

## RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-02440

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

### APPLICANT'S REQUEST

His general (under honorable conditions) discharge be upgraded to an honorable discharge.

### APPLICANT'S CONTENTIONS

He was falsely accused of rape and took a plea for a lesser charge so he could move on with his life. The case took almost four years to go to court and the applicant suffered a lot of stress because of this. He has been an upstanding citizen since this situation, and he has never been to jail after this incident. The applicant's situation occurred during a time when the Air Force Academy was under fire for rape accusations. The applicant was stationed at **Work-Product** Air Force Base (AFB) which is not many miles away from the Air Force Academy. It seemed anybody who was accused of rape at that time on **Work-Product** AFB was court-martialed due to the negative media coverage at the Air Force Academy. The applicant was shamed and isolated by his superiors and fellow airmen. Once it was found the rape did not occur, he was charged with lesser charges. The applicant always felt he was not taken seriously when denying those charges. The applicant had never been in any trouble in his life before this incident and feels the Board should consider his request because of the stress and shame this situation has caused him.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

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

On 14 Jan 04, 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 111, UCMJ:
  - [The applicant] did, at or near **Work-Product** AFB, Colorado (CO), on or about 12 Oct 03, near the **Work-Product** AFB West Gate, physically control a vehicle, to wit: a passenger car, while drunk.

- Violation of Article 108, UCMJ:
  - [The applicant] did, at or near **Work-Product** AFB, CO, on or about 12 Oct 03, without proper authority, through neglect, damage by hitting with his vehicle, military property of the United States the amount of said damage being in the sum of less than \$500.00.

The applicant was reduced to the grade of airman first class, with a new date of rank of 14 Jan 04, directed to forfeit \$792.00 pay per month for two months, suspended through 13 Jul 04, after which time it will be remitted without further action, unless sooner vacated, given 15 days extra duty, and was reprimanded.

On 3 Aug 04, according to Special Court-Martial Order (SCMO) Number XX, dated 27 Aug 04, the applicant was arraigned at court-martial for the following offenses:

- Additional Charge: Article 134, UCMJ. Plea: G. Finding: G.

- Specification 1: [The applicant] did, at [Work-Product] AFB, CO, between on or about 6 Sep 02 and on or about 7 Sep 02, wrongfully commit an indecent act with [individual] by openly and notoriously engaging in oral sex. Plea: G. Finding: G.

- Specification 2: [The applicant] did, at or near [Work-Product] AFB, CO, between on or about 6 Sep 02 and on or about 7 Sep 02, serve, give away, or deliver or permit the serving, giving or procuring of an alcohol beverage to or for [individual], a person under the age of twenty-one years, in violation of Colorado Revised Statutes section 12-47-901(1)(a). Plea: NG. Finding: NG.

The applicant was adjudged by the military judge and sentenced to reduction to airman basic (E-1), confinement for one month, and hard labor without confinement for two months.

On 7 Sep 04, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of Air Force Instruction (AFI) 36-3208, *Administrative Separation of Airmen*, paragraph 5.52.1.4, for Commission of a Serious Offense, specifically, Sexual Perversion. The specific reason for the action was:

- [The applicant] did, at or near [Work-Product] AFB, CO, between on or about 6 Sep 02 and on or about 7 Sep 02, wrongfully commit an indecent act with [individual] by openly and notoriously engaging in oral sex. As a result, the applicant was convicted by Special Court-Martial on 3 Aug 04 for violating Article 134 (Indecent Acts), UCMJ.

On 14 Sep 04, the Staff Judge Advocate found the discharge action legally sufficient. On this same date, the discharge authority directed the applicant be discharged for Commission of a Serious Offense, Sexual Perversion, with a general service characterization. The authority for this action is AFI 36-3208, Chapter 5, Section H, paragraph 5.52.1.4. Probation and rehabilitation were considered but not offered.

According to SCMO Number XX, dated 14 Sep 04, that portion of the applicant's unserved sentence to hard labor without confinement, as promulgated in SCMO Number XX, dated 27 Aug 04, remaining to be served is remitted. The sentence was adjudged by the military judge on 3 Aug 04.

On 15 Sep 04, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct" and he was credited with 5 years, 6 months, and 12 days of total active service. Dates of Time Lost During This Period: 3 Aug 04 through 26 Aug 04.

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 Dec 24 and 17 Dec 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 Post-Traumatic Stress Disorder (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 Dec 24 and 17 Dec 24, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibits C and F).

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 based on his mental health condition.

This advisory is limited to the applicant's mental health condition. The Board may elect to obtain/review an advisory from a legal subject matter expert to address his contention about being falsely accused and other legal issues. A review of the available records finds there is no evidence or records the applicant received any mental health evaluation, treatment, or mental disorder diagnosis, including PTSD, during service. The applicant's service treatment records are not available or submitted by the applicant for review and there is no documentation of any mental health issues in his available military records. The applicant had consistently reported he was falsely accused of rape to his mental health providers at the Department of Veterans Affairs (DVA) and in his petition to the Board. There is no evidence from his military records to support this contention. Should the applicant's report be true, and he was falsely accused of rape, then it is not possible his mental health condition had caused his misconduct since he denied committing the act. However, the applicant was not discharged from the Air Force for sexual assault but for wrongfully committing indecent acts of oral sex with another person openly and notoriously. The applicant claimed once his sexual assault allegation was dropped because there was no sexual assault committed by him, he was charged with a lesser charge, presumably the indecent act with another individual. The applicant did not address or dispute his involvement in the indecent act in his petition except to state he accepted the lesser charge to move on with his life, which was the basis for his discharge. His objective records reflected he did engage in this misconduct and was convicted at a special court-martial for this offense, resulting in his discharge. There is no evidence the applicant had any mental health conditions, including PTSD, or he was in emotional distress impairing his judgment at the time of his misconduct when he engaged in an indecent act with another individual.

The applicant marked "PTSD" on his petition to the Board and contended he suffered a lot of stress because of his legal issues. His stressors were developed in response to his legal issues caused by the consequences of his misconduct. There is no evidence the applicant had any mental health issues or conditions that preceded his misconduct. He was diagnosed with PTSD by his mental health provider at the DVA 20 years after his discharge. The applicant identified his two traumatic experiences as being falsely accused of rape and witnessing the suicide of another service member. There is no evidence or records any of these experiences had existed or occurred in his available military records. He did not identify the timeframe of when he witnessed the suicide and did not discuss this experience in his petition. There is no evidence the residual mental health effects from witnessing the suicide had an impact on the applicant or caused him to engage in his misconduct. He endorsed to his psychiatry prescriber, a nurse practitioner, he had PTSD or trauma symptoms of flashbacks 1-2 times a week, intrusive thoughts daily, nightmares 3-4 times a month, hypervigilance, excessive startle response, avoidance of crowds and other activities that reminded him of the traumatic events, and feelings of dying prematurely. There is no evidence the applicant had or experienced any of these symptoms during service. It appeared he had a delayed onset of PTSD, causing him to meet the diagnostic criteria for PTSD decades after his traumatic experiences occurred. Delayed onset of PTSD is not an uncommon occurrence.

An exhaustive review of the available records finds the applicant's mental health condition, including PTSD, did not have a direct impact or was a contributing factor to his misconduct leading to his discharge from service. There is no error or injustice identified with his discharge from a mental health perspective. The applicant's contention is determined to not be compelling nor sufficient to support his request for an upgrade of his discharge based on his mental health condition.

Liberal consideration is applied to the applicant's petition due to his contention of having a mental health condition. It is reminded liberal consideration does not mandate an upgrade or a change to the records per policy guidance. 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 designated "PTSD" on his petition and contended he was falsely accused of rape during service because of similar incidents at the Air Force Academy. He said he took a plea deal for a lesser charge so he could move on with his life but was shamed and isolated by his superiors and fellow airmen. The applicant said he suffered a lot of stress from his legal problems and proceedings.
2. Did the condition exist, or experience occur, during military service?  
There are no records that corroborate the applicant's claim he was falsely accused of rape. There are no records reporting he witnessed the suicide of a service member during service. The applicant's service treatment records are not available or submitted by the applicant for review so there is no evidence or records he had received any mental health evaluation, treatment, or mental disorder diagnosis, including PTSD, during service. The applicant was diagnosed with PTSD by his mental health provider at the DVA about 20 years after his discharge from the Air Force. PTSD or trauma symptoms he endorsed to his provider included having flashbacks 1-2 times a week, intrusive thoughts daily, nightmares 3-4 times a month, hypervigilance, excessive startle response, avoidance of crowds and other activities that reminded him of the traumatic events, and feelings of dying prematurely. There is no evidence the applicant had, or experienced, any of these symptoms during service.
3. Does the condition or experience actually excuse or mitigate the discharge?  
There is no evidence the applicant's mental health condition, including PTSD, developed from his traumatic experiences, had a direct impact, or was a contributing factor, to his misconduct and discharge. There is no evidence the applicant had a mental health condition or was in emotional distress impairing his judgment at the time of his misconduct of indecent acts with another individual for which he was convicted at a special court-martial. His stressors were developed in response to the legal issues caused by the aftermath of his misconduct. There is no evidence the applicant had any mental health issues or conditions that preceded his misconduct. Thus, his mental health condition or experience does not excuse or mitigate his discharge.
4. Does the condition or experience outweigh the discharge?  
Since the applicant's mental health condition does not excuse or mitigate his discharge, his mental health condition 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 17 Dec 24 for comment (Exhibit E) but has received no response.

## **FINDINGS AND CONCLUSION**

1. The application was timely filed. Given the requirement for passage of time, all discharge upgrade requests under fundamental fairness or clemency are technically untimely. However, it would be illogical to deny a discharge upgrade application as untimely, since the Board typically looks for over 15 years of good conduct post-service. Therefore, the Board declines to assert the three-year limitation period established by Title 10, United States Code § 1552(b).

2. The applicant exhausted all available non-judicial relief before applying to the Board.

3. After reviewing all Exhibits, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. There is no evidence the applicant had a mental health condition or was in emotional distress impairing his judgment at the time of his misconduct of indecent acts with another individual for which he was convicted at a special court-martial. His stressors were developed in response to the legal issues caused by the aftermath of his misconduct. There is no evidence the applicant had any mental health issues or conditions that preceded his misconduct. There is no evidence or records he had received any mental health evaluation, treatment, or mental disorder diagnosis, including PTSD, during service. The applicant was diagnosed with PTSD by his mental health provider at the DVA approximately 20 years after his discharge from the Air Force. 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. Therefore, the Board recommends against correcting the applicant's record.

4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

## **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-2024-02440 in Executive Session on 16 Apr 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, dated 11 Jul 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 Dec 24.  
Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 12 Dec 24.  
Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 17 Dec 24.  
Exhibit F: Letter, SAF/MRBC, w/atchs (Updated Liberal Consideration Guidance), dated 17 Dec 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