



CUI//SP-MIL/SP-PRVCY

**UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS**

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2020-00775

Work-Product

COUNSEL:

Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His general (under honorable conditions) discharge be upgraded to honorable.
2. His narrative reason for separation of "Misconduct-Pattern Discreditable Involvement with Military or Civil Authorities" be changed to "Secretarial Authority."

APPLICANT'S CONTENTIONS

His conduct did not rise to such level of "discreditable," as defined in the Uniform Code of Military Justice (UCMJ). The actions are incorrect and he made mistakes, but it is unjust for these to be the reasons for characterization, when the entirety of his service outweighs the two isolated incidents. Furthermore, he was performing at a high level even though he had medical issues which were not taken care of by his command or the Air Force. He worked hard through pain and multiple medical issues. Also, he has been diagnosed with depressive disorder, for which he has a Department of Veterans Affairs (DVA) 70 percent disability rating. The depressive disorder occurred during military service. Because of the history of physical ailments, which were never taken care of while on active duty, and the traumatic events he witnessed. Finally, after separation, he has been a model citizen and worked hard to help this country, as well as raise a wonderful family. He has worked on many government projects, which have helped the nation's defense and has often been lauded for his work and accomplishments over the years. His life and accomplishments are a testament to his work ethic and character.

In support of his request for clemency, the applicant provides numerous military and post-service certificates of achievement and training, Graduation Certificate, President's Academic Distinction Certificate, civilian performance awards, medical documentation 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 airman first class (E-3).

On 14 Apr 83, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFR 39-10, *Separation Upon Expiration of Term of Service, for Convenience of Government, Minority, Dependency and Hardship*. The specific reasons for the action were:

**AFBCMR Docket Number BC-2020-00775
CUI//SP-MIL/SP-PRVCY**

Controlled by: SAF/MRB
CUI Categories: SP-MIL/SP-PRVCY
Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

CUI//SP-MIL/SP-PRVCY

- a. On 8 Dec 82, Civil Court Conviction for carrying a concealed weapon.
- b. On 18 Jan 82, Civil court Conviction for driving a motor vehicle under the influence of alcohol and/or drugs.

On 21 Apr 83, the Staff Judge Advocate found the discharge action legally sufficient.

On 22 Apr 83, the discharge authority directed the applicant be discharged for discreditable involvement with civil authorities with a general service characterization. Probation and rehabilitation were considered, but not offered.

On 26 Apr 83, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct-Pattern Discreditable Involvement with Military or Civil Authorities" and he was credited with 3 years, 1 month, and 29 days of total active service.

The applicant submitted an undated request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge.

On 14 Jan 85, the AFDRB concluded the discharge was consistent with the procedural and substantive requirements of the discharge regulation and was within the discretion of the discharge authority and the applicant was provided full administrative due process.

On 10 Dec 86, a Memorandum for the Chief of Staff, indicates the Air Force Board for Correction of Military Records (AFBCMR) directed the applicant's military records be corrected to remove all documents and references to positive urinalysis for marijuana.

On 29 Dec 86, HQ AFPC/SGMR memorandum indicate the applicant's service medical records were corrected to delete any reference to a positive drug urinalysis.

On 17 Jul 19, a DVA Letter, provided by the applicant, indicates he has a 70 percent service-connected disability for "depressive disorder due to another medical condition."

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

POST-SERVICE INFORMATION

On 18 Mar 20, the Board sent the applicant a request for post-service information and advised the applicant he was required to provide a Federal Bureau of Investigation (FBI) Identity History Summary Check, which would indicate whether he had an arrest record. In the alternative, the applicant could provide proof of employment in which background checks are part of the hiring process (Exhibit C). The applicant provided an FBI report dated 16 Dec 20. According to the report, the applicant was arrested and charged on 2 Sep 90 for Driving Under the Influence; on 18 Apr 91 for Assault; on 14 Mar 99 for Child Abuse; and on 15 Mar 99 for Child Neglect. The applicant provided post-service information with his initial application.

The applicant's FBI Report is at Exhibit D.

APPLICABLE AUTHORITY/GUIDANCE

AFBCMR Docket Number BC-2020-00775

CUI//SP-MIL/SP-PRVCY

CUI//SP-MIL/SP-PRVCY

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 7 Jan 23, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit G).

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 paragraphs 6 and 7 of the Kurta Memorandum.

On 12 Mar 20, the Board staff provided the applicant a copy of the clemency guidance (Exhibit C).

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

CUI//SP-MIL/SP-PRVCY

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

AFPC/DP2SSR recommends denying the application. Based on review of the applicant's request and the master of personnel record, there is no error or injustice with the discharge processing. The commander provided justification of arrests with local authorities culminating in civil court convictions to the Base Discharge Authority (BDA) to support discharge and the character of service. The BDA determined the significant negative aspects of the applicant's behavior outweighed any positive aspects of the applicant's brief military career. The discharge was consistent with the procedural and substantive requirements of the discharge regulation and was under the discretion of the discharge authority. Due to the excessive length of time since discharge, we recognize that the Board could consider granting the applicant's request based on clemency.

The complete advisory opinion is at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to counsel on 12 Apr 22 for comment (Exhibit F) but has received no response.

ADDITIONAL AIR FORCE EVALUATION

The AFRBA Psychological Advisor finds insufficient evidence has been presented to support the applicant's request for the desired changes to his records. There were no records to confirm he received any mental health evaluation, treatment, or mental disorder diagnosis during service. A review of the electronic medical records maintained by the DVA revealed the applicant initiated mental health treatment with the DVA on 20 Jan 09, 26 years post discharge. The applicant's legal counsel contentions were vastly different than reports and information documented and found in his objective military records. There was also numerous apparent discrepant reporting from the

CUI//SP-MIL/SP-PRVCY

applicant to the AFDRB, AFBCMR, and the DVA. There were no actual records confirming the applicant received any mental health evaluation, treatment, or mental disorder diagnosis nor did he report having any mental health issues during service according to his military records. In fact, he denied during his separation physical he had any mental health concerns per his completion of the Report of Medical History form dated 19 Apr 83. Counsel reported the applicant had been rated with 70 percent by the DVA for depressive disorder because of his history of physical ailments and traumatic events. The submitted DVA letter dated 17 Jul 19 did not specify his depressive disorder was caused by his traumatic experiences and only stated “depressive disorder due to another medical condition.” His DVA treatment notes consistently reported he developed depression from his chronic migraine headaches (medical condition) and his depression was developed post-service. The rationale for how his depression was service connected was not provided by the DVA but either way, his records reported his depression was derived from his medical condition and no evidence caused his misconducts and discharge.

Liberal consideration is applied to the applicant’s request. The following are answers to the four questions from the Kurta Memorandum from the records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
The applicant’s legal counsel contends the applicant self-medicated due to his physical ailments and traumatic experiences causing his discharge.

2. Did the condition exist or experience occur during military service?
There is no evidence the applicant had any mental health conditions during service, and he denied having any mental health issues during his separation physical. There were no records he received any mental health evaluation, treatment, or mental disorder diagnosis during service. He was diagnosed with Depressive Disorder Due to Another Medical Condition (migraines) by the DVA over 25 years post discharge. There were no records he reported experiencing any trauma from his time in service to the DVA and was never given a diagnosis of PTSD by the DVA.

3. Does the condition or experience actually excuse or mitigate the discharge?
Although it is possible, he may have self-medicated during service, there was no evidence he had a mental health condition to include anxiety, depression, trauma, etc, or coped with his mental health condition/emotional distress with alcohol at the time of any of his two misconducts of receiving a DUI and carrying a concealed weapon causing his civil court convictions and subsequent discharge. His mental health condition or experience does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?
Since his mental health condition or experience does not excuse or mitigate his discharge, his condition or experience also does not outweigh his original discharge.

The complete advisory opinion is at Exhibit H.

ADDITIONAL AIR FORCE EVALUATION

The AFBCMR Medical Advisor found the medical evidence submitted was insufficient to support the applicant’s contention his overall non-medical separation proceedings were either improper, inequitable or in error and therefore, the applicant’s request to change his DD Form 214 in any aspect, cannot be supported. Many of the counsel’s comments in the legal brief were either inaccurate, historical, or exaggerated in comparison to medical records contained in the case file. Although lacking in the acute presentation encounter, the radiology report clearly noted a left knee sprain occurred in 1980, while on active duty; that remains indisputable. Having a known injury

in and of itself which occurred while on active duty does not necessarily mean an individual is headed to a medical evaluation board (MEB) but rather, medical treatment for the condition remains the highest priority. If treatment is prolonged or the condition holds significant mobility or physical restrictions, then the attention is turned to the question of fitness. In the documents provided, there was no duty limiting condition report listing any physical restrictions, no profiled restrictions, and no evidence the applicant was incapable of performing his military duties. Therefore, the left knee pain and or the radiographic finding of cartilaginous fragments, which could be idiopathic in nature or from simple inflammation, would not be considered an unfitting condition. For awareness sake, the military's Disability Evaluation System, established to maintain a fit and vital fighting force, can by law, under Title 10, United States Code (U.S.C.), only offer compensation for those service incurred diseases or injuries which specifically rendered a member unfit for continued active service and were the cause for career termination; and then only for the degree of impairment present at the time of separation and not based on future progression of injury or illness. On the other hand, operating under a different set of laws (Title 38, U.S.C.), with a different purpose, the DVA is authorized to offer compensation for any medical condition determined service incurred, without regard to and independent of its demonstrated or proven impact upon a service member's retainability, fitness to serve, or the length of time since date of discharge. Furthermore, it is paramount to understand the DVA's decision of an "effective date" for the initiation of benefits has all to do with when the DVA receives a claim or when the DVA is notified of an individual's intent to file a claim, with rare exceptions. It has nothing to do with what is crucial from the DoD/military perspective, which is duty status and fitness ability.

The complete advisory opinion is at Exhibit I.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinions to counsel on 21 Feb 23 for comment (Exhibit J) and counsel responded on 29 Mar 23. In the response counsel disagrees with the AFBCMR Medical Advisor's contention that he exaggerated and provided inaccurate comments, as that was not his intention. Counsel attached a "Report of Operation," dated 5 Dec 83, to support the terms he used to characterize the applicant's injuries.

The complete response is at Exhibit K.

FINDINGS AND CONCLUSION

1. The application was timely filed. Given the requirement for passage of time, all clemency and discharge requests are technically untimely. However, it would be illogical to deny such applications 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. 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. Therefore, the Board concurs with the rationale and/or recommendations of AFPC/DP2SSR, the AFRBA Psychological Advisor and the AFBCMR Medical Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. There were no records to confirm the applicant received any mental health evaluation, treatment, or mental disorder diagnosis during service. The Board is satisfied the

application of liberal consideration does not warrant relief. Finally, in the interest of justice, the Board considered upgrading the discharge based on fundamental fairness; however, given the evidence presented, 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 the Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2020-00775 in Executive Session on 17 Jan 23 and 26 Apr 23:

Work-Product [Redacted] Panel Chair
[Redacted] Panel Member
Work-Product [Redacted] Panel Member

All members voted against correcting the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 28 Jun 20.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Clemency Guidance), dated 12 Mar 20.
- Exhibit D: FBI Report, dated, 16 Dec 20.
- Exhibit E: Advisory Opinion, AFPC/DP2SSR, dated 12 Apr 22.
- Exhibit F: Notification of Advisory, SAF/MRBC to Counsel, dated 12 Apr 22.
- Exhibit G: Letter, SAF/MRBC, w/atchs (Liberal Consideration Guidance), dated 7 Jan 23.
- Exhibit H: Advisory Opinion, AFRBA Psychological Advisor, dated 9 Jan 23.
- Exhibit I: Advisory Opinion, AFBCMR Medical Advisor, dated 1 Feb 23.
- Exhibit J: Notification of Advisories, SAF/MRBC to Counsel, dated 21 Feb 23.
- Exhibit K: Counsel's Response, w/atchs, dated 29 Mar 23.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.11.9.

12/4/2023

Work-Product [Redacted] _____
Board Operations Manager, AFBCMR
Signed by: [Redacted] *Work-Product*