

## **RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2023-02222

XXXXXXXXXXXXXXXXXX

**COUNSEL:** NONE

**HEARING REQUESTED:** YES

### **APPLICANT'S REQUEST**

His bad conduct discharge be upgraded to honorable.

### **APPLICANT'S CONTENTIONS**

His current mental health issue (depression) went undiagnosed for many years. This was always his issue as a child and continued through his adult years, including his Air Force service. His medical records show he was treated for mental health issues while at MacDill Air Force Base, Florida (FL) and Lackland AFB, Texas. With this being undiagnosed, his decision-making capabilities were not in the right mindset. This led to his offenses which were not the real him. Since leaving the Air Force, he has never been arrested and stayed out of trouble and made a great life for himself. Once his condition was treated with medication, he was able to get his life together. He went to college while he worked full-time and has two associate degrees and a bachelor's degree. He has three great kids who are now adults. He has had a great career as a Senior Account Manager selling technology solutions for over 20 years. This was not shared earlier as he did not know this was an option and never looked at it. With the internet now, he was able to connect with the Veterans Administration and found this was an option.

The applicant's complete submission is at Exhibit A.

### **STATEMENT OF FACTS**

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

On 27 Sep 89, 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 117, UCMJ:
  - [The applicant] did, in Tampa, FL, on or about 16 Sep 89, wrongfully use provoking words, to wit: "spick...wetback...dirty Mexican...remember the Alamo...", or words to that effect toward [another airman].
  - [The applicant] was, in Tampa, FL, on or about 16 Sep 89, disorderly which conduct was of a nature to bring discredit upon the armed forces.

The applicant received a reduction to the grade of airman basic, forfeiture of \$100.00 pay per month for 2 months, and 30 days correctional custody. The reduction to the grade of airman basic was suspended until 26 Mar 90 at which time it would be remitted without further action unless sooner vacated. The NJP action was filed in the applicant's Unfavorable Information File (UIF).

On 15 Jun 90, according to AF Form 3070, the applicant was issued NJP, under Article 15, UCMJ, for:

- Violation of Article 86, UCMJ:

- [The applicant] did, at MacDill AFB, FL, on or about 1 Jun 90, without authority, fail to go at the time prescribed to his appointed place of duty, to wit: Fuels Management Branch, building 1062.

The applicant received a reduction to the grade of airman (E-2), with a new date of rank of 15 Jun 90, and 15 days extra duty. The NJP action was filed in the applicant's UIF.

On 6 Jul 90, according to AF Form 3070, the applicant was issued NJP, under Article 15, UCMJ, for:

- Violation of Article 86, UCMJ:

- [The applicant] did, at MacDill AFB, FL, on or about 23 Jun 90, without authority, fail to go at the time prescribed to his appointed place of duty, to wit: Fuels Management Branch, building 1062.

The applicant received a reduction to the grade of airman basic (E-1), with a new date of rank of 6 Jul 90, and 15 days extra duty. The NJP action was filed in the applicant's UIF.

On 1 Nov 90, according to General Court-Martial Order (GCMO) Number XX, dated 26 Nov 90, the applicant was arraigned at a court-martial on the following offenses:

- Charge I. Article 128. Plea: G. Finding: G.

- Specification: [The applicant], did, on or about 3 Aug 90, unlawfully strike and spit upon [another airman]. Plea: G. Finding: G.

- Charge II. Article 112a. Plea: G. Finding: G.

- Specification: [The applicant], did, on divers occasions, from on or about 4 May 90 to on or about 29 May 90, wrongfully use marijuana. Plea: G. Finding: G.

- Charge III. Article 134. Plea: NG, but G, of violation of Article 80. Finding: NG, but G, of violation of Article 80.

- Specification: [The applicant] did, on or about 5 Jun 90 wrongfully give to Air Force Office of Special Investigations (AFOSI) Special Agent [XX] the sum of \$150.00 with intent to influence the action of the said [XX] with respect to an official matter. Plea: NG, (but G, of violation of Article 80) excepting the words "wrongfully give to AFOSI Special Agent [XX], a person [the applicant] believed to be a military supervisor at the MacDill AFB clinical laboratory, the sum of \$150.00, with intent to influence the action of the said [XX] with respect to an official matter in which the United States was and is interested, to wit: the safeguarding and disposition of a urinalysis sample provided by [the applicant] as part of the Air Force urinalysis program", substituting the words, therefore, "Attempt to wrongfully give a military supervisor at the MacDill AFB clinical laboratory the sum of \$150.00 with intent to influence the action of the said supervisor with respect to an official matter in which the United States was and is interested, to wit: the safeguarding and disposition of a urinalysis sample provided by [the applicant] as part of the Air Force urinalysis program." Finding: G, as pled.

Charge IV. Article 81. Plea: G. Finding: G.

- Specification: [The applicant] did, from on or about 31 May 90 to on or about 5 Jun 90, conspire with [another airman] to commit an offense of bribery. Plea: G. Finding: G.

The applicant was sentenced to a bad conduct discharge, confinement for 15 months, and total forfeiture of all pay and allowances. Only so much of the sentence which provided for a bad

conduct discharge, confinement for 12 months, and total forfeitures was approved, and except for the bad conduct discharge, was executed.

On 1 Nov 90, according to AF Form 2098, *Duty Status Change*, the applicant's duty status changed from Present for Duty to Military Confinement.

On 17 Apr 91, according to AF Form 2098, the applicant's duty status changed from Military Confinement to Parole.

On 18 Jul 91, according to GCMO Number XX, the applicant's sentence to a bad conduct discharge, confinement for 12 months, and forfeiture of all pay and allowances, as promulgated in GCMO Number XX, dated 26 Nov 90, has been finally affirmed. Article 71(c) having been complied with, the bad conduct discharge will be executed.

On 2 Aug 91, the applicant received a bad conduct discharge. His Narrative Reason for Separation is "Conviction by Court-Martial (Other Than Desertion)", he was credited with 1 year, 1 month, and 16 days of total active service, and dates of time lost of 1 Nov 90 through 2 Aug 91.

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 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 C). The applicant replied on 25 Apr 24 and provided an FBI report. According to the report, the applicant has had no arrests since discharge.

The applicant's complete response is at Exhibit D.

## **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 15 Apr 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 was convicted at a general court-martial for engaging in serious offenses of unlawfully striking and spitting on an airman, wrongfully using marijuana on several occasions, attempting to influence the actions of an AFOSI Special Agent by giving the agent the sum of \$150.00, and conspiring with an airman first class to commit an offense of bribery. There are no statements from the applicant to explain any of his behaviors at the time of service, and he claims in his petition he had an undiagnosed mental health condition of depression causing his behaviors. He also claims he received mental health treatment during service. His service treatment records are not available or submitted by the applicant for review, so there is no evidence or records to corroborate his claims. The existing available objective military records find no evidence or records he had a mental health condition, whether diagnosed or undiagnosed, including depression, during service or that his mental health condition impaired his judgment causing any of his acts of misconduct as contended. He submitted no mental health treatment records to support the notion his mental health condition caused his maladaptive behaviors and misconduct during service. Moreover, he contends he had always had depression as a child that continued through his adult years. His statement could indicate his depression had existed prior to service (EPTS) and there is no evidence his military duties or service had aggravated his EPTS condition. His convicted misconducts were serious offenses and some of his misconducts, such as attempting to influence the actions of an AFOSI agent with \$150.00, and conspiring with another airman to commit bribery, are considered to be premeditated behaviors. Premeditative behaviors involve planning and are not impulsive acts and there is no evidence they were caused by his mental health condition. These behaviors are also not common or typically seen in individuals with depression. There is no evidence he used marijuana to cope with his mental health condition or that his mental health condition caused him to use marijuana. Lastly, his misconduct of striking and spitting on an airman was egregious and could not be excused or mitigated by his mental health condition, even if hypothetically, he had a condition at the time of this offense. His behaviors were inappropriate and harmful to a fellow service member and could not be disregarded. The applicant's testimony was found to be insufficient and not compelling to support his request. After an exhaustive review of the available records, this psychological advisor finds no error or injustice with the applicant's discharge from service from a mental health perspective.

This psychological advisor opines liberal consideration is not required to be applied to the applicant's petition due to his prior service/EPTS mental health condition of depression is determined to not have been aggravated by his military service per the Kurta Memorandum #15. Should the Board elect to apply liberal consideration to his petition, 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 his current mental health issues of depression went undiagnosed for many years. He always had this issue as a child that continued through his adult years including his time in the Air Force. His medical records showed he was treated for mental health issues while he was at MacDill AFB and Lackland AFB. With his condition being undiagnosed, his decision-making capabilities were not in the right mindset which led to his offenses and was not the real him.

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

There is no evidence or records the applicant's mental health condition, including depression, 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 depression, had caused, was a contributing factor, or had a direct impact on his numerous serious offenses and bad conduct discharge. His misconducts were serious and egregious 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 E.

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

The Board sent a copy of the advisory opinion to the applicant on 14 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 during military service. Additionally, his serious and egregious misconduct could not be excused or mitigated by his mental health condition, particularly the charge of bribery which is a premeditated behavior. Given the applicant's contention that his mental health condition existed prior to his military service, and there is no record this condition was aggravated by military service, liberal consideration is not required in accordance with the Kurta memorandum.

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 post-service information 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-2023-02222 in Executive Session on 12 Sep 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 1 Jul 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 15 Apr 24.  
Exhibit D: FBI Report, dated, 25 Apr 24.  
Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 14 May 24.  
Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 14 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

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Board Operations Manager, AFBCMR