

## **ADDENDUM TO RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2010-01043

XXXXXXXXXXXX

**COUNSEL:** XXXXXXXXXXXX

**HEARING REQUESTED:** YES

### **APPLICANT'S REQUEST**

The Board reconsider his request to upgrade his bad conduct discharge to an honorable discharge. In addition, he requests his DD Form 214, *Certificate of Release or Discharge from Active Duty*, be amended to change his Narrative Reason for Separation, Separation Code, and Reentry Code to reflect Secretarial Authority as the basis for separation, and any other relief that is equitable and just.

### **RESUME OF THE CASE**

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

On 25 Jan 11, the Board considered and denied his request to upgrade his bad conduct discharge and his request to receive back pay for the time spent in military confinement finding the applicant had provided insufficient evidence of an error or injustice to justify 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 E.

On 5 Oct 23, the applicant, via counsel, requested reconsideration of his request to upgrade his bad conduct discharge to an honorable discharge. In addition, he requests his DD Form 214, *Certificate of Release or Discharge from Active Duty*, be amended to change his Narrative Reason for Separation, Separation Code, and Reentry Code to reflect Secretarial Authority as the basis for separation, and any other relief that is equitable and just. Counsel, on behalf of the applicant, contended his request for relief is rooted in clemency, in addition to the principles of fairness, justice, and equality. The applicant recognized the Board cannot set aside the findings from his court-martial; however, he requests the Board consider his arguments in conjunction with his request for clemency. He served his country for over six years, during which time he made sacrifices like all service members. Although he was discharged pursuant to a court-martial, he nevertheless contributed to the collective defense of our country in positive ways for multiple years prior to his transgressions. The applicant's post-service conduct is also strong evidence in support of his request for clemency. His declaration in support of relief details his background, motivation for service, the facts and circumstances surrounding his misconduct, and his post-service activities. Prior to joining the Air Force, the applicant enjoyed academic success, training as an aircraft armament systems specialist and obtaining his digital sound engineer certificate. Following his discharge, the applicant worked as a sound engineer at his church during worship services and as a security and resource officer in local high schools.

Notwithstanding the devastating effects of his confinement and bad conduct discharge have had on his life, the applicant has worked hard to get his life back on track. As reflected in the Federal Bureau of Investigation (FBI) Identity History Summary, he has not had a perfect record since returning to civilian life. He had several encounters with law enforcement between his discharge and present day. His last encounter was in 2019, and since then he has resolved to refrain from questionable choices. The applicant is married and has a daughter, and he draws strength and

courage from his family. He is also a man of faith and is an active volunteer in his community. Counsel highlights the letters in support of clemency that have been written on the applicant's behalf. These letters are additional evidence of his overall good character and good conduct. Coupled with his declaration, these letters provide the Board with evidence that the applicant is deserving of clemency.

The applicant recognizes his actions fell short of what was expected of him as an airman and is sorry for what he did. That said, he has already paid a heavy price for his conduct. The discharge and overall punishment were severe and have continued to impact his life. He is working hard to comport himself in the best possible way and to overcome the continuing consequences his discharge has on his daily life. His efforts should be rewarded in the form of clemency.

In addition, at the time of the alleged misconduct, the applicant was suffering from behavioral health conditions, which qualifies him for consideration and relief pursuant to the Hagel Memorandum. As reflected in his medical record excerpts, the applicant was treated in the mental health clinic while stationed in Japan and was diagnosed with alcohol abuse. Counsel presents the Secretary of Defense Chuck Hagel's memorandum, dated 3 Sep 14, and the Clarifying Guidance memorandum issued by the Under Secretary of Defense for Personnel and Readiness on 25 Aug 17, in support. He provides the following responses to the four questions from the Kurta Memorandum:

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

Yes. The evidence demonstrates the applicant was experiencing mental health-related issues and substance abuse problems while still in the Air Force.

2. Did that condition exist/experience occur during military service?

Yes. The evidence indicates these mental health and substance abuse issues occurred while he was in the Air Force.

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

Yes. The evidence demonstrates the applicant's conditions actually excuse or mitigate his misconduct and his discharge. The evidence indicates these mental health and substance abuse issues occurred while he was in the Air Force and before the misconduct at issue took place. Based on the timeline of events, it appears these conditions played a role in the misconduct and thus, mitigate the misconduct and his discharge.

4. Does that condition or experience outweigh the discharge?

Yes, the totality of the evidence demonstrates the applicant's medical conditions outweigh his discharge, given the evidence indicates his symptomology contributed to his actions and impacted his thought process. The fact that his behavioral health conditions contributed to his behavior outweighs his conduct and thus, outweighs the discharge.

Given these facts, the applicant is entitled to the requested relief. It would be unfair, unjust, and inequitable for his discharge to remain unchanged.

In support of his reconsideration request, the applicant submitted the following new evidence: (1) applicant's personal declaration; (2) FBI Identity History Summary; (3) clemency letters; (4) medical record excerpts; (5) copies of the Hagel Memorandum and Clarifying Guidance; and (6) a letter from a board-certified mental health nurse practitioner (PMHNP-BC) applying the clarifying guidance.

The applicant's complete submission is at Exhibit F.

## **POST-SERVICE INFORMATION**

On 8 Mar 24, the Board sent the applicant a request for post-service information and advised the applicant he was required to provide an 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 11 Mar 24 and provided an FBI report. According to the report, the applicant was arrested on:

- 12 Sep 03 (while on excess leave pending appellate review) for Battery/Assault and Battery on Police Officer, Resisting Executive Officer
- 25 Aug 05 (while on excess leave pending appellate review) for Driving Under the Influence of Alcohol or Drugs, First Offense.
- 14 Jun 13 for Battery.
- 19 Sep 19 for Cocaine Possession, Possession of Drug Paraphernalia, Resisting an Officer with Violence, and Battery of a Law Enforcement Officer.
- 23 Oct 20 for Failure to Register as a Convicted Felon.

The applicant's complete response is at Exhibit I.

## **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 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 8 Mar 24, 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 of his discharge.

There is insufficient evidence to suggest the applicant was diagnosed with Post-Traumatic Stress Disorder (PTSD) in service or at discharge. The encounters supplied by counsel only diagnose the applicant with alcohol abuse and an alcohol-related disorder. The applicant was seen by Family Health in 2008 (two years after military service) and in 2023 (17 years after discharge) to be assessed as a caregiver. Both encounters do not note any mental health symptoms, with the applicant denying any mental health symptoms. Additionally, a self-authored declaration by the applicant (28 Aug 23), 17 years after discharge from the military does not mention any mental health conditions or symptoms as reasons for his misconduct while in the military. However, he mentions he had several experiences that needed him to apply more wisdom and has learned from these mistakes.

While the PMHNP-BC noted the applicant was being treated by her for PTSD, no documentation of these encounters was included in the application. Further, the PMHNP-BC references the applicant's C-File [Department of Veterans Affairs (DVA) record file]. There is no evidence the applicant was ever diagnosed with PTSD or any other mental health condition. His available medical records do not contain any mental health diagnoses. His electronic record consists of approximately 14 encounters, which do not contain any mental health treatment or diagnoses. There is no record of a DVA Compensation and Pension examination, or mental health treatment being completed that would determine a PTSD diagnosis or if this would have been service-related. The PMHNP-BC's letter, while including some symptomology, does not include the etiology of these symptoms which are critical for a PTSD diagnosis. Additionally, her letter is in direct contradiction to two post-service DVA encounters, in 2008 and 2023, that state the applicant is not suffering from any mental health condition.

While substance usage (alcohol abuse) can be part of the sequela of symptoms associated with PTSD (self-medication), there is insufficient evidence to support the applicant had PTSD during service or at discharge. Further, the applicant's alcohol abuse is not a mitigating factor for his bad conduct discharge. His misconduct of failure to refrain from having a person under 18 years of age visit his dormitory room, making a false official statement with intent to deceive, unlawfully grabbing a Petty Officer, communicating a threat, breaking restriction to remain on base, and controlling a passenger car while drunk, and causing the car to smash into a guardrail and injure a passenger in the car, are not part of the sequela of symptoms associated with alcohol abuse. Therefore, there is no nexus between his misconduct and his alcohol abuse. Even if the applicant had PTSD, his misconduct is not excused or mitigated by a PTSD diagnosis. Again, while using alcohol to manage symptoms can be a part of a mental health condition, his decision to drive after becoming intoxicated, resulting in an injury, is not part of the symptoms associated with a mental health condition, including PTSD.

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 was diagnosed with alcohol abuse and alcohol-related disorder while in the military.

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

The applicant was diagnosed with alcohol abuse and alcohol-related disorder while in the military. The PMHNP-BC noted the applicant was being treated by her for PTSD and it was a direct result of his military service.

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

While the PMHNP-BC noted the applicant was being treated by her for PTSD, no documentation of these encounters was included in the application. Further, the PMHNP-BC references the applicant's C-File. There is no evidence the applicant was ever diagnosed with PTSD or any other mental health condition. His available medical records do not contain any mental health diagnoses. While substance usage (alcohol abuse) can be part of the sequela of symptoms associated with PTSD (self-medication), there is insufficient evidence to support the applicant had PTSD during service or at discharge. Further, the applicant's alcohol abuse is not a mitigating factor for his bad conduct discharge. His misconduct of failure to refrain from having a person under 18 years of age visit his dormitory room, making a false official statement with intent to deceive, unlawfully grabbing a Petty Officer, communicating a threat, breaking

restriction to remain on base, and controlling a passenger car while drunk, and causing the car to smash into a guardrail and injure a passenger in the car, are not part of the sequela of symptoms associated with alcohol abuse. Therefore, there is no nexus between his misconduct and his alcohol abuse. Even if the applicant had PTSD, his misconduct is not excused or mitigated by a PTSD diagnosis. Again, while using alcohol to manage symptoms can be a part of a mental health condition, his decision to drive after becoming intoxicated, resulting in an injury, is not part of the symptoms associated with a mental health condition, including PTSD.

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 26 Mar 24 for comment (Exhibit K), and the applicant replied on 23 Apr 24. In his response, counsel contended the advisory opinion was provided by an unnamed psychological advisor and ultimately recommends denial of the applicant's request. It was noted the advisory opinion must be limited to the field and issue on which the psychological advisor was asked to comment and was presumably sought with respect to the question of whether the applicant suffered from a mental health condition at the time of discharge that may have mitigated his discharge pursuant to the Hagel, Kurta, and Wilkie memorandums. The applicant's original petition does make the argument that he suffered from such a condition, and it did mitigate his discharge.

The advisory opinion asserts there is insufficient evidence to suggest the applicant was diagnosed with PTSD in service or at discharge. There is evidence he both suffered from a mental health condition at discharge and said condition mitigates his discharge. The advisory opinion conceded there is a medical record, dated 16 Dec 23<sup>1</sup>, from the PMHNP-BC that noted the applicant was under her care for the treatment of PTSD. She also noted it was more likely than not the diagnosis of PTSD is a direct result of his military service. This is evidence the applicant was suffering from PTSD at discharge and that fact mitigates the discharge. The advisory opinion's dismissive attitude towards this evidence is disappointing. It is the Board's responsibility to independently discuss and assess whether the applicant's condition mitigates the discharge. Counsel requested the Board ignore the erroneous assertions of the advisory opinion and come to their own decision on the issue.

The applicant provided two new medical records with the rebuttal as well as medical encounters. He also included the obituary of the family member referenced in his medical opinions. This additional medical opinion and corresponding medical records confirm his PTSD diagnosis and mitigates his misconduct and resulting discharge. The applicant also provided a letter from his mother and his personal responses to the advisory opinion, and counsel requested the Board review these materials in their entirety in connection with their review of the case.

The applicant has provided evidence and argument in support of his application for relief. Nothing in the advisory opinion adds anything to understanding this case and amounts to nothing more than a biased opinion; therefore, it should be disregarded. The applicant has demonstrated the result in his case constitutes both an error and injustice and he is therefore, entitled to relief for all the reasons outlined in the original filing.

The applicant's complete response is at Exhibit L.

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<sup>1</sup> PMHNP-BC letter provided by the applicant to the AFBCMR in support of his request was dated 26 Dec 23, not 16 Dec 23.

## **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 rebuttal response, 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 during military service or at discharge. While the applicant was diagnosed with alcohol abuse and alcohol-related disorder, and substance abuse (alcohol abuse) can be part of the sequela of symptoms associated with PTSD (self-medication), there is insufficient evidence the support the applicant had PTSD during service or at discharge. Additionally, alcohol abuse is not a mitigating factor for his bad conduct discharge. The applicant's specific behaviors/misconduct are not part of the sequela of symptoms associated with alcohol abuse; therefore, there is no nexus between his misconduct and his alcohol abuse. Further, during the applicant's separation physical, he reported he was not feeling nervous, anxious, or depressed, and he was released without limitation. His post-service DVA record reflects a 26 Nov 08 Family Health visit which notes no psychological symptoms and no depression. Finally, as recently as 29 Aug 23, during a DVA caregiver assessment, the applicant denied any medical or mental health concerns, and reported no current or past physical or mental health conditions that would adversely affect his ability to provide personal care services.

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, and the extensive and recent criminal history provided by the applicant, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's record.

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 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-2010-01043 in Executive Session on 17 Jul 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 Feb 11.

Exhibit F: Application, DD Form 149, w/atchs, dated 5 Oct 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 8 Mar 24.  
Exhibit I: FBI Report, dated, 6 Jul 23.  
Exhibit J: Advisory Opinion, AFRBA Psychological Advisor, dated 25 Mar 24.  
Exhibit K: Notification of Advisory, SAF/MRBC to Counsel, dated 26 Mar 24.  
Exhibit L: Counsel's Response, w/atchs, dated 23 Apr 24.

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