

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-01488

XXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His general (under honorable conditions) discharge be upgraded to an honorable discharge and his narrative reason for separation changed from "Misconduct" to "Secretarial Authority" with a corresponding separation code.

APPLICANT'S CONTENTIONS

Counsel, on behalf of the applicant, provided a brief summary of the applicant's service awards and decorations. On 13 Apr 07, the applicant was issued nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ) for violation of Article 111, UCMJ, by driving while intoxicated. He was reprimanded and reduced in rank to E-4 with 25 days extra duty. On 17 Apr 07, the applicant appealed the punishment, but the appeal was denied. On 28 Oct 07, the applicant received a second citation for having "actual physical control" of a vehicle while intoxicated. The applicant failed the field sobriety test and refused a breathalyzer; however, a blood alcohol test showed his whole blood alcohol concentration to be zero percent. On 1 Nov 07, the applicant received a letter of reprimand (LOR) due to the 28 Oct 07 DUI [driving under the influence]. On 2 Nov 07, the applicant wrote a response to the LOR. In his letter, he explained he refused the breathalyzer because he wanted a more accurate blood test. The applicant also wrote, "I love being a member of the United States Air Force. It has taught me how to be a man, and how to live my life with values, honesty, and integrity." The applicant also took full responsibility for his actions.

On 4 Feb 08, the applicant's commander issued a memorandum informing the applicant he would be recommending the applicant's discharge. The reason for the discharge was Misconduct: Minor Disciplinary Infractions. The commander also stated he was recommending the applicant be discharged with a general (under honorable conditions) characterization of service. The reasons listed for the recommendation were the two driving incidents.

On 19 Feb 08, a Legal Review of Administrative Discharge Action was issued and stated the "procedures involved and the basis for this action are in compliance with applicable laws and directives." It also stated, "[The applicant] is eligible for probation and rehabilitation (P&R) under AFI-3208, Chapter 7. However, P&R should be offered only in cases where there seems to be a reasonable expectation of rehabilitation (Para 7.2.7). [The applicant] was afforded the opportunity to adhere to the rules and regulations yet has refused to do so despite attempts to rehabilitate him. Therefore, as recommended by [the commander], [the applicant's] discharge should not be suspended for P&R."

The applicant's separation was approved on 19 Feb 08, directing the applicant be discharged with a general (under honorable conditions) characterization of service, and a narrative reason for separation of Misconduct: Minor Disciplinary Infractions. The applicant was discharged accordingly on 20 Feb 08.

In support of this petition, counsel provided excerpts from Title 10, United States Code § 1552 (10 USC § 1552) and Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*.

Per counsel, the applicant was a remarkable airman before his struggles with alcohol began. This fact is reflected in both his Enlisted Performance Reports (EPR) and in the support he has garnered from friends, family, and fellow airmen. Counsel provided excerpts from the applicant's EPRs and character letters in support of his contentions. The applicant also wrote a letter to the Board explaining the circumstances that led to his discharge. Among other statements, the applicant also shared the demands of military life took a toll on his personal life and contributed to the dissolution of his marriage in 2003. The applicant stated following the divorce, he found himself "grappling with the delicate balance between personal turmoil and the responsibilities of his service." In 2005, the applicant writes he was sent to Iraq for his first deployment, and it was "a profound experience that both honored and scarred him." Despite the accolades the applicant earned for his service, his mental health began to suffer though he did not understand what was happening. Counsel cited multiple excerpts from the applicant's personal statement.

Following the applicant's discharge, he worked for a service company before taking an opportunity to work overseas. His overseas work for the next three years provided increased income so the applicant could pursue his degree after having lost access to the GI Bill. The applicant stated despite his success when he returned home, his personal redemption remained elusive. The applicant also shared, since his discharge, his pursuit of an education has been relentless. He earned a Bachelor of Science in Engineering Management, a Bachelor of Applied Science in Energy Management, and is currently working toward his Bachelor of Science in Electrical Engineering.

Further, counsel cited the Under Secretary of Defense for Personnel and Readiness (USD P&R) memorandum, Subject: Clarifying Guidance to Military Discharge Review 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 (Kurta Memorandum) and responded to the four questions to be considered in discharge relief.

In response to whether there was a condition or experience, counsel stated the evidence shows the applicant's performance was flawless prior to his deployment to Iraq. The change in behavior following his deployment should be afforded liberal consideration under the Kurta Memorandum. Regarding existence/occurrence during military service, per counsel, the applicant could not comprehend the emotions he was feeling; therefore, was unable to report them, and he asks the Board to accept this as evidence his Post-Traumatic Stress Disorder (PTSD) existed/occurred during military service. Further, the applicant argues following his deployment to Iraq, his PTSD reasonably existed and should be afforded liberal consideration when reviewing his discharge upgrade request. Additionally, per the Kurta memo, "substance-seeking behavior and efforts to self-medicate symptoms of a mental health condition may warrant consideration." In the instant case, that is exactly what happened – the applicant began to drink in an effort to manage emotions he did not understand and felt unable to share. Finally, the Kurta Memorandum states, "An honorable discharge characterization does not require flawless military service. Many veterans are separated with an honorable characterization despite some relatively minor or infrequent misconduct." The Notification Memorandum, dated 4 Feb 08, stated the applicant's discharge is based on "Minor Disciplinary Infractions." This is the very scenario the Kurta Memorandum contemplates, and the applicant requested the Board take this into consideration when reviewing his application. The applicant served his nation flawlessly until he began to abuse alcohol to treat symptoms of his undiagnosed PTSD.

In support of his request for a discharge upgrade, the applicant provides a personal statement, copies of his EPRs, excerpts from his medical record, his resume, letters of support, and other documents related to his request for upgrade.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 3 Apr 07, according to AF Form 3070A, *Record of Nonjudicial Punishment Proceedings (AB thru TSgt)*, the applicant was issued nonjudicial punishment under Article 15, UCMJ, for:

- Violation of Article 111, UCMJ
- [The applicant] did, at or near [Work-Pro...] Oklahoma, on or about 18 Mar 07, in the vicinity of [Work-Product] physically control a vehicle, to wit: a passenger car while the concentration in his breath was 0.21 grams of alcohol per 210 liters of breath or greater, as shown by chemical analysis.

The applicant was reduced to the grade of E-4, with a new date of rank of 13 Apr 07, given 25 days extra duty, and a reprimand.

On 15 Feb 08, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFI 36-3208, *Administrative Separation of Airmen*, Chapter 5, Section H, paragraph 5.49. The specific reasons for the action were:

a. On or about 27 Oct 07, [the applicant] physically controlled a vehicle while drunk. For this misconduct, he received an LOR, dated 1 Nov 07.

b. On or about 18 Mar 07, [the applicant] physically controlled a vehicle while the concentration in his breath was 0.21 grams of alcohol per 210 liters of breath or greater, as shown by chemical analysis.

On 19 Feb 08, the Staff Judge Advocate found the discharge action legally sufficient. On this same date, the discharge authority directed the applicant be discharged pursuant to AFI 36-3208, Chapter 5, Section H, paragraph 5.49, with a general (under honorable conditions) service characterization. Probation and rehabilitation were considered, but not offered.

On 20 Feb 08, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct" and his separation code is "HKN" [Misconduct – Minor Infractions]. The applicant was credited with 5 years, 9 months, and 28 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 4 Oct 24, the Board sent the applicant a request for post-service information, including a standard criminal history report from the Federal Bureau of Investigation (FBI); 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 4 Oct 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.

AIR FORCE EVALUATION

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

There is insufficient evidence to support the applicant had PTSD during his military service or at discharge. The applicant was seen regularly in the Air Force substance abuse program [Alcohol and Drug Abuse Prevention and Treatment] after his second incident of physically controlling a vehicle after drinking alcohol. His only mental health diagnosis during this time was alcohol abuse. His examination for his administrative separation only noted hypertension and patellar femoral syndrome, noting the applicant had no other issues. After thoroughly reviewing the applicant's available medical record during his service, there is no indication he had any mental health condition other than alcohol abuse.

Additionally, there is no indication the applicant was diagnosed with PTSD post-service. He has had numerous Compensation & Pension examinations from 2008 until 2023 and has been service-connected for 11 different medical conditions. The applicant was never service-connected for any mental health condition. A PTSD screening completed on 26 Jun 15, seven years after his military separation, determined the applicant was negative for PTSD. He saw a mental health provider on 6 Jul 15 and was diagnosed with unspecified anxiety.

This Psychological Advisor concludes the applicant does not have any mental health conditions that would mitigate or excuse his misconduct of physically controlling a vehicle while drunk or physically controlling a vehicle while the concentration in his breath was 0.21 grams of alcohol per 210 liters of breath.

Even if the applicant had a mental health condition at the time of his misconduct, his mental health condition would not be a mitigating factor for his behavior. While substance usage (drinking) may be related to a mental health condition (even PTSD), the decision to drive (or other behaviors following substance use) has no nexus with an applicant's mental health condition. These are rather conscious and deliberate decisions, following the actual substance usage.

While the applicant's counsel contends his blood alcohol concentration was zero percent on 28 Oct 07, it should be noted the applicant did fail the field sobriety test. Additionally, he refused a breathalyzer exam. The applicant's blood alcohol concentration of zero percent was determined approximately 12 hours after an Oklahoma Highway Patrol Trooper first made contact with the applicant (3:00 AM first contact - 2:46 PM blood draw, 28 Oct 07).

Counsel also contends the applicant's alcohol abuse is an indication he had PTSD at the time of his misconduct. While substance usage can be a sign of self-medicating mental health symptoms, there is insufficient evidence the applicant was self-medicating any mental health condition. Also, as mentioned above, self-medicating a mental health condition would not mitigate his misconduct.

After considering the entire record and contentions, there is insufficient evidence to suggest the applicant had any mental health condition that would mitigate the 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, through counsel, contends he has undiagnosed PTSD.

2. Did the condition exist, or experience occur, during military service?
There is insufficient evidence to support the applicant had PTSD during his military service or at discharge.

3. Does the condition or experience excuse or mitigate the discharge?
This Psychological Advisor concludes the applicant does not have any mental health conditions that would mitigate or excuse his misconduct of physically controlling a vehicle while drunk or physically controlling a vehicle while the concentration in his breath was 0.21 grams of alcohol per 210 liters of breath. Even if the applicant had a mental health condition at the time of his misconduct, his mental health condition would not be a mitigating factor for his behavior. While substance usage (drinking) may be related to a mental health condition (even PTSD), the decision to drive (or other behaviors following substance use) has no nexus with an applicant's mental health condition. These are rather conscious and deliberate decisions, following the actual substance usage.

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 16 Oct 24 for comment (Exhibit E) and the applicant replied on 12 Nov 24. In his response, counsel contends the author of the advisory opinion concluded the applicant does not have a mental health condition that would mitigate or excuse his misconduct of physically controlling a vehicle while drunk or physically controlling a vehicle while the concentration of his breath was 0.21 grams of alcohol per 210 liters of breath. The author continues that if the applicant had a mental health condition, the alcohol use may be related to a mental health condition, but the decision to drive a vehicle has no nexus with the applicant's mental health condition because that would be a conscious and deliberate decision. The author concluded there is insufficient evidence to support the applicant's request for an upgrade of his discharge.

As established by the Kurta Memorandum, the applicant is entitled to lenient review because of his mental health condition that manifested during his military service. It also establishes certain criteria that can be used as evidence of an existing mental health condition during military service when there is no formal diagnosed condition. Evidence of a mental health condition can include deterioration in work performance, inability of the individual to conform their behavior to the expectations of a military environment, and changes in behavior. There is no doubt the applicant served honorably and with distinction for the vast majority of his Air Force career as evidenced by his awards and decorations. The applicant's high level of performance and conduct is a far cry from the actions that led to his discharge from the Air Force. As such, this is exactly the type of situation the Kurta Memorandum was drafted to address. Clearly, the applicant showed a deterioration in his conduct and a sudden inability to conform his behavior to the expectations of a military environment.

Furthermore, the author's opinion that consuming alcohol may be attributable to self-medicating a mental health condition but not the operation of a vehicle when under the influence of alcohol is short-sighted. The applicant was over-indulging in alcohol because of his mental health condition, which impaired his judgment and compromised his executive decision making. There is a clear and obvious delineation between the applicant's alcohol abuse to his alleged decision to operate a vehicle with alcohol in his system. To only consider the substance abuse as a legitimate sign of mental health struggles but not any resultant outcome of said substance abuse would set a dangerous precedent and is completely contrary to the language, spirit, and intent of the Kurta Memorandum.

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 10 USC § 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 insufficient evidence to support the applicant had PTSD during his military service or at discharge. Additionally, even if the applicant was using alcohol to self-medicate a mental health condition, operating a vehicle with alcohol in his system was a conscious and deliberate decision. Particularly after his 18 Mar 07 incident, not making alternate transportation arrangements prior to using alcohol on 28 Oct 07 is inexcusable. Liberal consideration was applied; however, the applicant's mental health condition does not excuse or mitigate his discharge.

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/fundamental fairness; however, given the evidence presented, the insufficient post-service information, and in the absence of 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-2024-01488 in Executive Session on 15 Jan 25:

, 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 2 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 4 Oct 24.
- Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 11 Oct 24.
- Exhibit E: Notification of Advisory, SAF/MRBC to Counsel, dated 16 Oct 24.
- Exhibit F: Counsel's Response, dated 12 Nov 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