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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-00374

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His under other than honorable conditions (UOTHC) discharge be upgraded to general (under honorable conditions or honorable conditions.

APPLICANT'S CONTENTIONS

Due to a decision by the Board of Veterans Appeals, his discharge status was an obstacle to achieving Department of Veterans Affairs (DVA) eligibility. On 7 Dec 23, he was declared insane at the time in question. This ruling lifted the bar which kept him from obtaining DVA benefits, but it also stated another reason for the favorable ruling was his mental health behavior deviated from his previous meritorious service. Because the Board of Veterans Appeals ruled, he was insane at the time in question and he had a spotless record of service before the incident, he is asking for consideration of the evidence presented to upgrade his discharge to the status of his service prior to the incident in question.

In support of his request for a discharge upgrade, the applicant provides a DVA claim decision.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force senior airman (E-4).

On 8 Mar 96, the DD Form 458, *Charge Sheet*, indicates the applicant was charged with violating the Uniform Code of Military Justice (UCMJ), Article 121. Specifically, he stole a laptop computer, a computer carrying case, three power cords, and a computer power unit, with a value of about \$2545.00, which was property of the United States Air Force, between on or about 5 Jan 96 and on or about 8 Jan 96.

On 14 Mar 96, a memorandum from the applicant indicates he requested he be discharged from the Air Force according to Air Force Instruction (AFI) 36-3208, *Administrative Separation of Airmen*, Chapter 4, in lieu of trial by court-martial.

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On 22 Mar 96, the applicant's commander recommended the applicant's request for discharge in lieu of trial by court-martial be approved.

On 25 Mar 96, the Assistant Staff Judge Advocate found the request legally sufficient.

On 2 Apr 96, the discharge authority directed the applicant be discharged in lieu of trial by court-martial, with a UOTHC service characterization. It is noted the execution of the applicant's discharge was withheld until he was medically cleared.

On 22 Apr 96, the applicant received a UOTHC discharge. His narrative reason for separation is "Triable by Court Martial" and he was credited with 2 years, 8 months, and 27 days of total active service.

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

POST-SERVICE INFORMATION

On 23 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 22 May 24 and provided an FBI report. According to the report, the applicant was arrested on 20 Aug 02 for domestic violence. The applicant also provided a personal statement, character statements, and educational documentation.

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 23 Apr 24, the 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 which 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 recommends denying the application. The applicant contends because of his DVA determination/definition of insanity, his discharge of UOTHC should be upgraded. It should be noted the definition the DVA uses for determining insanity is significantly different than what court martial proceedings use to determine mental capacity or mental responsibility from a mental health perspective. While a determination of insanity from the DVA may mean the applicant is now eligible for DVA services and potential service connection, it is not equivalent to determining mental capacity or mental responsibility from a legal/court martial perspective.

To further clarify, for DVA purposes, insanity is defined as: An insane person is one who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides.

The DVA's definition of insanity has no grounding in the clinical application of assessment for "insanity" as it applies to federal and state law which assesses a person's ability to appreciate and understand the nature and quality or wrongfulness of their acts. The DVA definition is not comprehensible to the advisor from a clinical standpoint. For example, the definition above states an insane person is one "...while not mentally defective or constitutionally psychopathic..." Taking only that part of the definition, the provider notes there is no clinical standard or research or general use of the term "mentally defective" nor "constitutionally psychopathic." These definitions exist nowhere in the Diagnostic and Statistical Manual (DSM) IV or DSM 5 diagnostic manual. The DVA definition goes on to state, "...when a psychosis has been engrafted upon such basic condition, exhibits due to disease, a more or less prolonged deviation from his normal method of behavior..." With respect to this part of the DVA definition, the DVA appears to state, due to a mental health disorder (they term this a disease) which may include psychosis, the person evidences a "more or less" prolonged deviation from his normal method of behavior. The Psychological Advisor is uncertain how to interpret the legal standard of "more or less."

Clinically, it's relevant to note, the great majority of persons experiencing mental health symptoms are deviating from their normal method of behavior. A relevant criterion for the diagnosis of almost all of the disorders of the DSM IV or DSM 5 is indicative of symptoms which depart from a person's "normal" behavior, with the exception of personality disorders and developmental disorders. A departure from one's normal behavior would not necessarily correlate with a person's ability to appreciate wrongdoing or the nature of a criminal act but this is again absent from the DVA definition. Giving a hypothetical clinical example, a common psychological symptom of depression may be experienced in correlation with the loss of a loved one. In this instance, according to the DSM 5, the person's depressed mood and associated depressive symptoms would be a deviation from their standard behavior. The person may isolate themselves more frequently, engage in less exercise, decrease food intake, etc. It appears, in examining the above DVA definition this person would be termed insane. This definition is not consistent with any known clinical or forensic application of an impairment of a person's ability due to severe mental illness to be able to understand or appreciate their wrongful actions. The standard for Court Martial proceedings (Manual for Courts-Martial United States (2024 Edition) states:

Rule 706. Inquiry into the mental capacity or mental responsibility of the accused:

(a) Initial action. If it appears to any commander who considers the disposition of charges, or to any preliminary hearing officer, trial counsel, defense counsel, military judge, or member, there is reason to believe the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, this fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused. The submission may be accompanied by an application for a mental examination under this rule.

Matters in inquiry. When a mental examination is ordered under this rule, the order shall contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused, or other reasons for requesting the examination. In addition to other requirements, the order shall require the board to make separate and distinct findings as to each of the following questions:

- (a) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (The term "severe mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.)
- (b) What is the clinical psychiatric diagnosis?
- (c) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?
- (d) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?

While the applicant was diagnosed with major depression on 19 Jan 95, the diagnosis was removed on 26 Jan 95, and he was diagnosed with partner relational problems (not a formal DSM diagnosis but a condition). The mental health encounter from 26 Jan 95 also noted he had no duty limitations, indicating he was fit for duty from a psychological perspective. A memorandum with the subject line, Request of Discharge in Lieu of Trial by Court-Martial, dated 22 Mar 96 noted at the time of the misconduct, the airman did not have a mental disease or defect which caused him to lack the substantial capacity either to appreciate the criminality of the acts, or to conform to the law (AFI 44-109, *Mental Health, Confidentially, and Military Law*). The airman presently has the capacity to understand the nature of the proceedings and to assist in the defense.

Using the standards set forth by the Manual for Courts-Martial United States, the Psychological Advisor concludes there is no evidence to support the applicant did not have mental capacity or mental responsibility at the time of his offenses. While he may have been diagnosed with a mental health diagnosis this does not equate to diminished mental capacity or mental responsibility. There is also no evidence to suggest the applicant was unable to appreciate the nature and quality or wrongfulness of his conduct. There is evidence in the investigative report and other service documents the applicant knew the wrongfulness of his misconduct. He removed the computer's hard drive, hoping it would erase any memory of him having used the computer and he anonymously returned the computer by leaving it in a paper bag on the hospital employee parking lot side of the hospital. While he later confessed, these actions show the applicant knew it was wrong to steal a computer as he attempted to conceal his actions and avoid punishment. Additionally, his actions of stealing the computer do not appear to be an impulsive act, but one which was planned and premeditated. His records show he saw a door was open and returned later to steal a computer and peripherals.

While the applicant was eventually declared insane by the DVA definition, there is evidence throughout his records he would not have met this definition of insanity until 2021, 25 years after his military service. The note he submitted (5 Feb 04), discussed the reasons for his nonappearance at his court date. It did not address mental competence or issues of insanity. A letter he submitted (7 Mar 18) noted his mental health condition did not include any psychotic features, and he was expected to return to work after treatment. A DVA evaluation (31 Jul 18) appears to have been completed to determine whether he met the DVA definition of insanity, concluded there was no evidence to suggest he was insane at the time the offenses were committed. It was not until 1 Sep 21 a provider determined he met the DVA's definition of insanity. The DVA in 2023 (27 years after discharge) also determined he met the DVA's definition of insanity.

It is the Psychological Advisor's conclusion and experience the DVA's determination the applicant met their definition of insanity, is to remove the regulatory bar to DVA benefits which would otherwise be denied with his UOTHC discharge. It is not intended to excuse legal charges. Past DVA administrative decision examiners have noted the DVA's definition of insanity, "does not excuse the veteran's legal charges, but rather just makes the possibility of the vet obtaining DVA benefits for his disorder to be a greater possibility." This distinction makes it possible he can be considered for DVA benefits, while at the same time be denied an upgrade of his discharge.

There is insufficient evidence to suggest his depression was a prodromal symptom of his later diagnoses post-military which impeded his ability to make reasonable decisions. The applicant earned overall ratings on both his performance evaluations of 5 out of a possible 5, demonstrating his fitness for duty by showing exemplary performance. His second evaluation had a thru date of 2 Jan 96, ending 2-3 days before his misconduct of larceny/computer theft. The applicant was promoted to senior airman on 8 Jan 96, 2-3 days after his misconduct of larceny/computer theft. Being diagnosed with a mental health condition and receiving mental health treatment do not automatically render a condition as unfitting. More information is required to determine unfitness such as being placed on a permanent deployment limiting condition (DLC) profile for a mental health condition, being deemed not world-wide qualified (WWQ) due to a mental health condition, and impact or interference of the condition on the service member's ability to reasonably perform their military duties in accordance with their office, grade, rank, or rating. These designations were absent from his records. While the applicant has a service connection for major depressive disorder (MDD), it should be noted the military's Disability Evaluation System (DES), 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 were the cause for career termination, and then only for the degree of impairment present at the time of separation and not based on post-service progression of disease or injury.

To the contrary, the DVA, operating under a different set of laws, Title 38, U.S.C., 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 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. The Psychological Advisor finds insufficient evidence to support the contention the applicant lacked mental capacity or mental responsibility. While the applicant was diagnosed with mental health conditions in the military, there is no evidence he lacked mental capacity or mental responsibility for his misconduct of larceny/computer theft. None of his encounters while the applicant was in service suggest he was unable to appreciate the nature and quality or wrongfulness of his conduct. His diagnosis did not include psychotic features, and a memorandum noted he did not have a mental disease or defect which caused him to lack the substantial capacity either to appreciate the criminality of the acts, or to conform to the law.

While the applicant was diagnosed with MDD and partner relational problems during his service, his misconduct of larceny is not mitigated by his mental health conditions. Larceny is not part of the sequelae of symptoms associated with his diagnoses and therefore has no nexus with his mental health conditions. After considering the entire record and contentions, there is insufficient evidence to suggest the applicant had any mental health condition which would mitigate his 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: 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?
The applicant check marked "other mental health" on his application. The applicant reported he was declared insane at the time of his offense.

2. Did the condition exist or experience occur during military service?
The applicant was diagnosed with MDD and had a mental health condition of partner relational problems.

3. Does the condition or experience excuse or mitigate the discharge?
The Psychological Advisor finds insufficient evidence to support the contention the applicant lacked mental capacity or mental responsibility. While the applicant was diagnosed with mental health conditions in the military, there is no evidence he lacked mental capacity or mental responsibility for his misconduct of larceny/computer theft. None of his encounters while the applicant was in service suggest he was unable to appreciate the nature and quality or wrongfulness of his conduct. His diagnosis did not include psychotic features, and the memorandum noted he did not have a mental disease or defect which caused him to lack the substantial capacity either to appreciate the criminality of the acts, or to conform to the law. While the applicant was diagnosed with MDD and partner relational problems during his service, his misconduct of larceny is not mitigated by his mental health conditions. Larceny is not part of the sequelae of symptoms associated with his diagnoses and therefore has no nexus with his mental health conditions.

4. Does the condition or experience outweigh the discharge?
Since the applicant's mental health condition does not excuse or mitigate his discharge, the applicant's condition also does not outweigh the 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 17 Sep 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 10 U.S.C. Section 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. 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. Furthermore, 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 a significant difference of defining insanity in what is used in court-martial proceedings and what the DVA uses to determine a service-connection and the Board finds he did not lack the mental capacity or responsibility for his larceny misconduct as his records show he did not have a mental health condition which impacted his capacity to understand his criminality or to conform to the law. Nonetheless, the Board applied liberal consideration to the evidence submitted by the applicant; however, it is not sufficient to grant the applicant's request. While the Board notes he was diagnosed with MDD and partner relation problems, his mental health condition did not influence or impact his negative behavior when he committed larceny. Therefore, the Board finds his mental health condition does not mitigate or outweigh his misconduct which led to his discharge. In the interest of justice, the Board considered upgrading the discharge based on fundamental fairness; however, given the evidence presented, the Board finds no basis to do so. In this respect, the applicant appears to have made a successful transition to civilian life and the supporting statements from his friends indicate his upstanding character, commitment to his church, and the struggles he endured since his separation. However, these statements do not provide his impact in the community and if the impact is so admirable the Board could conclude an upgrade of his discharge would not constitute an injustice to those who have earned this characterization of service. In addition, the applicant provided an FBI report indicating he had some criminal activity since his discharge. While, the incident occurred over 20 years ago, and given the evidence presented, the Board does not find the applicant's submission sufficient to grant the requested relief. Therefore, the Board recommends against correcting the applicant's records. The applicant retains the right to request reconsideration of this decision, which could be in the form of a personal statement, additional character statements, or testimonials from community leaders/members specifically describing how his efforts in the community have impacted others. Should the applicant provide documentation pertaining to his post-service accomplishments and activities, this Board would be willing to review the materials for possible reconsideration of his request based on fundamental fairness.

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-2024-00374 in Executive Session on 5 Mar 24:

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Panel Chair

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, Panel Member

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Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 30 Jan 24.

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 23 Apr 24.

Exhibit D: Applicant's Response, atchs, dated, 22 May 24.

Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 13 Sep 24.

Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 17 Sep 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.

3/11/2025

X

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Board Operations Manager, AFBCMR

Signed by: USAF

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