

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2018-01936

XXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

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

APPLICANT'S CONTENTIONS

On 27 Aug 73, he received a full pardon/clemency from President Ford and assumed his discharge had been upgraded to honorable.

In support of his request for clemency, the applicant provides his Presidential Pardon Citation and a copy of his DD Form 215, *Correction to DD Form 214, Report of Separation from Active Duty*, adding the following comment to Item 27, *Remarks*, to reflect DD Form 1953AF, *Clemency Discharge*, issued pursuant to Presidential Proclamation Number 4313.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 21 Mar 69, a Letter of Disciplinary Punishment indicates the applicant received nonjudicial punishment (NJP), Article 15 for operating a passenger vehicle while drunk. He received a reduction in grade to sergeant (E-4), suspended until 16 May 69, and forfeiture of \$25.00.

On 20 Aug 69, a Letter of Disciplinary Punishment indicates the applicant received NJP, Article 15 for operating a passenger vehicle without a valid license. He received forfeiture of \$171.00 for 2 months.

On 13 May 72, the convening authority published General Court-Martial Order Number XX. The Order stated the applicant was convicted for various charges and specifications of driving while drunk, leaving the scene of an vehicle accident, failure to report, failure to provide assistance to an injured person at a motor vehicle accident, and failure to have a valid Chinese driver's license, in violation of Articles 86, 92, 128, and 134. The applicant was sentenced to confinement at hard labor for nine months, forfeiture of \$25.00 pay for nine months, and a reduction to the grade to airman basic.

On 9 Mar 73, the convening authority published Special Court-Martial Order Number XXX. The Order stated the applicant was convicted for being absent without leave (AWOL) from 31 May 72 to 20 Dec 72, in violation of Article 86. The applicant was sentenced to confinement for five months and discharge from the service with a bad conduct discharge.

On 27 Aug 73, the applicant received an UOTHC discharge. His narrative reason for separation is “Special Court-Martial Order **Work...** and **Work...**” and he was credited with seven years and eight days of total active service.

Dated 13 May 76, the applicant provided a copy of the Presidential Citation granting him a full pardon for violations of Articles 85, 86, and 87 of the Uniform Code of Military Justice (UCMJ).

On 2 Jun 76, a DD Form 215 was issued to amend Item 27. *Remarks* to read: DD Form 1953AF, *Clemency Discharge*, issued pursuant to Presidential Proclamation Number 4313.

For more information, see the excerpt of the applicant’s record at Exhibit B and the advisories at Exhibits C and H.

POST-SERVICE INFORMATION

On 17 Apr 19, the Board sent the applicant a standard request for post-service information informing the applicant his case would remain closed until this information was received. This letter informed the applicant that a Federal Bureau of Investigation (FBI) background check would assist the Board in evaluating his case. Although the applicant did reply to the request for post-service information by submitting a new application dated 1 May 22, (Exhibit F), his response did not include an FBI background check or other criminal history data. In his response, the applicant provided his performance reports from his military service, his Department of Veterans Affairs (DVA) disability rating letter, and a personal statement. He also included a letter from his Senator requesting assistance with his application. The applicant contends he suffered from severe stress and while stationed in Taiwan and used alcohol and drugs to cope. He also alluded to a severe head injury he received in 1973 due to a vehicle accident and continues to suffer from Post-Traumatic Stress Disorder (PTSD).

APPLICABLE AUTHORITY/GUIDANCE

This Board is without authority to reverse, set aside, or otherwise expunge a court-martial conviction. Rather, in accordance with Title 10, United States Code, Section 1552(f), actions by this Board are limited to corrections reflecting actions taken by the reviewing officials and action on the sentence of the court-martial for the purpose of clemency.

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 (USD P&R) issued supplemental guidance 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 the supplemental guidance, paragraphs 6 and 7.

On 17 Apr 19 and 6 Jul 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibits E and G).

AFI 36-3208, *Administrative Separation of Airmen*, describes the types of service characterization:

Honorable. The quality of the airman's service generally has met 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.

Under Honorable Conditions (General). 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 airman's military record.

Under Other than Honorable Conditions. 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 airmen. 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 Air Force.
- 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 assault of a child, sexual abuse of a child, forcible sodomy and attempts to commit these offenses.

AIR FORCE EVALUATION

AFLOA/JAJM recommends denying the application noting there is no evidence of an error or an injustice in his NJP or his court-martial actions. There is no evidence or allegation of an error or injustice presented by applicant that tends to undermine the sentence adjudged at the applicant's courts-martial. However, the Presidential Pardon is a rare piece of persuasive evidence that should weigh significantly in the Board's decision.

On 13 May 1976, the President at the time granted the applicant a pardon of his court-martial convictions for violation of Articles 85, 86, and 87 of the UCMJ. An individual requesting a Presidential Pardon undergoes significant scrutiny; the reviewing pardon attorney requests a full FBI background check, which generates a report of 50-100 pages. The FBI verifies every claim made by the applicant, interviews coworkers, former coworkers, friends, and neighbors. If a pardon is granted, due diligence has been done to ensure the pardon recipient is as deserving as he claims. Pardons are rare; according to the Department of Justice, the President at the time received 978 pardon requests during his presidency and granted only 382 of them.

The President at the time did not pardon all of the applicant's offenses. As such, the applicant's charges at the 16 Mar 72 general court-martial of violating a lawful general regulation in violation of Article 92 of the UCMJ, leaving the scene of an accident without rendering

assistance after striking and injuring persons with his car in violation of Article 134 of the UCMJ, and what appears to be assault in violation of Article 128 of the UCMJ were not pardoned.

While a Presidential Pardon will restore various rights lost as a result of the pardoned offense and should lessen to some extent the stigma arising from a conviction, it will not erase or expunge the record of a conviction. Therefore, even if a pardon is granted, an individual must still disclose their conviction on any form where such information is required, although they may also disclose the fact that they received a pardon. In addition, most civil disabilities attendant upon a federal felony conviction, such as loss of the right to vote and hold state public office, are imposed by state rather than federal law, and require state action for removal and reinstatement.

The complete advisory opinion is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 26 Sep 18 for comment (Exhibit D), but has received no response.

ADDITIONAL AIR FORCE EVALUATION

The AFRBA Psychological Advisor completed a review of all available records and finds insufficient evidence to support the applicant's request for the desired changes to his record. His service treatment records were not available or submitted for review and so there is no evidence he received any mental health evaluation, treatment, or mental disorder diagnosis to include PTSD or similar conditions during service. There is evidence he had at least two alcohol related incidents during the service as he had operated a vehicle while drunk on 26 Jan 69 in Japan and the second time on or about 16 Dec 71 when he struck an individual while operating a vehicle while drunk in Taiwan. There were no records he used illicit drugs during service although this is a possibility as he disclosed this information in his personal testimony. He contends he developed PTSD from two incidents; his time in Taiwan and when he sustained a head injury from a car accident while he was AWOL. He discussed being stressed with his personal/family problems while he was in Taiwan and used alcohol and illicit drugs as a possible way to cope with his stress. While this situation may have been plausible and his mental health condition may have been a factor to his behaviors, his behaviors could not be excused or outweighed by his mental health condition. He admitted to operating his friend's vehicle while he was intoxicated and struck a local national with the vehicle. He fled the scene and failed to render any aid to this individual. The collision could have severely injured or had been fatal to the individual. His behavior was unacceptable and his explanation that he was intoxicated at the time is inexcusable. He reported being AWOL in Taiwan (his records showed he was AWOL twice in Taiwan) to work in the black market to support his habits. He clearly had substance abuse issues causing him to engage in illegal activities and his behaviors were also inexcusable. His behaviors and misconduct had resulted with him being convicted by both a general and special court-martial and the Psychological Advisor opines his behaviors and misconduct were too egregious to be disregarded, excused, or mitigated by his mental health condition. The Psychological Advisor

acknowledges the applicant had received a Presidential Pardon. The pardon does not provide an excuse or mitigate his misconduct due to his mental health condition.

The applicant reported he had sustained a severe head injury on 8 Nov 73 while AWOL. Although he stated he was AWOL at the time, he was already discharged from the Air Force effective 27 Aug 73 and so this incident occurred post-service. His head injury or the effects of his head injury had no direct impact to his discharge from service. His traumatic experience of his head injury and his discharge from service were two mutually exclusive events with no relation to one another. He did report he was AWOL when he was enroute/transferred to Lowry AFB. He provided no explanation for why he went AWOL at that time and there was no evidence his decision to be AWOL was caused by his mental health condition. The applicant reported to the DVA decades post-discharge he developed PTSD from his time in Vietnam. There is evidence in his military record he had served in Vietnam sometime during his performance evaluation rating period between 13 Jun 67 and 12 Jun 68. There was no evidence he had PTSD, PTSD symptoms, or similar conditions during service that would affect or influenced his behaviors. The applicant reported he used drugs possibly while he was in Vietnam but was able to overcome this issue. He stated he used drugs again in Taiwan because of his family stressors and not because of his experience from Vietnam. It appeared he had a delayed onset of PTSD post-service causing him to meet diagnostic criteria for this condition decades post-event. His report of traumatic experiences for this petition were different than his report to the DVA. He did not identify his experiences in Vietnam were traumatic to him in his personal testimony and he did not identify his stressors in Taiwan and his head injury in 1973 as his traumatic experiences to the DVA.

Liberal consideration is applied to the applicant's request due to the contention of a mental health condition. The following are responses to the four questions in the policy based on 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 was under severe stress when he was in Taiwan and turned to alcohol and drugs and had sustained a severe head injury from an auto accident in 1973. He reported developing PTSD from these experiences.

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

The applicant's service treatment records were not available or submitted for review and so there is no evidence he received any mental health evaluation, treatment, or mental disorder diagnosis to include PTSD or similar conditions during service. There is evidence he had at least two alcohol related incidents during his service in Jan 69 (Japan) and Dec 71 (Taiwan) respectively. He reported to the DVA over 20 years post-discharge he experienced trauma from his service in Vietnam and was diagnosed with PTSD. He did not report his experiences in Taiwan and his head injury as traumatic experiences to the DVA.

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

The applicant's mental health condition/substance abuse issues may have caused some of his misconduct; however, his behaviors and misconduct of numerous AWOLs, operating a vehicle while drunk, striking an individual while operating a vehicle while drunk, leaving the scene of

the accident and without rendering aid to the injured individual he struck, and operating a vehicle without possession of his driver's license resulting with his conviction by both a general and special court-martial were found to be egregious and could not be disregarded or overlooked. His mental health condition does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

Since his mental health condition does not excuse or mitigate his discharge, his condition also does not outweigh his original discharge.

The complete advisory opinion is at Exhibit H.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 22 Nov 22 for comment (Exhibit I), but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed. Given the requirement for passage of time, all clemency requests are technically untimely. However, it would be illogical to deny a clemency 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. § 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 finds no evidence the sentence of the military court was improper or it exceeded the limitations set forth in the Uniform Code of Military Justice. Furthermore, the Board concurs with the rationale and recommendation of AFLOA/JAJM and the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. Liberal consideration was applied to the applicant's request due to the contention of a mental health condition; however, since there is no evidence he had a mental health condition to include PTSD, his condition or experience does not excuse, mitigate, or outweigh his discharge. The applicant's mental health condition/substance abuse issues may have caused some of his misconduct; however, this does not excuse or mitigate his more serious misconduct. 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 and a criminal history report, the Board finds no basis to do so. The Board noted the applicant's Presidential Pardon; however, it did not pardon all of the applicant's offenses nor does it provide an excuse or mitigate his misconduct due to his mental health condition. Therefore, the Board recommends against correcting the applicant's records.

The applicant retains the right to request reconsideration of this decision. The applicant may provide post-service evidence depicting his current moral character, occupational, and social advances, in the consideration for an upgrade of discharge characterization based on clemency.

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 the Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.5, considered Docket Number BC-2018-01936 in Executive Session on 25 Jan 23:

, 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 12 May 18.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C Advisory Opinion, AFLOA/JAJM, dated 10 Sep 18.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 26 Sep 18.
- Exhibit E: Non-Viable Letter, SAF/MRBC, w/atchs (Post-Service Request and Clemency Guidance), dated 17 Apr 19.
- Exhibit F: Applicant's Response, w/atchs, dated 1 May 22.
- Exhibit G: Letter, SAF/MRBC, w/atchs (Liberal Consideration Guidance), dated 6 Jul 22.
- Exhibit H: Advisory Opinion, AFRBA Psychological Advisor, dated 21 Nov 22.
- Exhibit I: Notification of Advisory, SAF/MRBC to Applicant, dated 22 Nov 22.

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