ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF: XXXXXXXXXXX

DOCKET NUMBER: BC-2019-02762

COUNSEL: XXXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider his request to upgrade his discharge from a general (under honorable conditions) to an honorable discharge with a Narrative Reason for Separation of "For the Convenience of the Government" (and/or Secretarial Authority) and a Reentry Code of "1."

RESUME OF THE CASE

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

On 22 Jul 21, the Board considered and denied his request to upgrade his discharge from a general (under honorable conditions) to an honorable discharge with a Narrative Reason for Separation of "For the Convenience of the Government" and a Reentry Code of "1" finding the applicant had provided insufficient evidence of an error or injustice to justify relief. The discharge appeared to be 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. The Board considered upgrading the discharge based on clemency but found no basis to do so.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the Air Force Board for Correction of Military Records (AFBCMR) Letter and Record of Proceedings at Exhibit K.

On 2 Feb 23, the applicant, via counsel, requested reconsideration of his request to upgrade his discharge from a general (under honorable conditions) to an honorable discharge with a Narrative Reason for Separation of "For the Convenience of the Government" (and/or Secretarial Authority) and a Reentry Code of "1." Counsel again contends the applicant's discharge was unfair at the time and remains so now. The discharge was both procedurally and substantively defective, and the applicant requests liberal consideration.

The appeal is based on three errors: (1) the underlying basis of the applicant's separation was procedurally defective at the time of the discharge; (2) the adverse action, to include the administrative discharge, was unfair at the time; and (3) the general discharge is inequitable now. Counsel references Title 10, United States Code § 1552 and Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)* in support of these contentions and AFBCMR authority. Additionally, counsel references *Roth v. United States*, *Baker v. Dep't of Marine Corps*, *Van Bourg v. Nitze*, *F.C.C. v. Fox Television Stations, Inc*, and *Kreis v. Sec'y of Air Force*, in support of the legal standards utilized during consideration.

Additionally, counsel references the Secretary of Defense memorandum, Subject: Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder, dated 3 Sep 14 (Hagel Memo) and 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 Memo) in support of the applicant's request for liberal consideration.

Per counsel, the applicant entered the Air Force as a security police officer. He did not get to choose his career field and felt he did not have the personality to be a security police officer. One week after the applicant completed basic training, his father passed away. The applicant had trouble making friends and was also dealing with depression due to the loss of his father. He was 18 years old and keeping company with acquaintances who liked to drink. One night, on an approved day off, they were all drinking soju, and they dared the applicant to do something very irresponsible. The applicant accepted the dare and attempted to steal a leather jacket from a store outside the base. His acquaintances distracted the shop owner while the applicant shoplifted the jacket. Before the applicant could make it back to the base, the store owner called the authorities and the applicant was arrested. The applicant returned the jacket and apologized to the store owner for the disrespect, and he was escorted back to the base. A few weeks later, the civilian authorities decided not to press charges and dismissed the case against the applicant. The applicant did not receive an Article 15 but was given the option to choose court-martial proceedings or go before a local review board. The applicant thought the court-martial proceeding sounded like he would go to jail, so he took the review. The board met for 30 minutes, came out, and told the applicant he was stripped of all rank and would be discharged post haste. Ultimately, the applicant was issued a general (under honorable conditions) discharge on 28 Aug 97, 18 months after he was first inducted into the Air Force. Up until that time, the applicant had a spotless military record.

The applicant has been out of the military for more than 21 years and has been leading a productive and accomplished life without any instance of misconduct since his involuntary discharge from the Air Force. He has raised a family, been a good husband, volunteered in his community, and held a steady job while working his way up to become a manager. The applicant wants the ability to enlist in the Air National Guard to fulfill his obligation to his country; hence, the general discharge no longer serves a purpose.

There is a procedural defect in this case. The request for administrative separation can be both command-initiated and initiated by the service member. In this case, there was a hasty command-initiated request for separation. The commander must provide the member reasonable time to overcome deficiencies. In this case, there was a rush to judgment that there was a problem which could not be fixed. The applicant had the ability to perform his duties. There were never any substantiated charges filed against the applicant. The command should have evaluated whether the applicant had a long-term problem or whether there had been a misunderstanding. Additionally, was the applicant offered legal counsel at any time during the separation process?

Although the command was authorized to administratively separate the applicant, the fundamental reason for the discharge was substantially deficient. There was no fully determined reason to initiate his elimination. The guidance also allows for the service member to be able to "fix" the problem and/or be rehabilitated. The applicant was not allowed these opportunities. The command in this case did not have the proper authority to administratively separate the applicant. Finally, the general discharge does not serve a further purpose. The events that took place are no longer relevant to the applicant's life and he has lived since in as responsible a manner as he could. There is no valid equitable purpose in leaving the general discharge in place.

The applicant's complete submission is at Exhibit L.

POST-SERVICE INFORMATION

On 24 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 (FBI); however, he has not replied. An FBI Identity History Summary Check, dated 16 Oct 19, was provided with the applicant's original case.

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 24 Apr 24, Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit K).

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.

AIR FORCE EVALUATION

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

There is insufficient evidence the applicant had any mental health condition. There is no evidence of any mental health encounters or diagnoses in his military service or medical record. The applicant did not submit any documentation to support his contention of having a mental health condition. On his Personal Affidavit (undated) the applicant noted in part:

"What got me here was shoplifting from a store off-base just outside of [Air Force base]. I have never made friends easy and at the time was suffering from a severe loss of my adopted father and depression. I do not want to make any excuses for my actions, that were wrong, I just want to give a reference for where I was mentally at that time."

Despite this brief mention of grief and depression, there is no evidence the applicant met the diagnostic criteria for any mental health disorder. Even if the applicant had met the criteria for prolonged grief disorder or a mood disorder, it would not be a mitigating factor for his misconduct, as stealing is not part of the sequalae of symptoms associated with these mental health conditions. Therefore, this Psychological Advisor concludes the applicant does not have any mental health condition that would excuse or mitigate his misconduct (stealing).

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 check-marked "Other Mental Health" on his application.

2. Did the condition exist, or experience occur, during military service?
There is insufficient evidence the applicant had any mental health condition during his military service, at discharge, or post-service.

3. Does the condition or experience excuse or mitigate the discharge?
Despite his brief mention of grief and depression, there is no evidence the applicant met the diagnostic criteria for any mental health disorder. Even if the applicant had met the criteria for prolonged grief disorder or a mood disorder, it would not be a mitigating factor for his misconduct, as stealing is not part of the sequalae of symptoms associated with these mental health conditions. Therefore, this Psychological Advisor concludes the applicant does not have any mental health condition that would excuse or mitigate his misconduct (stealing).

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 L.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 24 Apr 24 for comment (Exhibit M) but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed.

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

3. After reviewing all Exhibits, the Board remains unconvinced the evidence presented demonstrates 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 met the diagnostic criteria for any mental health disorder. Even if the applicant had met the criteria for prolonged grief disorder or a mood disorder, it would not be a mitigating factor for his misconduct, as stealing is not part of the sequalae of symptoms associated with these mental health conditions. 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. Further, the applicant was afforded due process and the opportunity to consult with military legal counsel. In the interest of justice, the Board considered upgrading the discharge based on fundamental fairness; however, given the evidence presented, and in the absence of post-service information provided by the applicant, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's records.

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-2019-02762 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 H: Record of Proceedings, w/ Exhibits A-G, dated 23 Jul 21.
Exhibit I: Application, DD Form 149, w/atchs, dated 2 Feb 23.
Exhibit J: Documentary evidence, including relevant excerpts from official records.
Exhibit K: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 24 Apr 24.
Exhibit L: Advisory Opinion, AFRBA Psychological Advisor, dated 22 Apr 24.
Exhibit M: Notification of Advisory, SAF/MRBC to Counsel, dated 24 Apr 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