

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXXXXXXXXXX

DOCKET NUMBER: BC-2015-03434

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider his request for the following:

1. Upgrade his dismissal from active duty to an honorable discharge.
2. Change his narrative reason for separation of Conviction by Court-Martial (Other than Desertion) to Secretarial Authority.
3. Change his Reentry (RE) code from Not Applicable to "1M¹."

RESUME OF THE CASE

The applicant is a former Air Force first lieutenant (O-2).

The applicant's military human resources record (MHRR) includes Chronological Record of Medical Care dated 29 Apr 91, which states he was diagnosed with alcohol abuse and personality disorder, not otherwise specified (NOS).

On 4 Jun 92 (per General Court-Martial Order, Number 32, dated 4 Jun 92) the Secretary of the Air Force approved the sentence of the court-martial for his wrongful use of cocaine and ordered the applicant's dismissal.

On 23 Jun 92, the applicant was discharged in the rank of first lieutenant with type of separation "Dismissal" and narrative reason for separation of "Conviction by Court-Martial) Other Than Desertion." Block 27, *Reentry Code*, reflects "Not Applicable." He served 2 years, 3 months, and 26 days of active duty service. Item 18, *Remarks*, shows "Continuous Honorable Active Military Service Date of 28 Feb 90, 31 Dec 91 through 22 Jun 92, 172 days excess leave."

On 1 Nov 16, the Board considered and denied his request for upgrade of his discharge and change of his narrative reason for separation. His request for service credit for his time in the Air Force Reserve was administratively corrected. The Board noted it was without authority to reverse, set aside or otherwise expunge a court-martial conviction and corrections were limited to reflect actions taken by reviewing officials and action on the sentence of the court-martial for the purpose of clemency. In this respect, the Board found no basis to grant the requested relief. For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letter and Record of Proceedings at Exhibit F.

On 10 Sep 20, the applicant requested reconsideration of his request. Counsel, on behalf of the applicant, requests the applicant's discharge be upgraded based on new evidence. He qualifies for

¹ Eligible to reenlist, Second Term or Career Airmen not yet considered under the SRP.

relief under the Secretary of Defense guidance for liberal consideration. The primary reason he is seeking a discharge upgrade is to be allowed to use his skills to help veterans and their families in need. He suffers from depression and post-traumatic stress disorder (PTSD). His military record shows his counseling duties involved treating victims and perpetrators of domestic violence and sexual abuse, which led to his suffering and repeated hospitalization. The failure to receive proper treatment for his depression and PTSD led to his self-medication, illegal drug use and a suicide attempt, which led to his less than honorable discharge. His post-service life has been exemplary and he has demonstrated his complete rehabilitation, good character and high achievement. He has been drug free, he is a good family man, active in his church and is devoted to helping others.

The two key factors in the request for reconsideration of his request are the presence of a mental condition as a cause of the conduct and his exemplary conduct post-service. Both the Kurta and Wilkie Memos were issued after the Board's decision. He provides letters from psychiatrists who have been treating him since 2013. He continually receives medication and psychotherapy for his conditions. He was also the victim of sexual abuse as a child by one of his siblings. His work as a family advocacy officer took a toll on him. Beginning in Oct 90, he sought treatment for his mental health condition. There is ample evidence in his records that he suffered from depression and PTSD due to his highly stressful service as a social worker in the Air Force. His military health records conclusively demonstrate he had a mental health condition that existed during service and his mental health condition was a mitigating factor in his discharge.

The Kurta Memo directs the Board to give liberal consideration to applicants seeking discharge upgrades in circumstances where the evidence shows that a mental health condition leading to the other than honorable discharge. The Board should give a more liberal consideration to the applicant's case, especially his military records which show he suffered from a debilitating mental condition while on active duty. The Wilkie Memo directs the Board to exercise clemency for applicants seeking discharge upgrades in circumstances involving nonviolent offenses where the applicant has shown ample evidence of rehabilitation. His offense was nonviolent. Moreover, there is ample evidence he has fully rehabilitated himself and led a highly honorable life post-service.

In a personal response, the applicant states prior to being commissioned in the Air Force, he served as an enlisted Airman in the Air Force Reserve and never experienced any physical, mental or disciplinary problems. With the benefit of age, experience and hindsight he can see he was overwhelmed with his caseload as a social worker and the nature of the cases. He was tasked with counseling victims and perpetrators of sexual abuse and this had a profound mental impact on him given his own repressed childhood sexual trauma.

The applicant's complete submission is at Exhibit G.

On 23 Jul 21, the applicant's case was administratively closed per his counsel's request on 13 Jul 21 for additional time to provide the required FBI Identity History Summary Check.

On 17 Aug 21, counsel provided an additional response, to include the FBI Identity History Check and requested the case be re-opened. On 24 Jan 23, the applicant's counsel requested status of the applicant's case. Counsel was informed that due to an administrative oversight the applicant's case was not re-opened upon request. The applicant's case was re-opened on 24 Jan 23.

POST-SERVICE INFORMATION

The applicant in his request provided the Massachusetts Criminal Offender Record Information (CORI) dated 24 Jun 20, which shows no criminal information on file. He also provides letters of support from his mental health provider, employer, family and church. In a personal statement,

he states he has led a productive life and has worked in the mental health field in three states as a social worker, outpatient clinician, team leader and supervisor.

On 25 Jun 21, the Board sent the applicant a request for post-service information. On 17 Aug 21, counsel provided the FBI Identity History Check report dated 30 Jul 21, which shows the applicant has no arrests on file aside from his court-martial sentence for cocaine use in Jul 91.

The applicant's complete response is at Exhibit N.

APPLICABLE AUTHORITY/GUIDANCE

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 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 the supplemental guidance, paragraphs 6 and 7.

Per 10 U.S.C. § 1161, Commissioned officers may be dismissed from the Armed Forces by a sentence of a general court-martial.

AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, describes the types of service characterization:

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.

AFI 36-2606, *Reenlistment and Extension of Enlistment in the United States Air Force*. RE codes determine whether or not enlisted Airmen may reenlist, or enlist in a military service at a later time.

DD Form 214, *Certificate of Release or Discharge from Active Duty*, Total Force Personnel Service Delivery Guide. An Airman's reentry code is annotated in block 27 of the DD Form 214. Officers do not receive a reentry code; therefore, NA [Not Applicable] will be entered in block 27.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor finds insufficient evidence to support the desired changes to his record. The Board, after applying the Kurta and Wilkie factors may find that liberal consideration or clemency may support an upgrade of his discharge.

On 29 Nov 90, he was admitted to inpatient psychiatry. He detailed stress relating to having to counsel "wife beaters and child molesters." He also relayed his father was ill, his brother was incarcerated and there was pressure on him to return home to take care of his father. He reported receiving letters of counseling for reporting late to work related to commuting to take care of his father. His supervisors reported to mental health he would leave scheduled patients in the waiting room for hours; they would be unable to locate him and then find him off-base. He also noted having financial difficulties and that he was sexually abused as a child.

On 17 Apr 91, a mental health provider stated the applicant overdosed on cough syrup and his girlfriend relayed he had been drinking to the point of blackout and seizures for three to four months. The applicant noted depressed mood. He was diagnosed with Axis I: Adjustment disorder with disturbance of conduct and alcohol abuse and Axis II: Personality disorder, not otherwise

specified (NOS). He was admitted for inpatient alcoholism treatment. On 25 Apr 91, he was referred to social actions for substance abuse rehabilitation and his commander ordered abstinence.

On 9 May 91, his urine toxicity test was positive for cocaine and medical providers concurred his behavior was consistent with substance abuse. On 20 Jun 91, he was given a diagnosis of alcohol abuse, cocaine abuse per positive urinalysis and personality disorder NOS. A medical note entry dated 8 Jul 91 noted he was seen in the emergency room for suicidal thoughts and had smoked cocaine all night. He was discharged from the hospital on 9 Jul 91 and his medical record indicated he felt woozy from cocaine overdose.

The board may elect to apply liberal consideration to the applicant's request due to the applicant's contention of a mental health condition. The following responses are based on information provided in the records to the four pertinent questions in the policy:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge? The applicant claims, through counsel, that "failure to receive the proper treatment for his depression and PTSD led to self-medication, illegal drug usage and a suicide attempt that resulted in his less than honorable discharge."

2. Did the condition exist or experience occur during military service? There is no evidence or records the applicant was diagnosed with or exhibited any symptoms of PTSD at any time in service. The applicant was given a provisional diagnosis of Major Depression that was updated to Personality Disorder NOS by the applicant's treating psychiatrist. The applicant was, on multiple occasions, given the diagnoses of substance use and personality disorder, which are unsuiting conditions that are incompatible with military service.

3. Does the condition or experience excuse or mitigate the discharge? The applicant was dismissed from service for drug use. The applicant, in his testimony, did not attribute his substance use to being caused by, or to cope with, a mental health condition. Rather, he stated it was a willful and knowing violation of Air Force policy.

4. Does the condition or experience outweigh the discharge? Since the applicant's condition does not mitigate or excuse the discharge, it does not outweigh the discharge. No error or injustice was found in the discharge processing.

There is no evidence he was diagnosed with or exhibited any symptoms of PTSD at any time in service. On multiple occasions, he was given the diagnoses of substance use and personality disorder, which are unsuiting conditions incompatible with military service. With respect to whether his condition or experience excused or mitigated the discharge, he was dismissed for drug use. In his testimony, he stated it was a willful violation of Air Force policy. He did not indicate his substance use was caused by or to cope with a mental health condition. Since his condition does not mitigate or excuse the discharge, it does not outweigh the discharge. There was no error or injustice in the discharge processing.

The complete advisory opinion is at Exhibit J.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the Secretary of Defense Clarifying Guidance memoranda to counsel and applicant on 25 Jun 21 (Exhibit I) and a copy of the advisory on 7 Jul 21 for comment (Exhibit K). In a response dated 17 Aug 21, the applicant's counsel provided the FBI report dated 30 Jul 21 showing the applicant has had no arrests since his court-martial for cocaine use in 1991.

Counsel states the Kurta Memo directs the Board to give liberal consideration to applicants seeking discharge upgrades in circumstances where the evidence shows that a mental health condition leading to an other than honorable discharge. The Board should give liberal consideration to the applicant's case. His military records show he suffered from a debilitating mental condition while on active duty. The Wilkie Memo provides standards and principles to guide the Board when determining whether to exercise clemency or to grant relief for fundamental fairness. In particular, the memo lists factors in paragraphs 6.a-l. and 7.a-r. for the Board to consider. Among other things, these factors include evidence of rehabilitation, character letters, acceptance of responsibility, passage of time since the misconduct, and the fact the offense was nonviolent. His offense was non-violent and there is ample evidence he has fully rehabilitated himself and led a highly productive and honorable life post-service.

The applicant's complete response is at Exhibit N.

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 Majority concludes the applicant has presented evidence sufficient to demonstrate an injustice regarding part, but not all, of his request. While the Board finds no error in the applicant's court-martial and discharge for drug use, the Board Majority recommends partial relief based on clemency. In particular, the Board Majority finds the applicant's commendable 30-year post service conduct warrants upgrade of his discharge to general (under honorable conditions) and change of his narrative reason for separation to reflect "Secretarial Authority." The Board Majority notes the applicant's FBI history shows no arrests since his court-martial and numerous letters of support have been provided from medical professionals, employers, ministers, friends and family over the course of many years to demonstrate his rehabilitation and contributions to his community. The applicant also admitted to his failings, expressed regret and took responsibility for his crime, a crime that the Board notes was not violent. However, for the remainder of the applicant's request, the evidence presented did not demonstrate an error or injustice, and the Board therefore finds no basis to recommend granting that portion of the applicant's request. In this respect, the applicant requests his discharge be upgraded to honorable on the basis of his mental health condition (Kurta Memo); however, the Board finds insufficient evidence to show he was diagnosed with or exhibited any symptoms of PTSD during his service. While the applicant contends his duties as a social worker were a nexus for his PTSD and drug use, insufficient evidence has been provided to substantiate this to be the case. The applicant was given the diagnoses of substance use and personality disorder, which are unsuited conditions incompatible with military service. Accordingly, the Board does not find his mental health condition mitigated his discharge. The applicant also requests his RE code be changed to "1M;" however, officers do not have reenlistment codes and RE codes are not listed on the DD Forms 214 for officers. Therefore, the Board Majority recommends correcting the applicant's records as indicated below.
4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show on 23 Jun 92, he was discharged with service characterized as general (under honorable conditions), and a separation code and corresponding narrative reason for separation of JFF, *Secretarial Authority*.

CERTIFICATION

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2015-03434-2 in Executive Session on 16 Feb 23:

, Panel Chair
, Panel Member
, Panel Member

A majority of the panel voted to correct the record. **Work-Product** voted to not correct the record and did not provide a minority opinion. The panel considered the following:

- Exhibit F: Record of Proceedings, w/ Exhibits A-E, dated 13 Jan 17.
- Exhibit G: Application, DD Form 149, w/atchs, dated 10 Sep 20.
- Exhibit H: Documentary evidence, including relevant excerpts from official records.
- Exhibit I: Notification of Clarifying Guidance Clemency, w/atchs, dated 25 Jun 21.
- Exhibit J: Advisory Opinion, Psychological Advisor, dated 6 Jul 21.
- Exhibit K: Notification of Advisory, SAF/MRBC to Applicant, dated 9 Jul 21.
- Exhibit L: Counsel's request for Admin Close, dated 13 Jul 21.
- Exhibit M: Notification of Admin Close, dated 23 Jul 21.
- Exhibit N: Counsel's response, w/atchs, dated 17 Aug 21.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.11.9.