

RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXXXXXXXXXX

DOCKET NUMBER: BC-2023-02159

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

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

APPLICANT'S CONTENTIONS

He is asking the Board for special consideration as he pursues his claim for mental instability.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 26 Sep 00, according to General Court-Martial Order (GCMO) Number XX, dated 29 Oct 00, the applicant was arraigned on the following offenses:

- Charge I: Article 92. Plea: Guilty. Finding: Guilty.
 - Specification: [The applicant] did, at or near Building 613, Room 341, Kadena Air Base (AB), Okinawa, Japan, on divers occasions between on or about 18 Feb 00 and on or about 25 Feb 00, fail to obey a lawful general regulation, to wit: XX Wing Instruction 32-6002, dated 23 Oct 96, by wrongfully having XXX, a visitor under 18 years of age and not an active duty member of the United States Armed Forces, in his dormitory room. Plea: Guilty. Finding: Guilty.

- Charge II: Article 120. Plea: Guilty. Finding: Guilty.
 - Specification: [The applicant] did, at or near Kadena AB, Okinawa, Japan, on divers occasions between on or about 18 Feb 00 and on or about 25 Feb 00, commit the offense of carnal knowledge with XXX, a child under the age of 16. Plea: Guilty. Finding: Guilty.

- Additional Charge I: Article 125. Plea: Guilty. Finding: Guilty.
 - Specification: [The applicant] did, at or near Kadena AB, Okinawa, Japan, between on or about 18 Feb 00 and on or about 23 Feb 00, commit sodomy with XXX, a child under the age of 16. Plea: Guilty. Finding: Guilty.

The applicant was sentenced by a military judge to reduction to the grade of airman basic, eight months confinement, and forfeiture of all pay and allowances. Only so much of the sentence as provides for three months confinement, forfeiture of all pay and allowances, and reduction to the grade of airman basic is approved and will be executed.

On 26 Sep 00, according to AF Form 2098, *Duty Status Change*, the applicant's duty status changed from Present for Duty to Military Confinement.

On 10 Dec 00, according to AF Form 2098, the applicant's duty status changed from Confinement to Present for Duty.

On 13 Dec 00, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of Air Force Instruction (AFI) 36-3208, *Administrative Separation of Airmen*, paragraph 5.52.3., *Other Serious Offenses*. The specific reasons for the action were:

a. Between on or about 18 Feb 00 and on or about 25 Feb 00, [the applicant] did, at or near Kadena AB, Okinawa, Japan, fail to obey a lawful general regulation, to wit: XX Wing Instruction 32-6002, dated 23 Oct 96, by wrongfully having XXX, a visitor under 18 years of age and not an active duty member of the United States Armed Forces, in his dormitory room, in violation of Article 92, Uniform Code of Military Justice (UCMJ). As a result, he was found guilty by a general court-martial on 26 Sep 00.

b. Between on or about 18 Feb 00 and on or about 25 Feb 00, [the applicant] did, at or near Kadena AB, Okinawa, Japan, commit the offense of carnal knowledge with XXX, a child under the age of 16, in violation of Article 120, UCMJ. As a result, he was found guilty by a general court-martial on 26 Sep 00.

c. Between on or about 18 Feb 00 and on or about 25 Feb 00 (sic¹), [the applicant] did, at or near Kadena AB, Okinawa, Japan, commit sodomy with XXX, a child under the age of 16, in violation of Article 125, UCMJ. As a result, he was found guilty by a general court-martial on 26 Sep 00.

On 12 Jan 01, the Staff Judge Advocate found the discharge action legally sufficient.

The discharge authority directed the applicant be discharged pursuant to AFI 36-3208, paragraph 5.52.3., with a general (under honorable conditions) service characterization. Probation and rehabilitation were considered and denied.

On 5 Feb 01, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct" and he was credited with two years, two months, and three days of total active service. Dates of lost time during this period: 26 Sep 00 – 10 Dec 00.

On 7 Jun 07, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge.

On 15 Oct 08, the AFDRB concluded the discharge was consistent with the procedural and substantive requirements of the discharge regulation and was within the discretion of the discharge authority and the applicant was provided full administrative due process.

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

POST-SERVICE INFORMATION

On 28 Mar 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.

¹ According to GCMO XX, dated 29 Oct 00, this charge specified dates of on or about 18 Feb 00 and on or about 23 Feb 00.

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 28 Mar 24, Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit C).

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 the desired change to his records based on his mental health condition.

The applicant pled guilty and was convicted at a general court-martial for engaging in serious offenses of wrongfully having an underage person in his dormitory room, committing the offense of carnal knowledge with a child under the age of 16, and committing sodomy with the same child under the age of 16 on more than one occasion. He served time in confinement for these convicted offenses and was also discharged from service for these reasons. The applicant responded to his discharge action at the time of service and admitted to engaging in all of these offenses. He did state he was abused in his life and had been sodomized in his childhood, but these are prior service experiences and do not excuse or mitigate his behaviors in the service. There is no evidence or records that his military service or duties aggravated his prior-service conditions or experiences. There is no evidence or records he had any mental health conditions including Post-Traumatic Stress Disorder (PTSD) or cognitive deficit issues impairing his judgment at the time of his sexual indiscretion and misconduct. There is no evidence he had any mental health conditions during service or that his mental health condition had a direct impact or was a contributing factor to his serious offenses and discharge. The applicant disclosed to a provider at the Department of Veterans Affairs (DVA) one month after his discharge he thought the person was of age when he entered into a relationship with the individual. This would indicate he made his decision based on information he had at the time whether it was factual or not, and it was not caused by having a mental health condition. He knew what he was doing at the time. He also disclosed he had childhood trauma from being sexually abused when he was a child, and he was possibly assaulted by an inmate while serving his sentence during service. These traumatic experiences occurred before and after his acts of misconduct or serious offenses and did not have a mitigating factor to his discharge. The applicant marked "PTSD" on his application to the Air Force Board for Correction of Military Records (AFBCMR) and did not provide any additional information about this condition. His available treatment records from the DVA find no records he was ever diagnosed with PTSD. Hypothetically, if there was evidence he had a mental health condition causing his behavior/misconduct, his behavior/misconduct could not be excused or mitigated by his mental health condition. His convicted offenses of having a sexual relationship with a minor are serious and egregious and could not be disregarded even by his mental health condition. Therefore, after an exhaustive

review of the available records, this psychological advisor finds no error or injustice with his discharge from a mental health perspective.

Liberal consideration is applied to the applicant's petition due to his contention of 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 marked "PTSD" on his application to the AFBCMR and is asking for special consideration to the Board as he is pursuing his claim for mental instability. He did not discuss how he developed PTSD from his military service, when he was diagnosed with this condition, and how this condition may cause, excuse, or mitigate his discharge.

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

There is no evidence or records that the applicant's mental health condition, including PTSD, had existed or occurred during his military service. There are no records he was ever diagnosed with PTSD including from his providers at the DVA.

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

There is no evidence the applicant's mental health condition, including PTSD, had caused or had a direct impact on his convicted serious offenses and discharge. His misconducts of having a sexual relationship with a minor were serious and egregious offenses resulting in his conviction at a general court-martial and could not be excused or mitigated by his mental health condition. 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 D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 30 May 24 for comment (Exhibit E) 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. Although the applicant contends PTSD on his application to the Board, there is no evidence he was diagnosed with PTSD during or post-service. There is no evidence he had any mental health conditions

during service or that his mental health condition had a direct impact or was a contributing factor to his serious misconduct and subsequent discharge.

Additionally, it appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. Nor was the discharge unduly harsh or disproportionate to the offenses committed. 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 serious nature of the offenses, and in the absence of post-service information/criminal history provided by the applicant, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's record.

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-2023-02159 in Executive Session on 22 Aug 24:

, Panel Chair
, Panel Member
, Panel Member

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

Exhibit A: Application, DD Form 149, dated 26 Jun 23.
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 28 Mar 24.
Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 14 May 24.
Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 30 May 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.

X

Board Operations Manager, AFBCMR