

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-01150

XXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His DD Form 214, *Certificate of Release or Discharge from Active Duty*, be amended to:

- a. Change Block 24, *Character of Service*, to reflect honorable.
- b. Change Block 26, *Separation Code*.
- c. Change Block 27, *Reentry Code*, to allow for reenlistment.
- d. Change Block 28, *Narrative Reason for Separation*, to remove "Misconduct."

APPLICANT'S CONTENTIONS

This correction should be made because it does not reflect the applicant's character of service. He was going through a medical board, and he bought a medication used to treat back disorders and osteoporosis and it was deemed illegal. He did not ever get into any type of trouble in the time before and during his service. It was an honest mistake. He wanted to continue serving. The applicant wants to join the Air National Guard or Air Force Reserve. He knows he can still contribute to effectively serve the country. During his time, the applicant served to the best of his abilities and the evidence he provided shows this. He has suffered from depression ever since his discharge.

In support of his request for clemency, the applicant provides a memorandum requesting his interim security clearance, military certificates, promotion order, a medical record excerpt, and character statements.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman (E-2).

On 5 Oct 04, according to AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, the applicant received nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), for the following offenses:

- Violation of the UCMJ, Article 80
 - [The applicant] did, at or near **Work-Product**, United Kingdom (UK), on or about 7 May 04, attempt to wrongfully distribute some amount of Percocet, a Schedule II controlled substance, by offering said controlled substance to [another airman].
- Violation of the UCMJ, Article 86
 - [The applicant] did, at or near Royal Air Force (RAF) **Work-Product**, UK, on or about 7 May 04, without authority, fail to go at the time prescribed to his appointed place of duty, to wit: Building 632.
- Violation of the UCMJ, Article 112a

- [The applicant] did, at or near **Work-Product**, UK, on or about 7 May 04, wrongfully possess some amount of Nandrolone Decanoate, a Schedule III controlled substance.

The applicant was reduced to the grade of airman (E-2), with a new date of rank of 5 Oct 04, restricted to the limits of RAF **Work-Product**, UK for 30 days, and reprimanded.

On 15 Oct 04, the applicant's commander recommended the applicant be discharged from the Air Force for Misconduct, under the provisions of Air Force Instruction (AFI) 36-3208, *Administrative Separation of Airmen*, paragraph 5.54. The specific reasons for the action were:

a. [The applicant] did, on or about 7 May 04, attempt to wrongfully distribute some amount of Percocet, a Schedule II controlled substance, as evidenced by AF Form 3070, dated 5 Oct 04.

b. [The applicant] did, on or about 7 May 04, wrongfully possess some amount of Nandrolone Decanoate, a Schedule III controlled substance, as evidenced by AF Form 3070, dated 5 Oct 04.

In an undated memorandum, the Staff Judge Advocate found the discharge action legally sufficient.

On 21 Oct 04, the discharge authority directed the applicant be discharged for Misconduct: Drug Abuse, under the provisions of AFI 36-3208, paragraph 5.54, with a general (under honorable conditions) service characterization. Probation and rehabilitation were considered, but not offered.

On 17 Feb 05, according to an AFPC/DPPRS [Separations Processing Manager] memorandum, Subject: Administrative Discharge "Dual Action" – [applicant], execution of the approved discharge was deferred pending outcome of the required dual action processing.

On 16 Mar 05, according to a SAF/MRBP [Secretary of the Air Force Personnel Council] memorandum, Subject: Dual Action, AFI 36-3212 and AFI 36-3208 – [applicant], the Secretary of the Air Force directed the applicant be discharged by execution of the approved AFI 36-3208 action. This terminated the action under the provisions of AFI 36-3212.

On 31 Mar 05, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct" with separation code of JKK [Misconduct – Drug Abuse] and reentry code of 2B [Separated with a general or under other than honorable conditions discharge]; he was credited with 2 years, 10 months, and 8 days of total active service.

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

POST-SERVICE INFORMATION

On 9 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 9 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.

AIR FORCE EVALUATION

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

The applicant is petitioning the Board to change the characterization of service from under honorable conditions (general) to honorable. He is also requesting his separation code be changed, his misconduct removed from his DD Form 214, and his reenlistment code be changed so he can reenlist. The applicant check-marked Other Mental Health on his application.

While the applicant was diagnosed with service-connected Major Depressive Disorder (MDD), his misconduct is not excused or mitigated by his mental health condition. Wrongfully possessing an anabolic steroid and wrongfully attempting to distribute some amount of Percocet are not part of the sequela of symptoms associated with MDD. Anabolic steroids would not be used to self-medicate MDD. Attempted distribution of Percocet is a willful, deliberate, and conscious act, that is not part of the symptoms of MDD. Therefore, his misconduct has no nexus with his mental health condition and is not a mitigating factor.

After considering the entire record and contentions, there is insufficient evidence to suggest the applicant had any mental health condition that 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 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 reported he has suffered from deep depression since his discharge. There are no available mental health records noted from his time in service.

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

The applicant was diagnosed with dysthymia and MDD after his discharge.

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

While the applicant was diagnosed with service-connected MDD, his misconduct is not excused or mitigated by his mental health condition. Wrongfully possessing an anabolic steroid and wrongfully attempting to distribute some amount of Percocet are not part of the sequela of symptoms associated with MDD. Anabolic steroids would not be used to self-medicate MDD. Attempted distribution of Percocet is a willful, deliberate, and conscious act, that is not part of the symptoms of MDD. Therefore, his misconduct has no nexus with his mental health condition and is not a mitigating factor.

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 D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 15 Apr 24 for comment (Exhibit E), and the applicant replied with an undated rebuttal. In his response, the applicant contends the accusation of attempted sale of Percocet was false and never substantiated. It was

made by another airman who was trying to save face because of an ongoing rape trial. If the applicant tried to sell the other airman Percocet, he would have said medication, but because he did not, the airman made a broad, and again, unsubstantiated accusation. The other airman was convicted of rape.

Though the diagnosis of MDD was made after the fact, the truth was it started when the applicant was injured and facing a medical board and the possibility of no longer being able to serve his country in face of all the 9/11 terror attacks. He was a native New Yorker and deeply affected by the attacks. All he wanted was to continue his service. The applicant bought the medication (anabolic steroid) online. The fact that the applicant could purchase it online gave him no indication it was not legal. All he wanted was to pass his medical test and not be discharged from the military. He was a top airman in his unit and lived by the core values, service before self, integrity and excellence in all we do, and his prior service and actions reflected this.

The applicant's complete response is at Exhibit F.

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, to include the applicant's rebuttal, 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. The applicant was diagnosed with MDD post-service. There are no available mental health records noted from his time in service. Additionally, wrongfully possessing an anabolic steroid and wrongfully attempting to distribute some amount of Percocet are not part of the sequela of symptoms associated with MDD. Anabolic steroids would not be used to self-medicate MDD. Attempted distribution of Percocet is a willful, deliberate, and conscious act, that is not part of the symptoms of MDD. Liberal consideration was applied; however, the applicant's mental health condition does not excuse or mitigate his discharge.

Further, 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. If the applicant wishes to pursue reenlistment, a gaining service can weigh the reason for a prior discharge against the needs of the service and may consider granting an enlistment waiver. 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-2024-01150 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, w/atchs, dated 18 Mar 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 9 Apr 24.
Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 11 Apr 24.
Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 15 Apr 24.
Exhibit F: Applicant's Response, w/atchs, Undated.

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