

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-00622

XXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His official military personnel record amended to reflect:

- a. Discharge upgrade from under other than honorable conditions (UOTHC) to honorable.
- b. Grade of senior airman (E-4).

APPLICANT'S CONTENTIONS

Two weeks after his daughter was born, he was sent to serve in Kuwait. While he was there, the applicant had a few close calls and suffered from Post-Traumatic Stress Disorder (PTSD). Upon returning home, he did not seek treatment as he should have, but instead returned to normal duty. He was miserable and very unhappy. While on duty, the applicant had an incident that led to false accusations against him, and he saw it as an opportunity to be able to walk away from the service without knowing or caring about his life and future. Since treatment, the applicant now sees he was very wrong, and he is trying to patch his past so he can continue to move forward with his life. This is something he has wanted to fix for many years as he did serve proudly and honorably.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 1 Feb 05, according to AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, the applicant was issued nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ) for:

- Violation of Article 92, UCMJ:

- [The applicant], who knew or should have known of his duties, at or near **Work-Product**, Florida (FL), on or about 21 Oct 04, was derelict in the performance of those duties in that he willfully failed to perform his bike patrol duties by stopping at the dormitories for inappropriate personal purposes, as it was his duty to do.

- Violation of Article 128, UCMJ:

- [The applicant] did, at or near **Work-Product**, FL, between on or about 15 Sep 04 and on or about 21 Oct 04, unlawfully slap Airman First Class XXX and Senior Airman XXX on the buttocks with his hand.

- [The applicant] did, at or near **Work-Product**, FL, between on or about 1 Jan 04 and on or about 21 Oct 04, unlawfully handcuff Airman First Class XXX on the wrists with his handcuffs.

- [The applicant] did, at or near **Work-Product**, FL, on or about 21 Oct 04, unlawfully rub and touch Airman First Class XXX on the breasts with his hands after partially removing her shirt and bra.

Punishment imposed included reduction to the grade of airman basic, with new date of rank of 1 Feb 05, and forfeiture of \$150.00 pay per month for two months, suspended through 31 Jul 05, after which time it will be remitted without further action, unless sooner vacated.

On 29 Mar 05, 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*. The specific reasons for the action were:

a. On or about 21 Oct 04, [the applicant] was derelict in the performance of his duties in that he willfully failed to perform his bike patrol duties by stopping at the dormitories for inappropriate purposes. Between on or about 15 Sep 04 and on or about 21 Oct 04, [the applicant] did, unlawfully slap Airman First Class XXX and Senior Airman XXX on the buttocks with his hand. Between on or about 1 Jan 04 and on or about 21 Oct 04, [the applicant] did, unlawfully handcuff Airman First Class XXX on the wrists with his handcuffs and on or about 21 Oct 04, [the applicant] did, unlawfully rub and touch Airman First Class XXX on the breasts with his hands after partially removing her shirt and bra, for which he was punished under Article 15, UCMJ, dated 1 Feb 05, which was filed in his Unfavorable Information File (UIF).

b. On 21 Jul 03, [the applicant] failed to show up to mandatory physical training. For this, he received a Letter of Reprimand (LOR), dated 21 Jul 03, which was placed in his UIF.

c. On 3 Aug 01, [the applicant] failed to stay in his required patrol zone while posted as an Interior Security Response Team member. For this, he received an LOR, dated 14 Aug 01, which was placed in his UIF.

d. On 11 Sep 00, [the applicant] failed to obey a lawful general order or regulation by disregarding weapons safety, by placing the barrel of his M-16 in his mouth. For this, he received an LOR, dated 11 Sep 00, which was placed in his UIF.

e. On 10 Jul 00, [the applicant] failed to return to his post immediately as instructed by his Flight Sergeant. For this, he received a Letter of Counseling (LOC), dated 11 Jul 00, which was filed in his UIF.

f. On 21 Jun 00, with intent to deceive, [the applicant] made a false official statement regarding damage to the steering wheel of a government vehicle. On 7 Jun 00, he willfully caused damage to the steering wheel of a government vehicle with a cigarette lighter. For this, he was punished under Article 15, UCMJ, dated 26 Jul 00, which was filed in his UIF.

g. On 5 Jun 00, [the applicant] failed to obey a lawful order or regulation by reporting to Guard Mount with sideburns that extended past the opening of the ear, a direct violation of AFI 36-2903 [*Dress and Personal Appearance of Air Force Personnel*]. For this, he received an LOC, dated 5 Jun 00, which was filed in his Personnel Information File.

On 7 Apr 05, the Staff Judge Advocate found the discharge action legally sufficient.

On 11 Apr 05, the discharge authority directed the applicant be discharged for a pattern of misconduct under AFI 36-3208, Chapter 5, Section H, paragraph 5.50.2, with a UOTH service characterization. Probation and rehabilitation were considered, but not offered.

On 13 Apr 05, the applicant received a UOTHC discharge. His narrative reason for separation is "Misconduct" and he was credited with 5 years, 10 months, and 5 days of total active service.

On 18 May 09, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge.

On 8 Nov 10, 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 5 Apr 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.

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 5 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.

AFI 51-202, *Nonjudicial Punishment*, dated 7 Nov 03, Chapter 3 – *Procedures for Initiating and Imposing Nonjudicial Punishment*:

3.17. *Permissible Punishments.* Table 3.1. and Table 3.2. set out the maximum permissible punishments, based on the grade and status of the commander and grade of the member.

Table 3.1. *Enlisted Punishments. Punishment: Reduction; Imposed by a Major: Senior Airman to Airman Basic.*

AIR FORCE EVALUATION

The AFRBA Psychological Advisor finds insufficient evidence to support the applicant's request for the desired changes to his records based on his mental health condition.

The applicant's service treatment records are not available or submitted by the applicant for review and the existing records find no evidence or documentation he had any mental health conditions, including PTSD, during his military service. There are no records the applicant was ever diagnosed with PTSD by a duly qualified mental health professional in his lifetime. There are records substantiating he deployed to an austere location in support of Operation IRAQI FREEDOM and Operation ENDURING FREEDOM sometime during his Enlisted Performance Rating period between 16 Jan 03 and 15 Jan 04. It is not certain if this was the deployment the applicant was referring to in his petition as he did not identify when he deployed, but it is the only reference to an overseas deployment in his military records. When using this deployment as a reference point, the majority of his misconduct had occurred before his deployment. Prior to his deployment, he was documented to have engaged in misconduct and being reprimanded for failing to maintain a proper appearance (his sideburns extended past the opening of his ear), making a false official statement about damaging the steering wheel of a government vehicle and damaging the steering wheel with a cigarette lighter, failing to return to his post, disregarding weapons safety by placing the barrel of his M-16 in his mouth, and failing to stay in his patrol zone while posted as an Interior Security Response Team member. These misconducts occurred between the period of 05 Jun 00 to 3 Aug 01. Since these misconducts pre-dated his deployment, it is not possible his condition of PTSD, developed from his deployment, caused any of these pre-existing behavioral problems. There is no evidence or records the applicant had any mental health conditions or was in emotional distress impairing his judgment before his deployment.

There is also no evidence or records he had PTSD or any other mental health conditions after he returned from deployment. The applicant claimed he was falsely accused in reference to his misconduct of inappropriate touching and assaulting women or other service members; he was under investigation for these inappropriate behaviors. The applicant made a similar contention to the AFDRB claiming his discharge action was based on "hearsay evidence." The applicant's statement suggested he denied engaging in these misconducts and if so, then it is not possible his mental health condition, or PTSD, caused his behaviors since they did not occur. Even if hypothetically his mental health condition was present and had caused these behaviors, his behaviors and misconducts were egregious and could not be excused, mitigated, or outweighed by his mental health condition. Assaulting and inappropriately touching another individual are unacceptable behaviors. The other misconduct which occurred after the applicant's deployment was when he failed to show up for mandatory physical training. His LOR stated when he was asked why he did not show, he said, "I told you, I wasn't coming," which was considered disrespectful to the noncommissioned officer. The applicant did not address this misconduct or his pre-deployment misconduct in his petition and presented no evidence they were caused by having a mental health condition. He did not describe his trauma or PTSD symptoms and how they caused his numerous acts of misconduct causing his discharge from service. The existing available records find no evidence or records his mental health condition had a direct impact or was a contributing factor to his acts of misconduct and subsequent discharge. Thus, there is no error or injustice identified with the applicant's discharge from a mental health perspective. This Psychological Advisor finds the applicant's statement to be insufficient and not compelling to support his request for an upgrade of his discharge and restoration of his rank of E-4 based on his mental health condition.

Liberal consideration is applied to the applicant's request for an upgrade of his discharge due to the contention of having a mental health condition, specifically PTSD, caused by his deployment experience(s). It is reminded per the Kurta Memorandum pertaining to mental health, an upgrade is not mandated. Liberal consideration is not applied to his request to restore his rank of E-4 because this policy does not apply to this type of request. The following are answers to the four questions from the Kurta Memorandum from the available records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?

The applicant contends he suffered from PTSD from his deployment in Kuwait. He did not seek treatment and was miserable and unhappy. He did not discuss or identify his traumatic experience(s) during deployment, the trauma or PTSD symptoms he developed or had during service, and how his mental health condition may excuse or mitigate his misconduct and discharge.

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

The applicant's service treatment records are not available or submitted by the applicant for review and the existing records find no evidence or documentation he had any mental health conditions, including PTSD, during his military service. There are no records he was ever diagnosed with PTSD by a duly qualified mental health professional in his lifetime. There is evidence he had deployed to an austere location in support of Operation IRAQI FREEDOM and Operation ENDURING FREEDOM sometime during his Enlisted Performance Rating period between 16 Jan 03 and 15 Jan 04 but no evidence or records to corroborate he developed PTSD from this deployment.

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 PTSD, had a direct impact or was a contributing factor to his acts of misconduct and discharge. Most of his misconduct had occurred before his deployment. There is no evidence or records any of the applicant's misconducts were caused by his mental health condition or he had a mental health condition impairing his judgment at the time of any of his misconduct. He denied assaulting and inappropriately touching women or other service members and claimed he was falsely accused. The applicant's explanation would indicate his mental health condition did not cause his egregious behaviors, which was one of his more serious misconducts. Therefore, his mental health condition or deployment experience does not actually excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

Since the applicant's mental health condition or experience does not excuse or mitigate his discharge, his condition or experience 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 27 Sep 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 or documentation the applicant had any mental health conditions, including PTSD, during his military service. Further, the only overseas deployment in the applicant's records

occurred during the rating period 16 Jan 03 to 15 Jan 04, after the majority of his misconduct occurred. Moreover, the behaviors and misconducts for which the applicant received nonjudicial punishment, assault, were egregious and could not be excused, mitigated, or outweighed by his mental health condition. Liberal consideration was applied; however, the applicant's mental health condition does not excuse or mitigate his discharge.

Regarding the applicant's request for restoration of his grade to senior airman (E-4), the reduction in grade which resulted from nonjudicial punishment imposed by his commander complied with AFI 51-202. Reduction was within the commander's authority, was reviewed by the Staff Judge Advocate, and found legally sufficient.

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. 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/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-2024-00622 in Executive Session on 18 Dec 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 9 Feb 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 5 Apr 24.
Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 3 Jul 24.
Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 27 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.

X

Board Operations Manager, AFBCMR