

## **ADDENDUM TO RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-1991-00023

XXXXXXXXXXXXXX

**COUNSEL:** XXXXXXXXXXXX

**HEARING REQUESTED:** NO

### **APPLICANT'S REQUEST**

The Board reconsider his request to upgrade his under other than honorable conditions (UOTHC) discharge.

### **RESUME OF THE CASE**

The applicant is a former Air Force airman basic (E-1).

On 3 Apr 91, the Board considered and denied his request to upgrade his UOTHC discharge to a general (under honorable conditions) discharge finding the prior request was not timely submitted. The applicant contended the court-martial board was prejudiced by an erroneous diagnostic label of sociopathic personality disorder. The applicant contended he had no such disorder; however, alcohol abuse was present throughout his military service, and it appears no efforts were made to enforce Department of Defense and Air Force directives to require him to seek help for that condition.

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 E.

On 9 Mar 23, the applicant, via counsel, requested reconsideration of his request for upgrade of his UOTHC discharge, and in this instance, requested upgrade to honorable. Via counsel, the applicant contended he turned down an offer to become a drill instructor as he dreamed of serving overseas, and in retaliation, he was assigned as a fuels system repairman. He was initially confused by this assignment as he is over 6-foot tall and much larger than other fuel systems technicians, but it soon became clear he was being punished by his superiors. When he went to his commander to discuss his assignment, he was met with derision and mockery.

His assignment required crawling into the interior of the airplanes to make repairs to the fuel systems. During a routine repair, he became entangled in the respiratory hoses and began feeling claustrophobic, calling for help, but no one came to assist. His anxiety worsened the longer he was trapped, and he remained confined for an extended period. This feeling of being trapped and not able to escape is something the applicant still experiences today. Eventually, he was able to free himself and when he went to find out why no one came to help, his commander simply laughed and told him to get back to work. He understood he was being hazed and his treatment at the hands of his superiors was not likely to improve.

As a result of this incident, along with the treatment he received from his fellow airmen, he began to experience anxiety and depression. Not finding help within the Air Force, he began self-medicating as a form of relief. His performance remained positive on overseas deployments, but upon returning stateside, his anxiety worsened, as did his attempts at self-medication. His drinking continued to increase until eventually, he was hospitalized with alcohol poisoning. Despite the need for intervention, he received no support from the Air Force

and was back to full duty within days. This led to several instances of misconduct, including unauthorized leave, possession of marijuana, and escaping from lawful confinement.

On 27 Aug 73, he was given nonjudicial punishment (NJP) which stated the action would be delayed pending psychiatric and medical evaluation. Yet, despite this order, he was never given psychiatric evaluation. If such an evaluation had been completed, it would have determined the applicant was suffering from deteriorating mental health conditions and needed treatment. In Oct 73, a special court-martial was convened related to two periods of unauthorized leave and possession of .80 of a gram of marijuana. After his conviction and confinement, his anxiety symptoms came to a head. In Feb 74, he got into an off-base altercation and was arrested and returned to the military base. He was segregated for 42 days and pushed to the brink, and feeling like he had no other option, he and another airman escaped confinement. He was returned to confinement less than 24 hours later. He was told repeatedly that he was better off dead and completely worthless. Worn down, he eventually attempted suicide in his jail cell. The applicant met a second court-martial in Apr 74, and was discharged on 13 Feb 75. While the misconduct was of a serious nature, it was entirely connected to, and explained by, his trauma. He would suffer for years from mental health conditions he developed as a result of his service before finally being diagnosed with Post Traumatic Stress Disorder (PTSD).

Upon returning to his parent's home post-service, he was completely adrift, in the throes of alcohol dependence, anxiety, and PTSD but receiving no services or care. He struggled for years to hold a job, got married and divorced twice, and had three children. His life changed for the better in Jan 89 when he completed a rehabilitation program and has not had a drink since. As a result of getting sober, he had reconnected with his family. While his life improved, he was still haunted by his time in service. He spent years with the effects of his mental health conditions, but without an official diagnosis. It wasn't until Nov 21 that he was first diagnosed with PTSD related to his military service. This diagnosis was later confirmed on 24 Jan 23.

Prior to this application, he twice applied for a change to his discharge status. In decisions dated 19 Jun 83 and 8 Apr 91, he was denied both times. However, each application came before his PTSD diagnosis.

On 3 Sep 14, Secretary Hagel issued a memorandum of supplemental guidance to the Discharge Review Boards (DRB) and Boards for Correction of Military/Naval Records (BCM/NR) regarding applications for a discharge upgrade where PTSD is alleged. As part of that guidance, the Boards were instructed that "[t]ime limits to reconsider decisions will be liberally waived for applications covered by this guidance." On 24 Feb 16, the Principal Deputy Under Secretary Brad Carson issued a second guidance letter to the Boards. As part of this guidance, the Boards were instructed that for cases that were previously considered either by the DRBs or BCM/NRs "but without benefit of the application of the Supplemental Guidance, shall be, upon petition, granted de novo review utilizing the Supplemental Guidance." Finally, on 25 Aug 17, A.M. Kurta, performing the duties of the Under Secretary of Defense for Personnel and Readiness, issued clarifying guidance to the Boards that expanded the cases in which liberal consideration is to be applied to include all mental health conditions, not just PTSD.

The applicant requests the Board grant liberal consideration to his contention his behavior that led to his discharge was a direct result of his mental health conditions. In the interest of justice, his discharge warrants an upgrade to honorable, and he asked the Board to consider that the Air Force failed to acknowledge his behavior was symptomatic of an undiagnosed mental health condition as a result of his service and in light of his faithful and dutiful service prior to his injury, an UOTHC discharge acts as an injustice. He served honorably prior to his multiple instances of misconduct and his performance records reflect his competent service for the majority of his time in the Air Force. Further, an honorable discharge does not require flawless service and many service members are separated with an honorable discharge despite several

instances of minor misconduct. Finally, the offenses that led to his discharge occurred almost 50 years ago. For a majority of this time, he was forced to work through his mental health disorders without assistance from the Veterans Administration (VA). Since his discharge, he has addressed and treated his alcohol dependence and PTSD. Despite the hurdle he has had to overcome, the applicant has become a contributing member of his community and has never stopped working on bettering himself.

In support of his reconsideration request, the applicant submitted the following new evidence: (1) Personal Affidavit; (2) Health Record from XXXXX General Health; and (3) Letter from a licensed clinical professional counselor (LCPC), unsigned, dated 24 Jan 23.

The applicant's complete submission is at Exhibit F.

## **POST-SERVICE INFORMATION**

On 21 Sep 23, 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 H). The applicant replied on 18 Oct 23 and provided an FBI report. According to the report, the applicant had the following arrests:

- 5 Dec 70 for Disorderly Conduct; misdemeanor – fined \$35.00
- 4 Oct 77 for Drunk Driving (dismissed); B (dismissed); Reckless Driving – fined \$315.00 w/o probation
- 23 Jan 78 for Misdemeanor Drunk Driving (dismissed); Driving without a License (dismissed)
- 21 Jan 79 for Warrants (B on person and Reckless Driving); 24 months probation
- 7 Feb 84 for Rearrest/Revoke Probation on Reckless Driving; B on Person
- 9 Sep 15 for Domestic Violence Assault (dismissed, pled to other charge); Obstructing Report of a Crime – misdemeanor (dismissed, pled to other charge); Criminal Restraint – Misdemeanor – fined \$250.00; Criminal Mischief – misdemeanor (dismissed)

## **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 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 issued supplemental guidance, known as the Wilkie Memo, 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 Memo.

On 21 Sep 23, Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit H).

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 Department of the 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.

**General (Under Honorable Conditions).** 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 member's military record.

**Under Other than Honorable Conditions.** This characterization is used 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 members. 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 DAF.
- 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 abuse of a child, sexual harassment, and attempts to commit these offenses.

## AIR FORCE EVALUATION

AFRBA Psychological Advisor finds insufficient evidence to support the applicant's request for an upgrade to his discharge.

This advisor finds that there is insufficient evidence that the applicant had PTSD during his time in service or at discharge, thus his recent diagnosis of PTSD does not mitigate his misconduct and discharge from the military with a UOTHC characterization after his conviction from a special court-martial. While a provider diagnosed him with PTSD 48 years after his military service, there is insufficient evidence he met the criteria for PTSD while he was in service. Despite the applicant's claim that he was not psychiatrically evaluated during his service, an evaluation was completed on 19 Jul 73. It did not find evidence of a psychiatric disorder other than a personality disorder. This psychological advisor notes that PTSD was not recognized as a diagnosis until 1980. Even though PTSD was not a recognized diagnosis during the applicant's service, there were other mental health disorders/conditions that may have met the diagnostic criteria for reaction to stress such as an anxiety disorder, depression, or adjustment disorder. The applicant presumably did not show symptoms of any of these mental health disorders and was not diagnosed during the time of his service. Additionally, assuming regularity with his court-martial proceedings, the applicant would have been evaluated and cleared from a psychological perspective, before proceeding to trial. It should also be noted that the counsel's contention that he was never psychiatrically evaluated applies to his reduction in grade/rank, not to either of his court martial proceedings.

The applicant's LCPC (XXXXXX) noted the applicant had PTSD from the time he was in the service. With all due respect to the provider, her professional opinion is purely speculative. It has been approximately 48 years since his time in the service and his reported traumatic experience while in the military. External stressors, experiences, and progression of the condition or disease more likely than not may have influenced and impacted the applicant's clinical presentation during the years since his discharge in 1975. Again, the evaluation is applicable to the applicant's presentation at the time of the evaluation (2023) and not at the time of his military service (1971-1975).

The applicant, through counsel, submitted four medical encounters. It is unclear if these encounters represent the entirety of the applicant's mental health treatment post-discharge. The encounters from XXXXX General Health seem to list previous diagnoses from the Active Problem list that are not diagnosed in the submitted encounters, indicating the applicant may have prior mental health encounters that were not submitted with his application. The document from his LCPC only briefly described the applicant's diagnosis, but not his treatment or the etiology of his PTSD (except to report it came from his time in service). Regardless, even in 2021, the submitted records show mental health diagnoses of anxiety and reaction to stress. The submitted records indicate he was not diagnosed with PTSD until 2023. The encounters indicate that his stressors and anxiety are the result of current circumstances (in the middle of a multi-million-dollar real estate deal), that his symptoms were fairly recent in nature (never had this happen before and similar symptoms several times in the past year) and his symptoms appear to resolve after the stressor passes. These reported symptoms are not consistent with a long-standing diagnosis of PTSD.

The applicant reported he declined a position as a drill instructor, as he wanted to serve overseas. After turning down this assignment, he was transferred and trained as a fuel system repairman. Despite reporting that he was assigned this position in retribution for turning down the drill sergeant position, the record indicates that he excelled at it. While working on aircraft fuel system components, his performance was rated as 7s and 8s, with an overall evaluation of 7 out of a possible 9. Further, he was promoted to airman on 22 Jun 72 and promoted to airman first

class on 22 Feb 73. There is no indication he was assigned this position as retribution for turning down the drill sergeant position.

There is insufficient evidence the applicant had any mental health condition during his time in service. There is no evidence that he sought mental health treatment while he was in the military or that he was suffering from any mental health symptoms, other than those related to a personality disorder (as reported in a physical profile serial report). Therefore, there are no mental health reasons that would be mitigating factors for his misconduct that included absenting himself, failure to go/report, disrespect of a superior noncommissioned officer, wrongfully possessing marijuana, and escaping from lawful confinement.

After considering the entire record and contentions, there is insufficient evidence to suggest the applicant had any mental health condition that would mitigate his misconduct. A review of the available records finds no error or injustice with the applicant's discharge and insufficient evidence has been presented to support the applicant's request. Liberal consideration is applied to the applicant's petition due to the contention of a mental health condition. The following are responses to the four questions from the Kurta Memorandum based on information presented in the records:

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

The applicant contends he has PTSD related to his military experience.

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

The applicant was diagnosed with PTSD 48 years after the military. A document dated 24 Jan 23 indicated that it was, "from the time he was in the service."

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

There is insufficient evidence the applicant had any mental health condition during his time in service. There is no evidence he sought mental health treatment while he was in the military or that he was suffering from any mental health symptoms, other than those related to a personality disorder (physical profile serial report). Therefore, there are no mental health reasons that would be mitigating factors for his misconduct that included absenting himself, failure to go/report, disrespect of a superior noncommissioned officer, wrongfully possessing marijuana, and escaping from lawful confinement.

4. Does the condition or experience outweigh the discharge?

Since the applicant's mental health condition does not excuse or mitigate his discharge, the applicant's condition also does not outweigh the original discharge.

The complete advisory opinion is at Exhibit J.

## **APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 8 Nov 23 for comment (Exhibit K), and the applicant replied on 6 Dec 23. In his response, applicant's counsel contended the advisory called into question the connection between the applicant's PTSD diagnosis and his time in service. In her letter of support, the applicant's LCPC specifically stated, in her professional opinion, the applicant's PTSD is connected to his time in service. The advisory claims the LCPC's professional opinion is purely speculative and it has been 48 years since his military service and reported trauma; however, his LCPC has been meeting with and treating the applicant for more than a year, and her opinion is based on actual, clinical sessions, while the advisor has never met with or treated the applicant.

To claim the LCPC's opinion is purely speculative calls into question any provider's ability to diagnose a mental health condition and pinpoint the cause of that condition. For veterans of the applicant's generation, PTSD is often diagnosed many years after the fact, given that PTSD was not a recognized diagnosis at the time of his discharge. The advisory opinion notes several times that there has been 48 years between his discharge and diagnosis. While this is true, that fact alone cannot be dispositive of the fact that his diagnosis is not connected to his service. This delay can be attributed to the applicant's ineligibility for VA services, making getting diagnosed extremely difficult. In fact, the only reason he was diagnosed by this LCPC was she agreed to take his case pro bono.

Further, the opinion fails to offer the liberal consideration required by the Hagel memo. In this case, the applicant has provided proof of a civilian diagnosis of PTSD connected to his time in service, while also demonstrating a deterioration of performance typically associated with a mental health condition. When referring to his performance in service, the opinion notes he had an overall rating of 7 out of a possible 9 and was promoted twice. Yet, despite his performance rating and promotions, he was charged with multiple instances of misconduct including possession of marijuana, escaping lawful confinement, and using disrespectful language towards a superior officer. Despite noting this conduct, the opinion draws no connection between the deterioration of service and the PTSD diagnosis. This connection is specifically mentioned in the Kurta memorandum. As the advisory opinion fails to follow the guidance issued by both Secretary Hagel and A.M. Kurta, the Board should not follow the recommendation to deny relief to the applicant.

The applicant's complete response is at Exhibit L.

## **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, to include the applicant's rebuttal, the Board remains unconvinced the evidence presented demonstrates an error or injustice. 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. There is no evidence the applicant was diagnosed with PTSD, or any other mental health conditions, during military service. Documentation of mental health encounters with an LCPC post-service indicate his stressors and anxiety were results of current circumstances, his symptoms fairly recent in nature, and appeared to resolve after the stressor passed. These reported symptoms are not consistent with a long-standing PTSD diagnosis. Additionally, the documentation from the LCPC only briefly described the applicant's diagnosis, but not his treatment or the etiology of his PTSD, except to report it came from his military service. Liberal consideration was applied; however, the applicant's mental health condition does not excuse or mitigate his discharge. In the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the evidence presented, the applicant's post-service criminal history, and in the absence of more recent supporting post-service information provided by the applicant, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's records.

## **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 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-1991-00023 in Executive Session on 20 Mar 24:

, Panel Chair  
, Panel Member  
, Panel Member

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

Exhibit E: Record of Proceedings, w/ Exhibits A-D, dated 3 Apr 91.  
Exhibit F: Application, DD Form 149, w/atchs, dated 9 Mar 23.  
Exhibit G: Documentary evidence, including relevant excerpts from official records.  
Exhibit H: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 21 Sep 23.  
Exhibit I: FBI Report, dated, 18 Oct 23.  
Exhibit J: Advisory Opinion, AFRBA Psychological Advisor, dated 25 Oct 23.  
Exhibit K: Notification of Advisory, SAF/MRBC to Counsel, dated 8 Nov 23.  
Exhibit L: Counsel's Response, dated 5 Dec 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.

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Board Operations Manager, AFBCMR