

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03007

XXXXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

Her official military personnel record be amended to:

- a. Change her service characterization from general (under honorable conditions) to honorable.
- b. Change her Narrative Reason for Separation from Misconduct (Drug Abuse) to Secretarial Authority.

APPLICANT'S CONTENTIONS

Per counsel, the applicant is an Operation IRAQI FREEDOM veteran with no record of misconduct until she completed her deployments to Iraq and Kuwait and developed mental health symptoms soon after. She served in the Air Force from Mar 05 to Apr 08 and was assigned to the Security Forces for the duration of her service. To perform her responsibilities, she received Nuclear Weapons Personnel Reliability Program (PRP) certification. The PRP "screening process is designed to ensure that only those personnel who have demonstrated the highest degree of reliability, trustworthiness, personal conduct, and integrity are assigned to PRP duties." [MILPERSMAN 1300-320(1)]. Until the events that led to her discharge, the applicant maintained her PRP certification, indicating an absence of misconduct in her record.

The applicant asserts due to stresses involved with her deployments, she began exhibiting mental health symptoms. She completed a post-deployment health assessment, dated 24 Aug 06. As part of that assessment, she stated she felt she was in great danger of being killed and requested help regarding the stress she was feeling following her deployment; however, she was cleared from a mental health perspective. There is no indication from her service records that she received any ongoing mental health treatment in service.

In Jun 07, after a lengthy investigation, the applicant admitted to the use of marijuana in service. In her statement, dated 14 Jun 07, as part of the nonjudicial punishment (NJP) proceedings, she wrote, "it is hard for me to explain why I acted so senselessly. Honestly, I cannot explain it." The applicant contended, after the NJP proceedings, she was informed she would be discharged due to her marijuana use. In Jul 07, she was permanently decertified from PRP and was punished in Oct 07 for violating Article 86 of the Uniform Code of Military Justice (UCMJ) for failing to go to her appointed place of duty. She would ultimately be discharged in Apr 08, with a general (under honorable condition) service characterization for Misconduct (Drug Abuse).

The applicant's service treatment records establish she exhibited mental health symptoms after her deployment. Her Aug 06 *Post-Deployment Health Assessment* indicated she reported symptoms related to depression, hypervigilance, and avoidance behavior. Additionally, she noted she was interested in receiving help with dealing with the symptoms.

On 12 May 22, the Department of Veterans Affairs (DVA) awarded the applicant entitlement to service-connected compensation for adjustment disorder, rated at 50 percent for significant mental health impairments including depression, anxiety, panic attacks, suspiciousness, chronic

sleep impairment, and disturbances of motivation and mood. The DVA made this determination after finding the applicant began experiencing issues of fatigue, low mood, and other depressive symptoms while on active duty, and noted she first used marijuana while in service on an experimental basis.

In support of the applicant's contentions, counsel refers the Board to the Under Secretary of Defense for Personnel and Readiness memorandum, Subject: *Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment*, dated 25 Aug 17, (known as the Kurta Memo), and application of liberal consideration for cases involving mental health conditions.

Her mental health diagnosis helps explain her in-service misconduct. Before her deployments, she had no history of misconduct. Her marijuana use did not occur until after she reported mental health issues, shortly after experiencing prolonged trauma, the sort that can often lead to the onset of post-traumatic stress disorder (PTSD). Further, her marijuana usage in-service is consistent with an individual suffering from mental health symptoms. Her DVA medical records indicate she was likely using marijuana for experimental usage. Her personnel records indicate she requested treatment with her mental health symptoms; however, there is no evidence she was provided that treatment. In absence of that treatment, it is not uncommon for self-medication to occur.

In conclusion, the applicant's misconduct was the result of self-medication as a result of her unmet mental health treatment needs. When taking into account the overall length and quality of her service, her misconduct should not outweigh the positive aspects of her record. The applicant's general discharge was overly harsh and not a true indication of the quality of her service. The discharge is a stark and painful reminder of the mistake she committed 16 years ago and continues to haunt her.

In support of her request for clemency, the applicant provides a personal statement, military service treatment records, DVA medical records, her post-service academic transcript/record, and a research article from the American Journal on Addictions: "*Unmet mental health need and subsequent substance use in individuals with a history of depression: Are there differences between metro and nonmetro areas?*"

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 24 Aug 06, according to DD Form 2796, *Post-Deployment Health Assessment*, provided by the applicant, she was cleared from a mental health perspective.

On 14 Jun 07, according to AF Form 3070A, *Record of Nonjudicial Punishment Proceedings (AB thru TSgt)*, the applicant was issued NJP under Article 15, UCMJ, for violation of Article 112a, UCMJ:

- [The applicant] did, at or near Work-Product (AB), Italy, on divers occasions, between on or about 1 Jan 07 and on or about 3 May 07, wrongfully use marijuana.

The applicant was reduced to the grade of airman basic (E-1), with a new date of rank of 14 Jun 07, forfeiture of \$600.00 pay per month for two months, suspended through 13 Dec 07, after which time it would be remitted without further action, unless sooner vacated.

On 18 Jul 07, according to AF IMT 286A, *Notification of Nuclear Weapons Personnel Reliability Program Permanent Decertification/Disqualification Action*, the applicant was permanently disqualified from the PRP for illegal use or distribution of marijuana.

On 19 Oct 07, according to AF Form 366, *Record of Proceedings of Vacation of Suspended Nonjudicial Punishment*, the applicant violated one or more of the conditions of her suspension:

- Violation of Article 86, UCMJ:
 - [The applicant] did, at or near **Work-Product**, Italy, on or about 10 Oct 07, without authority, failed to go at the time prescribed to her appointed place of duty.
 - [The applicant] did, at or near **Work-Product**, Italy, on or about 12 Oct 07, without authority, failed to go at the time prescribed to her appointed place of duty.

Forfeiture of \$600.00 pay per month for two months, was ordered, effective 19 Oct 07.

On 26 Feb 08, 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 5.54., Drug Abuse. The specific reasons for the action were:

- On or about 1 Jan 07 and 3 May 07, on divers occasions, [the applicant] wrongfully used marijuana, a Schedule I controlled substance. For this incident, she received an Article 15, dated 14 Jun 07, with a punishment of reduction to the grade of airman basic (E-1), with a new date of rank of 14 Jun 07, and forfeiture of \$600.00 pay per month for two months, suspended through 13 Dec 07. This action was used to create her Unfavorable Information File.

On 25 Mar 08, the discharge authority directed the applicant be discharged under the provisions of AFI 36-3208, Chapter 5, Section H, paragraph 5.54., Drug Abuse, with a general (under honorable conditions) service characterization. Probation and rehabilitation were not authorized under the provisions of AFI 36-3208, Chapter 7, paragraph 7.2.6.7..

On 3 Apr 08, the applicant received a general (under honorable conditions) discharge. Her Narrative Reason for Separation is "Misconduct (Drug Abuse)", with Separation Code of JKK [Misconduct – Drug Abuse], and she was credited with 3 years and 27 days of total active service.

On 6 Apr 17, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to her discharge.

On 30 Aug 18, 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.

On 16 Sep 22, according to a DVA Rating Decision, provided by the applicant, she was awarded service-connection for adjustment disorder with depressed mood (also claimed as anxiety) and granted an evaluation of 50 percent, effective 12 May 22.

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

POST-SERVICE INFORMATION

On 13 Mar 24, the Board sent the applicant a standard request for post-service information. This letter informed the applicant that a Federal Bureau of Investigation (FBI) background check

would assist the Board in evaluating her case. Although the applicant did provide a copy of her post-service academic record with her original application, she did not respond to the Board's request and/or include an FBI background check or other criminal history data.

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 13 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

The AFRBA Psychological Advisor finds insufficient evidence to support the applicant's request for an upgrade of her discharge.

There is insufficient evidence the applicant had any mental health condition during her time in service or at discharge. The applicant had numerous mental health evaluations while she was in service and was never diagnosed or met the criteria for a Diagnostic and Statistical Manual of Mental Disorders (DSM) diagnosis. There is evidence she was evaluated for mental health issues, as she had reported them on evaluation forms. Her symptoms were carefully evaluated, especially as she served in the PRP. After thorough mental health evaluations, she was cleared and determined not to have any mental health condition. The Psychological Advisor provided a summary of the applicant's mental health evaluations and determinations while she was in service.

It was not until 27 Apr 15, approximately seven years after military service that she was diagnosed by the DVA with a mental health condition (adjustment disorder). At the time of this mental health diagnosis, it was determined the etiology of her diagnosis stemmed from recent events (loss of business and mother passing away), not events that occurred during her military service. The provider noted, "Veteran's depression was triggered by several important losses of the second half of last year." Notes from 21 Jun 19 and 26 Jun 19 that diagnosed her with major depressive disorder and uncomplicated bereavement stated the etiology as being the anniversary of her mother's death and psychosocial stressors related to her career and interpersonal relationships. The provider noted the symptoms had persisted for four years (seven years after her military discharge). Again, her mental health condition and symptoms appear to be the result of events that occurred after she was discharged from service.

It was not until her Compensation & Pension examination on 13 Jun 22 that she was service connected at 50 percent for adjustment disorder, with an original effective date of 12 May 22. It noted her symptoms began during her tour to Iraq/Kuwait in 2006. As noted above from her

numerous previous evaluations, she did not meet the criteria for any DSM diagnosis while she was in the military or at discharge and was not diagnosed with any mental health issues until 2015. While she was seen post-service on 1 Jun 10 and 10 Jun 10 (two years after her military service), she was not diagnosed with any mental health condition. The provider noted, "the applicant did not have depression, anxiety, PTSD symptoms, or sleeping difficulty" and "She denied any symptoms of PTSD/Mental Health." It should be noted the DVA is empowered to offer compensation for any medical condition with an established nexus with military service, without regard to its impact upon a member's fitness to serve, the narrative reason for release from service, or the length of time transpired since the date of discharge. The DVA may also conduct periodic reevaluations for the purpose of adjusting the disability rating awards as the level of impairment from a given medical condition may vary (improve or worsen) over the lifetime of the veteran.

Additionally, there is no evidence the applicant was unfit for duty during her military service from a psychological standpoint. She was never placed on a profile from a psychological perspective or determined to have a duty-limiting condition. She was never diagnosed with a mental health condition. She was routinely evaluated for PRP status and determined to be qualified (until she was decertified for drug usage). Her performance evaluations show she met standards throughout her military service. Her performance evaluation in which she received an overall rating of 2/5 for drug usage, still shows she met standards in all other areas of her performance report including her primary/additional duties. There is no evidence she was unable to perform the duties of her office, grade, rank, or rating from a psychological perspective.

This psychological advisor concludes the applicant was not suffering from any mental health conditions while she was in the military. Therefore, her misconduct of drug usage (marijuana) on several occasions is not mitigated or excused by any mental health condition.

There is insufficient evidence to suggest the applicant had any mental health condition that would mitigate her 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?

Counsel contends the applicant has been diagnosed with a mental health disorder (adjustment disorder).

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

The applicant was not diagnosed with any mental health disorder while in the military or at discharge. She was routinely evaluated and determined not to have any mental health conditions while in the military. She was not diagnosed with any mental health disorder until 2015, seven years after her military service. Her mental health diagnosis had an etiology that was post-service, not related to her military service.

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

This psychological advisor concludes the applicant was not suffering from any mental health conditions while she was in the military. Therefore, her misconduct of drug usage (marijuana) on several occasions, is not mitigated or excused by any mental health condition.

4. Does the condition or experience outweigh the discharge?

Since the applicant's mental health condition does not excuse or mitigate her discharge, the applicant's condition also does not outweigh the 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 13 Mar 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. There is no evidence the applicant suffered from any mental health conditions while she was in the military. She was routinely evaluated due to her PRP certification and was not diagnosed with any mental health disorder while in the military or at discharge. The applicant was not diagnosed with any mental health disorder until 2015, seven years after her military service, and her diagnosis had an etiology that was post-service, not related to her military service.

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 her discharge. 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 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-2023-03007 in Executive Session on 18 Jun 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, w/atchs, dated 24 Aug 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 13 Mar 24.
Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 12 Mar 24.
Exhibit E: Notification of Advisory, SAF/MRBC to Counsel, dated 13 Mar 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