applicant submitted the following new evidence: 1) a news article of PTSD; 2) his Bio/Mission Statement with accomplishments; 3) his company's Capability Statement; 4) a news article regarding the applicant; 5) Letters of Appreciation; 6) Drone Certification; and 7) a book cover and endorsement.

The applicant's complete submission is at Exhibit O.

POST-SERVICE INFORMATION

On 30 Apr 21, 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 P). The applicant replied on 3 May 21 and provided an FBI report. According to the report, the applicant has had one arrest since discharge for driving under a suspended license on 4 Apr 09.

The applicant's complete response is at Exhibit Q.

APPLICABLE AUTHORITY/GUIDANCE

This Board is without authority to reverse, set aside, or otherwise expunge a court-martial conviction. Rather, in accordance with Title 10, United States Code, Section 1552(f), actions by this Board regarding courts-martial are limited to two types: 1) corrections reflecting actions taken by the reviewing officials pursuant to the UCMJ (for example, if a convening authority or appellate court took action but that action was not reflected in an Air Force record); and 2) action on only the sentence of the court-martial and solely for the purpose of clemency.

On 3 Sep 14, the Secretary of Defense issued a memorandum providing guidance to the Military Department Boards for Correction of Military/Naval Records as they carefully consider each petition regarding discharge upgrade requests by veterans claiming PTSD. In addition, time limits to reconsider decisions will be liberally waived for applications covered by this guidance.

On 25 Aug 17, the Under Secretary of Defense for Personnel and Readiness (USD P&R) issued clarifying guidance to Discharge Review Boards and Boards for Correction of Military/Naval Records considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions [PTSD, Traumatic Brain Injury (TBI), sexual assault, or sexual harassment]. Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on the aforementioned conditions.

Under Consideration of Mitigating Factors, it is noted that PTSD is not a likely cause of premeditated misconduct. Correction Boards will exercise caution in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with the aforementioned mental health conditions and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

Boards are directed to consider the following main questions when assessing requests due to mental health conditions including PTSD, TBI, sexual assault, or sexual harassment:

- a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
- b. Did that condition exist/experience occur during military service?
- c. Does that condition or experience actually excuse or mitigate the discharge?
- d. Does that condition or experience outweigh the discharge?

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness (USD P&R) issued supplemental guidance 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 Memorandum.

On 30 Apr 21, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit P).

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 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.

Under Honorable Conditions (General). 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 airman's military record.

Under Other than Honorable Conditions. 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 airmen. 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 Air Force.
- 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 assault of a child, sexual abuse of a child, forcible sodomy and attempts to commit these offenses.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor completed a review of all available records and finds insufficient evidence to support the applicant's request for a discharge upgrade or correction of grade to E-5 based on his mental health contention. His counsel contends he began suffering from PTSD during his deployment and upon his return, he began acting out and was unaware he had PTSD at the time. His counsel also contends, if he failed to act appropriately during or after his deployment, it was highly likely his actions were the direct result of his mental instability. His condition was overlooked by his command and defense counsel and his condition could have served as a valid defense theory in his case. The applicant and his legal counsel alleged he suffered from PTSD caused by his deployment experience but did not specify the actual traumatic event(s) he experienced and the timeline of the events. Furthermore, they did not provide any additional

information of the specific symptoms of PTSD he experienced, particular “acting out” behaviors resulting from his mental health condition, and/or there was no evaluation or diagnosis from a duly qualified mental health professional to confirm he developed PTSD. His personal testimony alone was too ambiguous with not enough information that would be considered conceivable. Simply proclaiming one has PTSD is not sufficient enough as more clarified information is needed to augment their contentions. They also emphatically denied the applicant committed any of his convicted crimes and offenses and alleged he was falsely accused. A question however, arises from their declaration as to how did his condition of PTSD cause the offenses/misconduct he actually denied committing? They failed to effectively provide an answer to this question or notion and did not adequately demonstrate how his mental health condition caused his misconduct leading to his discharge from service. It appeared his convicted offenses/misconduct and condition of PTSD were two mutually exclusive events and have no nexus or causal relationship. There is no objective evidence in the form of his military personnel records and service and post-service treatment records that are available for review that would corroborate any of their statements. The burden of proof is placed on the applicant to demonstrate there was a material error or injustice with his discharge, and the Psychological Advisor finds the evidence presented was insufficient to support the applicant’s request for the desired changes to his records.

Liberal consideration is applied to the applicant’s request due to the contention of a mental health condition. The following are responses to the four questions in the policy based on the available records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?

The applicant and his legal counsel contend the applicant suffered from PTSD caused by his deployment experience. They alleged his command and defense counsel failed to take into consideration his condition at the time of trial despite denying the applicant committed any of his convicted offenses at general court martial.

2. Did the condition exist or experience occur during military service?

There is no evidence the applicant suffered from PTSD or similar conditions during military service. They contend he was unaware he suffered from PTSD at the time and believed this condition existed during military service. There are no records submitted to substantiate their claim and no evidence he was evaluated or given this diagnosis by a duly qualified mental health professional.

3. Does the condition or experience excuse or mitigate the discharge?

The applicant and his legal counsel denied the applicant committed any of his convicted offenses and misconduct and stated he was falsely accused. Since they maintained he did not commit his offenses and misconduct, his condition of PTSD developed from his deployment experience does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

Since there is no evidence his mental health condition of PTSD existed during service and no evidence his PTSD condition caused his convicted offenses and misconduct, his condition does not outweigh his original discharge.

The complete advisory opinion is at Exhibit R.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 15 Mar 22 for comment (Exhibit S), and the applicant replied through counsel on 14 Apr 22 asking for more time to gather evidence to support his case and his case was closed (Exhibit T).

On 2 Jun 22, the applicant's counsel submitted a reply requesting his client's case be reopened. In his response, the applicant's counsel contends his client's PTSD and depression is directly linked to his service time in the Persian Gulf War and Korea and is not "vague and unconvincing" as stated in the advisory opinion. Although the applicant denies his underlying misconduct for which he was court-martialed, he has always accepted responsibility for his lack of judgement which put him in a bad situation and is clearly related to his PTSD. If his PTSD had been known at the time of his trial, he likely would not have received a BCD. To support his case, the applicant submitted additional medical documentation to directly address whether his PTSD occurred during his military time.

The applicant's complete response is at Exhibit U.

ADDITIONAL AIR FORCE EVALUATION

The AFRBA Psychological Advisor finds the new information presented still insufficient to support the applicant's request for the desired changes to his records. Liberal consideration is applied to the applicant's request and the answers to the four questions from the Kurta Memorandum already presented in the previous advisory also remain unchanged. The submitted treatment records were primarily focused on his post-service stressors relating to his legal and employment issues. These post-service stressors exacerbated memories and stressors relating to his military service. There were references of trauma from his military service such as he felt he was wrongfully incarcerated at Fort Leavenworth, participated in DESERT STORM, deployed to Korea, and was on temporary duty with the Marines. There was no evidence he developed any mental health conditions/symptoms from these experiences during his military service. It appeared more likely than not he had developed anxiety, depression, and/or PTSD symptoms post-service. The submitted records did not indicate whether he had any mental health issues to include PTSD during service and/or how his mental health condition caused his misconduct and eventual discharge. The submitted records also did not show the applicant was diagnosed with PTSD but instead, he was given a diagnosis of Unspecified Trauma and Stressor Related Disorder. Regardless of a confirmed diagnosis of PTSD, there was no nexus established between his mental health condition and misconduct. It is reminded the applicant was convicted by general court-martial for bribery, larceny, impersonating an agent, and accepting or soliciting gifts from contractors. These are serious misconduct and offenses and some of these activities may be considered as premeditated behaviors. These behaviors and misconduct do not appear to be impulsive or were caused by his mental health condition. The applicant and/or his legal counsel also did not adequately explain how his mental health condition caused, excused, or mitigated any of his misconduct. Giving the applicant the benefit of the doubt he may have suffered from a mental health condition during service, the Psychological Advisor opines the severity of his

misconduct resulting with this general court-martial conviction could not be disregarded or outweighed by his mental health condition. The Board may decide otherwise, but there was no error or injustice identified with his discharge from a mental health perspective.

The complete advisory opinion is at Exhibit V.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 9 Dec 22 for comment (Exhibit W), and the applicant replied, through counsel on 28 Dec 22 and asked for his case to be closed. On 31 May 23, the applicant, through counsel, submitted his rebuttal. In his response, the applicant's counsel contends the supplemental advisory opinion does not provide a fair analysis of the applicant's mental health. First the advisory notes the applicant's mental health was not noted until many years after his discharge. This is explained in the original submission and is outlined in the Kurta Memo as it is unreasonable to expect the same level of proof for injustices committed years ago due to a mental health issue which need not appear in the veteran's records to receive relief. Second, the advisory is contradictory as to when the applicant's mental health issue first arose. The applicant submitted a statement of the events that caused him to develop mental health issues while in the service that plague him to this day. Finally, the advisory fails to consider how the applicant's incarceration experience affected his mental health. As stated in the original submission, the applicant denies the underlying misconduct that was the subject of his court-martial, while accepting responsibility for his lack of judgement and putting himself in a bad position. As stated in the Kurta Memo, mental health conditions inherently affect one's behaviors and choices causing veterans to think and behave differently which is precisely what happened with the applicant.

The applicant's complete response is at Exhibit X.

FINDINGS AND CONCLUSION

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board concludes the applicant is not the victim of an error or injustice. The applicant contends he was falsely accused of the offenses and had inadequate counsel. As previously stated, the Board is without authority to reverse, set aside, or otherwise expunge a court-martial conviction; rather, actions by the Board regarding court-martial are limited to corrections reflecting actions taken by the reviewing officials pursuant to the UCMJ and action on only the sentence of the court-martial and solely for the purpose of clemency. The Board finds the applicant has provided no evidence which would lead the Board to believe his service characterization was contrary to the provisions of the governing regulation, unduly harsh, or disproportionate to the offenses committed nor did they find he lacked proper counsel.

Furthermore, the Board concurs with the rationale of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. Liberal

consideration was applied to the applicant's request due to the contention of a mental health condition; however, since there is no evidence, he had a mental health condition from his deployments and other military duties had a direct impact on his behaviors and serious misconduct resulting with his discharge, his condition or experience does not excuse, mitigate, or outweigh his discharge. The severity of his misconduct resulting with this general court-martial conviction was not overcome by any mental health condition he may have suffered.

Nonetheless, in the interest of justice, the Board considered upgrading the applicant's discharge. In support of his request for an upgrade, the applicant has provided an FBI report which shows an arrest on 4 Apr 09 for driving under a suspended license, his resume, awards, letters of appreciation, and other certifications. However, the evidence he provides lacks references that demonstrate his character, post-service rehabilitation, service to the community, or any degree of remorse pertaining to his in-service conduct. The Board contemplated the many principles included in the Wilke Memo to determine whether to grant relief based on an injustice or fundamental fairness. Furthermore, the Board considered the applicant's post-service conduct and achievements, length of time since the misconduct, his character and reputation, service to the community, job history and degree of contrition. However, given the evidence presented, the Board determined relief is not warranted and therefore recommends against correcting the applicant's record.

The applicant retains the right to request reconsideration of this decision, which could be in the form of a personal statement, character statements, or testimonials from community leaders/members specifically describing how his efforts in the community have impacted others. Should the applicant provide documentation pertaining to his post-service accomplishments and activities, this Board would be willing to review the materials for possible reconsideration of his request based on clemency.

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-2002-02778-4 in Executive Session on 26 Jul 23:

, Panel Chair
, Panel Member
, Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit I: Record of Proceedings, w/ Exhibits A-H, dated 20 Jan 11.
Exhibit L: Addendum Record of Proceedings, w/ Exhibits J-K, dated 27 Sep 11.
Exhibit N: Denial Letter, SAF/MRBC to Applicant w/ Exhibit M, dated 17 Sep 14.
Exhibit O: Application, DD Form 149, w/atchs, dated 20 Nov 20.

- Exhibit P: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 30 Apr 21.
- Exhibit Q: FBI Report, dated, 3 May 21.
- Exhibit R: Advisory Opinion, AFBCMR Psychological Advisor, dated 21 Oct 21.
- Exhibit S: Notification of Advisory, SAF/MRBC to Applicant, dated 15 Mar 22.
- Exhibit T: Applicant's Request to Close Case, dated 14 Apr 22.
- Exhibit U: Applicant's Response, w/atchs, dated 2 Jun 22.
- Exhibit V: Advisory Opinion, AFBCMR Psychological Advisor, dated 29 Nov 22.
- Exhibit W: Notification of Advisory, SAF/MRBC to Applicant, dated 9 Dec 22.
- Exhibit X: Applicant's Response, w/atchs, dated 31 May 23.

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