

## RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2020-02888

XXXXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

### APPLICANT'S REQUEST

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

### APPLICANT'S CONTENTIONS

Due to an explosion he sustained severe head trauma, loss of hearing and vertigo. After his recovery he was offered a medical discharged but refused. After he was discharged he became a paramedic and eventually a police officer. He recently retired as a police commander due to his injuries. He is now working at a high school cafeteria. He is requesting an honorable discharge for his post-service contributions.

In support of his request, the applicant provides a personal statement, copies of numerous post-service certificates of achievement, his Department of Veterans Affairs (DVA) decision rating, and various other documents related to his request.

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 Nov 80, the applicant's commander recommended he be discharged from the Air Force, under the provisions of AFM 39-12, Chapter 2, Section A, Paragraph 2-4c, *Separation for Unsuitability, Misconduct, Resignation, or Request for Discharge for the Good of the Service and Procedures for the Rehabilitation Program*, for Unsuitability - Apathy/Defective Attitude. The specific reasons for the action were:

- a. Article 15, dated 1 May 79, disorderly in station.
- b. Article 15, dated 19 Mar 80, failure to go at the time prescribed to member's appointed place of duty.
- c. Record of Counseling, dated 18 Jan 80.
- d. 15AF Form 182, *Record of Counseling*, dated 17 Jun 80, late to work.

- e. Letter of Reprimand, dated 20 Oct 80, room failed to meet minimum requirements.
- f. Letter of Reprimand, dated 23 Oct 80, disrespectful to a NCO.
- g. Letter of Reprimand, dated 28 Oct 80, derelict in performance of his duties.

On 18 Nov 80, an evaluation officer found that the applicant was unsuitable for further military service because he lost the motivation for continued satisfactory service and will continue to be a supervisory problem. The evaluation officer also stated the applicant was not a suitable candidate for rehabilitation under the provisions of AFM 39-12.

On 19 Nov 80, the Staff Judge Advocate found the discharge action legally sufficient.

On 20 Nov 80, the applicant received a general (under honorable conditions) discharge with a narrative reason for separation of "Unsuitable, Apathy, Defective Attitudes, Evaluation Officer." He was credited with two years, three months, and three days of total active service.

On 17 Nov 86, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge.

On 16 Dec 86, the Air Force Discharge Review Board (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.

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

## **POST-SERVICE INFORMATION**

On 25 May 21, the Board sent the applicant a standard request for post-service information (Exhibit C). 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, his response did not include an FBI background check or other criminal history data. He included several post-service accomplishments, to include training certificates, awards/achievements, resume and character reference letters.

The applicant's complete response is at Exhibit D.

## **APPLICABLE AUTHORITY/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 May 21, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit C).

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.

## **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. The applicant implied that the disciplinary issues leading to his discharge may have been at least partly related to an alleged in-service traumatic brain injury (TBI), as well as a significant service-incurred hearing deficit. The evidence found in the applicant's medical record indicates that although he had substantial left-sided hearing loss which pre-existed entry into military service, this condition was not deemed to be unfitting for duty and did not result in behavioral problems. The available record also does not support the applicant's statement that he had sustained serious brain trauma, or that such trauma may have impacted his duty performance. The applicant's discharge characterization was already thoroughly considered by the AFDRB which did not find sufficient evidence to change it. The applicant did not subsequently present any new evidence related to the alleged in-service TBI sequelae or how such sequelae may have affected his behavior.

The AFDRB previously concluded that the discharge was consistent with the procedural and substantive requirements of the discharge regulation and was within the discretion of the discharge authority and that the applicant was provided full administrative due process. The medical evidence is insufficient to provide his requested discharge relief for re-characterization of his service to honorable.

Liberal consideration is applied to the applicant's request. The following responses are based on information provided in the records to the four pertinent questions in the policy:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?  
The applicant suggested that his TBI and/or hearing loss may have played a role in the misconduct leading to his discharge. As previously outlined, according to the available evidence, the applicant experienced a medical condition (partial hearing loss) that pre-existed military service and may or may not have been permanently aggravated by it. There is no evidence that during his time in the military the applicant had any other medical conditions, including those associated with or caused by traumatic brain injury that may have contributed to his repeated misconduct resulting in discharge for unsuitability. As such, the medical evidence is insufficient to provide his requested discharge relief for re-characterization of his service to "Honorable."
2. Did the condition exist or experience occur during military service?  
As above.
3. Does the condition or experience excuse or mitigate the discharge?  
The AFDRB considered whether the applicant's hearing loss may have been a mitigating factor. (He did not appear to have raised the TBI issue at that time.) 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." The applicant did not present any new evidence pertaining to his alleged in-service TBI and hearing loss, thus these conditions do not mitigate or excuse his discharge.
4. Does the condition or experience outweigh the discharge?  
Because no error or injustice was identified in the processing of the applicant's case with regard to consideration of his medical issues, the conditions do not outweigh the discharge. On the other hand, operating under a different set of laws, Title 38, United States Code, DVA offers compensation for any medical condition determined to be service-connected, without regard to its proven or demonstrated impact upon a former service member's retainability, fitness to serve, narrative reason for discharge, or time transpired since date of discharge. The DVA may also conduct periodic reevaluations for the purpose of adjusting the disability rating as the level of impairment from a given condition may improve or worsen over the life of the veteran. Therefore, the applicant's 100 percent disability rating awarded by the DVA, which includes some conditions mentioned by the applicant in his appeal to the BCMR, such as vertigo, hearing loss, and tinnitus, should not

be construed as evidence that said conditions may have been present at the time of discharge and/or may have mitigated the reason for discharge.

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 the applicant on 25 Jan 22 for comment (Exhibit F), 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 concurs with the rationale of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. In the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the evidence presented, the Board finds no basis to do so. Finally, the Board is satisfied that the application of liberal consideration does not warrant relief. 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 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-2020-02888 in Executive Session on 21 Mar 22.

, 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 23 Oct 20.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), 25 May 21.
- Exhibit D: Applicant's Response to Post Service Request, w/atchs, dated 2 Jun 21.
- Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, 9 Nov 21.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 25 Jan 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

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Board Operations Manager, AFBCMR