



**UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS**

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-03437

COUNSEL:

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His record be corrected to reflect:

1. His bad conduct discharge (BCD) be upgraded to honorable or general.
2. His highest pay grade held be reinstated.
3. He be awarded a medical retirement or permanent retirement with applicable compensation.

APPLICANT'S CONTENTIONS

Through counsel, applicant states his punishment/discharge was inequitable and too severe. Vital medical evidence was not considered during and prior to the General Court-Martial and he was not given treatment/rehabilitation for his depression, mental health and addiction issues. He was court-martialed due to symptoms of and for having a mental illness. Department of Defense and Air Force policies prior to and at the time of his court-martial, directed that he receive the appropriate mental health, physical health, and rehabilitation treatments. He received none. Instead, he was demoted to the grade of airman (E-1), forfeiture of pay, and years of hard labor incarceration; all from just one positive urinalysis test. He currently has a Department of Veterans Affairs (DVA) rating of 70 percent for depression. He deserves a discharge upgrade that would lead to a disability retirement.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 5 Oct 89, AF Form 1359, *Report of Result of Trial*, indicates in a general court-martial the applicant pled and was found guilty of violating UCMJ Article 112a, specifically on or about Jun 89, at or near his duty location, wrongfully use cocaine.

On 18 Dec 89, General Court-Martial Order Number [REDACTED], indicates the applicant was sentenced to a dishonorable discharge, confinement for three years, total forfeitures and reduction to the grade of airman basic.

On 16 Jan 90, AF Form 2098, *Duty Status Change*, indicates the applicant's duty status changed from "present" to "confinement" effective 9 Oct 89.

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[REDACTED]

[REDACTED]

[REDACTED]

On 5 Jul 90, AF Form 2098 indicates the applicant's duty status changed from "military confinement" to "Present for Duty (PFD) (casual)" effective 3 Jul 90.

On 22 May 91, General Court-Martial Order Number [REDACTED] indicates the applicant's sentence as provided for a BCD, confinement for eight months, forfeiture of pay for eight months as promulgated in the applicant's sentence in General Court-Martial Order Number [REDACTED].

On 3 Jun 91, DD Form 214, *Certificate of Release or Discharge from Active Duty*, indicates the applicant received a BCD from the Air Force under authority of General Court-Martial Order Number [REDACTED] with a narrative reason for separation of "Conviction by Court-Martial (Other than Desertion)."

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

APPLICABLE 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 (USD P&R) issued supplemental guidance to military corrections boards in determining whether relief is warranted based on equity, injustice, or clemency. These standards authorize the board to grant relief in order to ensure fundamental fairness. Clemency refers to relief specifically granted from a criminal sentence and is a part of the broad authority Boards have to ensure fundamental fairness. This guidance applies to more than clemency from sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief

[REDACTED]

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.

25 Feb 22, the Board staff provided the applicant a copy of the liberal consideration and clemency guidance (Exhibit C).

AFI 36-3208, *Administrative Separation of Airmen*, 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.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor finds sufficient evidence to provide partial relief to his request for an upgrade of his character of service to general based on liberal consideration. However, there was insufficient evidence to support his request for an honorable character of service or medical retirement based on his mental health condition. After a review of the available records, multiple inconsistent reports were found between the applicant and his records. The applicant claimed he was not offered any mental health and rehabilitation treatment, and this assertion is not true. The applicant's military records revealed the applicant was indeed offered, received, and was engaged in drug rehabilitation treatment during his time in service, and not just an alcoholics anonymous meeting as he alleged. He entered the drug rehabilitation program and attended numerous group and individual sessions from May 89 until Sep 89 when he was transferred to confinement due to his court-martial conviction. Even during confinement, his mental health provider would perform regular check-ins regarding his well-being until he was transferred to an official detention center.

[REDACTED]

The applicant claimed he was subjected to years of hard labor incarceration, but his records showed he was sentenced and served eight months (not years) in confinement following his conviction indicating another inconsistent reporting. The applicant had received numerous treatment and interventions for his drug abuse issues during service and at no time during any of his treatment he had reported feeling anxious or depressed or had other mental health issues that may cause him to use illicit drugs. It is well-known that co-occurring conditions do exist especially with substance abuse issues and his providers would have detected and assessed him for any potential mental health concerns that may cause his drug use, but none were reported by his multiple military providers. He was also monitored continuously during his inpatient hospitalization and his inpatient providers also did not document any observed or reported anxiety, depressed mood, etc. from the applicant. The applicant received a mental health evaluation when he was in confinement and was not observed to display any anxiety, depression, labile mood, etc. The applicant did not report having depression until Jun 15, 24-years post discharge, caused by his supposed hearing loss. His full service treatment records were not available for review to confirm if he actually had any hearing issues during service. The submitted medical opinion by the DVA evaluator reported the applicant reported having anxiety (not depression) from his firing range duties and not being around his family (not hearing loss). He also eventually developed depression from his anxiety exacerbated by his mother's death and coped with alcohol and later with cocaine and marijuana. His reports to his DVA evaluator were also inconsistent to his military records.

The applicant claimed he only used cocaine once to medicate himself and was instantly addicted; this claim was not corroborated by his records. The applicant did not use cocaine one time as claimed and his service treatment records reported he admitted to his inpatient providers he had used "crack" since Jan 89, would use an ounce per week, and one week prior to his admission/acceptance to the rehabilitation program, his First Sergeant and commander found he had used cocaine on that day causing them to escort him to inpatient treatment in Jun 89. He also tested positive for cocaine and marijuana from samples collected from him on 28 Apr 89. He reported to the DVA evaluator his cocaine use had progressively increased, cocaine became his number one priority, and he would maybe use one gram. These events showed he used illicit drugs repeatedly on more than one occasion over several months and not one time as claimed. He also contended he was discharged from service for one positive test. This statement is accurate, but it only takes one positive test to be discharged from service according to policy. Again, records showed he used drugs multiple times and may not be tested frequently to have more than one positive test [sic]. Also, the type of drug he used is a hard, illicit drug that is an unacceptable behavior for service members.

The applicant is also requesting for a medical retirement. This request could not be supported. There was no evidence the applicant had any unfitting mental health conditions that would meet criteria to be referred to the Medical Evaluation Board (MEB) for a possible medical discharge. He had polysubstance abuse problems during service and this condition is unsuiting for continued military service meeting criteria for an administrative discharge, which he had received. There were no records reporting he was placed on a duty limiting condition profile, was never deemed not worldwide qualified due to his mental health condition, and no records of any observations documented by his leadership his mental health condition, and not solely substance abuse issues, had impaired his ability to reasonably perform his military duties in accordance with his office, grade, rank or rating. The Psychological Advisor acknowledges he received service-connected compensation from the DVA awarded several years post discharge. For awareness, the military's Disability Evaluation System, established to maintain a fit and vital fighting force, can by law, under Title 10, United States Code (U.S.C.), only offer compensation for those service incurred diseases or injuries which specifically rendered a member unfit for continued active service and

[REDACTED]

were the cause for career termination; and then only for the degree of impairment present at the “snapshot” time of separation and not based on future progression of injury or illness. On the other hand, operating under a different set of laws (Title 38, U.S.C.), with a different purpose, the DVA is authorized to offer compensation for any medical condition determined service incurred, without regard to and independent of its demonstrated or proven impact upon a service member’s retainability, fitness to serve, or the length of time since date of discharge. The DVA is also empowered to conduct periodic re-evaluations for the purpose of adjusting the disability rating awards (increase or decrease) over the lifetime of the veteran.

The Psychological Advisor finds no error or injustice with his discharge following a review of his available records. The applicant contended he coped with depression with cocaine during service and although there was no evidence in his objective military records to support this claim, his contention is plausible. It appeared from the applicant’s military records, he was in denial of his problems as evidenced by his initial resistance to treatment and a military provider reported he minimized the effects of his drug use on his family. He may also not realize or understand his mental health issues at the time, and he reported there was stigma with being labeled as “crazy” and not wanting to appear weak for having mental health issues by his peers for reason for his drug use. These are all compelling reasons. The Board may consider upgrading his character of service to General (Under Honorable Conditions) based on liberal consideration. An Honorable character of service is not recommended as the applicant had used cocaine/crack multiple times during service and was convicted at general court-martial for his drug use, he did not acknowledge or discuss his positive test for marijuana and this substance is also an illicit drug, and he received a driving while intoxicated charge during service according to this his. These cumulative behaviors do not reflect Honorable service per the Psychological Advisor’s opinion. Liberal consideration is applied to the applicant’s request, and the following are answers to the four questions from the Kurta memorandum based on the available records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
The applicant contends he coped with depression with cocaine and his one positive UA test caused his discharge.
2. Did the condition exist or experience occur during military service?
There was evidence the applicant received outpatient drug rehabilitation treatment from Social Actions for several months, inpatient hospitalization for alcohol and drug detoxification and treatment for one month and participated in AA and NA meetings during hospitalization during military service. There was no evidence he reported feeling depressed or had any other mental health conditions to his multiple providers during service. He reported he had anxiety and depression to the VA about 24 years post discharge caused by various reasons such as hearing loss, being away from family, and his mother’s death.
3. Does the condition or experience excuse or mitigate the discharge?
There was no evidence the applicant had reported he used drugs to cope with his depression during service, but he was also reported to have been in denial or had minimized his personal problems to his military providers that may cause him to not be aware or report his mental health issues. He had reported the reason for his drug use several years post discharge to the VA and for this petition. His contention is plausible as co-occurring conditions are not uncommon occurrences and many people cope with depression with substances. Therefore, his condition may excuse or mitigate his discharge.
4. Does the condition or experience outweighs the discharge?
Since the applicant’s mental health condition may excuse or mitigate his discharge, his condition may also outweigh his original discharge to support his request for an upgrade to a general character of service discharge.

[REDACTED]

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to counsel and the applicant on 22 Jun 22 for comment (Exhibit E), and counsel replied on 7 Jul 22. In the response, counsel appreciates the recommendation to upgrade the discharge from BCD to General; however, he also believes a return to the highest pay grade achieved and a medical retirement is in order. The Psychological Advisor only pulled the negative aspect of the applicant's addiction and military career, and the evaluation was supposed to be a full evaluation of the time in the military and afterwards up to present day hence the necessity of the FBI background investigation. The psychological analysis was unfair in this regard and there is much to dispute and point out.

Counsel's complete response is at Exhibit F.

FINDINGS AND CONCLUSION

1. The application was timely filed. Given the requirement for passage of time, all clemency requests are technically untimely. However, it would be illogical to deny a clemency 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 10 U.S.C. § 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 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 substantiates the applicant's contentions in part. Specifically, it appeared from the applicant's military records, he was in denial of his problems as evidenced by his initial resistance to treatment and a military provider reported he minimized the effects of his drug use on his family. He may also not realize or understand his mental health issues at the time, and he reported there was stigma with being labeled as "crazy" and not wanting to appear weak for having mental health issues by his peers for reason for his drug use. These are all compelling reasons which is sufficient to justify granting the applicant's request to upgrade his discharge characterization to General (under honorable conditions). However, for the remainder of the applicant's request, the evidence presented did not demonstrate an error or injustice.
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 3 Jun 91 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).

However, regarding the remainder of the applicant's request, the Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the application will only be reconsidered upon receipt of relevant evidence not already considered by the Board.

CERTIFICATION

The following quorum of the Board, as defined in Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2021-03437 in Executive Session on 24 Aug 22:

[REDACTED], Panel Chair
[REDACTED], Panel Member
[REDACTED], Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 20 Sep 21.
- 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 25 Feb 22.
- Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 6 Jun 22.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 22 Jun 22.
- Exhibit F: Counsel's Response, w/atchs, dated 7 Jul 22.

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.

5/16/2023

X

[REDACTED]
Board Operations Manager, AFBCMR
Signed by: USAF