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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2020-02868

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His bad conduct discharge be upgraded to general (under honorable conditions).

APPLICANT'S CONTENTIONS

During the time of the conviction, he was under duress, stress, and just mentally drained and felt that he had no one to turn to. He regrets and feels remorse for his actions. The reason for the delay in his request is quite simply that his life after the Air Force took time to evolve. All experiences up to this point made him the person he is today. He originally submitted his request earlier but used the wrong form.

In support of his request for clemency, the applicant provides post-service certificates of achievement, civilian memberships, and character references related to his request for upgrade.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 18 Feb 88, according to AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, the applicant was issued nonjudicial punishment (NJP), under Article 15, Uniform Code of Military Justice (UCMJ) for:

- Violation of Article 121, UCMJ: [the applicant] did, at Norton Air Force Base (AFB), California (CA), on or about 8 Feb 88, steal one bottle of Giorgio Cologne, of a value of about \$27.50, the property of the Army and Air Force Exchange Service.

The applicant received a reduction in grade to airman first class, with a new date of rank of 18 Feb 88, and forfeiture of \$150.00 per month for two months. The NJP action was filed in the applicant's Unfavorable Information File (UIF).

On 23 Feb 88, according to an applicant's memorandum to 63 MAW/CC, he offered a rebuttal to his Article 15.

On 16 Mar 88, the Staff Judge Advocate found the NJP action legally sufficient.

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Controlled by: SAF/MRB

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Limited Dissemination Control: N/A

POC: SAF.MRBC.Workflow@us.af.mil

On 29 Sep 88, according to General Court-Martial Order (GCMO) Number [Atto...] dated 30 Nov 88, the applicant was arraigned at a court-martial on the following offenses:

- Charge I. Article 121. Plea: G. Finding: G.

- Specification 1: [The applicant] did, from on or about 1 Jun 87 to on or about 30 Apr 88, steal United States currency, of some value more than \$100.00, the property of the United States. Plea: G. Finding: G.

- Specification 2: [The applicant] did, on or about 10 Aug 87, steal United States currency, of some value more than \$100.00, the property of the United States. Plea: G, except the word "steal", substituting therefor the words, "wrongfully appropriate." To the excepted word, NG; to the substituted words, G. Finding: G, except the word "steal", substituting therefor the words "wrongfully appropriate." Of the excepted word, NG; of the substituted words, G.

- Specification 3: [The applicant] did, on or about 17 Aug 87, steal \$900.00, property of the United States. Plea: G, except the word "steal", substituting therefor the words "wrongfully appropriate." To the excepted word, NG; to the substituted words, G. Finding: G, except the word "steal", substituting therefor the words "wrongfully appropriate." Of the excepted word, NG; of the substituted words, G.

- Specification 4: [The applicant] did, on or about 6 Oct 87, steal \$1,700.00, property of the United States. Plea: G. Finding: G.

- Charge II. Article 80. Plea: G. Finding: G.

- Specification: [The applicant] did, on or about 8 Apr 88, attempt to steal \$2,358.70, property of the United States. Plea: G, except the figure "\$2,358.70", substituting therefor the figure of "\$460.00." To the excepted figure, NG; to the substituted figure, G. Finding: G, except the amount "\$2,358.70", substituting therefor the figure "\$460.00." Of the excepted figure, NG; of the substituted figure, G.

The applicant was sentenced to a bad conduct discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to airman basic (E-1). Only so much of the sentence as provides for a bad conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to airman basic is approved and, except for the part of the sentence extending to a bad conduct discharge, will be executed. The court-martial action was filed in the applicant's UIF.

On 29 Sep 88, according to AF Form 2098, *Duty Status Change*, the applicant's duty status changed from Present for Duty to Military Confinement.

On 19 Jul 89, according to GCMO Number [Atto...] [the applicant's] sentence to a bad conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to airman basic, as promulgated in GCMO Number [Atto...] dated 30 Nov 88, has been finally affirmed. Article 71(c) having been complied with, the bad conduct discharge will be executed.

On 18 Aug 89, the applicant received a bad conduct discharge. His Narrative Reason for Separation is "Conviction by Court-Martial (Other Than Desertion)", and he was credited with 6 years and 27 days of total active service, with dates of lost time of 29 Sep 88 – 18 Aug 89.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisory at Exhibit E.

POST-SERVICE INFORMATION

On 15 Apr 24, the Board sent the applicant a request for post-service information, including a standard criminal history report from the Federal Bureau of Investigation; however, he has not replied. Post-service documents in support of the applicant's request were provided with his initial application.

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 Post-Traumatic Stress Disorder (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 15 Apr 24 and 21 May 24, Board staff provided the applicant a copy of the liberal consideration guidance (Exhibits C and D).

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 based on his mental health condition.

The applicant was convicted at a general court-martial for engaging in serious offenses of numerous instances of stealing money/property of the United States. He had submitted a couple of statements at the time of service explaining he did not intend to steal from the Base Exchange. He did not address his other instances of theft. The applicant contends, during the time of his conviction, he was under duress, stress, and was mentally drained. It is comprehensible he could experience emotional and mental distress while undergoing a court-martial as this is a highly stressful process. However, according to his statement, his emotional or mental distress was in response to his legal problems that were caused by his own misconduct. There is no evidence or records the applicant had any mental health condition, including PTSD, impairing his judgment at the time of his misconduct or preceding his court-martial proceedings. He provided no treatment records for review and his service treatment records were also unavailable for review; thus, there is no evidence he was ever diagnosed with a mental disorder, including PTSD, during service or in his lifetime. The applicant said at the time of service he did not intend to steal from the Base Exchange, and he had put the aftershave and cologne in the wrong boxes because they looked similar, he did not pay attention to the details, and he was in a rush to get to the gym. His action

was a misunderstanding, and his theft did not appear to be caused by his mental health condition. There is no evidence or records to support the applicant's mental health condition had a direct impact or was a contributing factor to his numerous acts of misconduct and subsequent separation with a bad conduct discharge. His testimony for this petition was found to be insufficient and not compelling to support his request. Therefore, and after an exhaustive review of the available records, this psychological advisor finds no identifiable error or injustice with the applicant's discharge from service from a mental health perspective.

Liberal consideration is applied to the applicant's request due to his contention of having a mental health condition. The following are answers to the four questions from the Kurta Memorandum from the available records for review. It is reminded that liberal consideration does not mandate an upgrade per policy guidance.

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

The applicant contends during the time of his conviction, he was under duress, stress, and was mentally drained. He felt he had no one to turn to and regretted and was remorseful for his actions. He marked "PTSD" and "Other Mental Health" on his application to the Board and provided no explanation for how he developed PTSD or his other mental health condition, when he was diagnosed with either mental health condition, and how his mental health condition may excuse or mitigate his discharge.

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

There is no evidence or records the applicant had any mental health conditions, including PTSD, during service. There is no evidence or records his mental health condition, including PTSD, had existed or occurred during his military service. His service treatment records are not available or submitted for review.

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

There is no evidence or records the applicant's mental health condition, including PTSD, had caused, was a contributing factor, or had a direct impact on his numerous convicted serious offenses of theft and bad conduct discharge. His mental health condition does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

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

The complete advisory opinion is at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 23 May 24 for comment (Exhibit F) but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed. Given the requirement for passage of time, all discharge upgrade requests under fundamental fairness or clemency are technically untimely. However, it would be illogical to deny a discharge upgrade application as untimely, since the Board typically looks for over 15 years of good conduct post-service. Therefore, the Board declines to assert the three-year limitation period established by Title 10, United States Code § 1552(b).

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 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 are no mental health treatment records available or provided by the applicant that support his contention he had a mental health condition, including PTSD, during military service. There is no evidence the applicant's mental health condition, including PTSD, caused, was a contributing factor, or had a direct impact on his numerous convicted serious offenses of theft and his BCD. Liberal consideration was applied; however, his serious misconduct could not be excused or mitigated by his mental health condition.
- Further, it appears the discharge was within the general court-martial authority's discretion. Nor was the discharge unduly harsh or disproportionate to the offenses committed. In the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the evidence presented, and in the absence of 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 DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2020-02868 in Executive Session on 12 Sep 24:

Work-Product	, Panel Chair
Work-Product	, Panel Member
Work-Product	, Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 14 Jul 20.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 15 Apr 24.
- Exhibit D: Letter, SAF/MRBC, w/atchs (Updated Liberal Consideration Guidance), dated 21 May 24.
- Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 14 May 24.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 23 May 24.

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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.

10/3/2024

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Board Operations Manager, AFBCMR
Signed by: USAF

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