

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-00287

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. His under other than honorable conditions (UOTHC) discharge be changed to a medical retirement or a medical discharge, or
2. In the alternative, his UOTHC discharge be upgraded to a general discharge.

APPLICANT'S CONTENTIONS

The AFBCMR should mitigate his discharge characterization due to the circumstances surrounding his mental health condition, during the time when his wife was diagnosed with terminal breast cancer and subsequently died of the condition. During her diagnosis and treatment, he suffered with sleeping issues, depression, mood disorder, anxiety, and a variety of mental health issues. He self-medicated with substances and alcohol as a coping mechanism and was directed to mental health counseling while on active duty. During his wife's illness, he tried the best he could to care for her while trying to manage his military career. The Department of Veterans Affairs (DVA) service connected him with 50 percent disability for major depressive disorder with alcohol and substance dependence, effective 11 Feb 12.

In support of his request, the applicant provides a personal statement, copies of various military documents, a buddy statement, list of rated disabilities from the DVA, and various certificates from his employer (DVA).

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force second lieutenant (O-1).

On 10 Aug 95, according to Special Order Work-Product, dated 11 Aug 95, the applicant was honorably discharged from the Air Force and on 11 Aug 95, he was appointed as a second lieutenant with source of commission as graduate of Officer Training School (OTS).

On 19 May 97, according to a message from AFPC/DPPRP, dated 15 Jul 97, the applicant submitted his resignation and on 15 Jul 97, the Secretary of the Air Force accepted the applicant's resignation under the provisions of AFI 36-3207, *Separating Commissioned Officers*, for the good of the service, and directed the applicant be discharge with an UOTHC discharge.

On 17 Jul 97, the applicant received an UOTHC discharge. His narrative reason for separation is "Triable by Court-Martial" and he was credited with 1 year, 11 months, and 6 days of commissioned active service and 11 years, 2 months and 3 days of total prior active service.

On 2 Dec 02, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge.

On 10 Jul 03, the AFDRB concluded that neither the evidence of record nor the evidence provided by the applicant substantiated an inequity or impropriety that would justify a change of discharge. The applicant's discharge documents were not available for review and lacked evidence from the applicant, therefore the Board relied on the presumption of regularity and found no wrongful action by the Air Force and without basis for upgrade.

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

POST-SERVICE INFORMATION

On 12 Mar 21, the Board sent the applicant a standard request for post-service information. This letter informed the applicant his request may also be considered under clemency, and if elected, 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 (Exhibit D), he informed the Board that his request for equity is due to his mental health issue. In his response, the applicant did not include an FBI background check but provided copies of his application to the state of Florida for clemency consideration, a certificate of restoration of civil rights from the Florida Office of Executive Clemency, dated 7 May 08, certificates of investigation for employment, dated 5 Sep 08 and 22 Aug 13, and a DVA rating decision, dated 10 Jun 20.

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 (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 12 Mar 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.

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

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. There is no evidence the applicant had any mental health conditions during his time in service. A review of the applicant's available service treatment records revealed the applicant saw a clinical psychologist while in service on at least one occasion. The psychologist stated the applicant is "not consistently depressed or anxious" and was not given a diagnosis at any time for the duration of time his case was open with the mental health clinic. There is no evidence the applicant received any mental health diagnosis during his time in service. The applicant was

never placed on a duty limiting conditions profile for a mental health condition and he was never deemed not worldwide qualified. There is no evidence he was being considered for a medical evaluation board (MEB) for any unfitting mental health conditions.

The military's Disability Evaluation System (DES), 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 to the degree of impairment present at the "snapshot in time" of separation from service and not based on post-service progression of disease or injury. At the time of the applicant's discharge, there is no evidence or records the applicant had any unfitting mental health conditions. In contrast, the DVA, operating under a different set of laws, Title 38, U.S.C., is empowered to offer compensation for any medical condition with an established nexus to military service, without regard to its impact on a member's fitness to serve, the narrative reason for release for service, or the length of time that has transpired since the 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.

The applicant did not submit any records or objective evidence to substantiate his claims of mental health conditions during his time in service. The burden of proof is placed upon the applicant to substantiate claims and provide documentation. While the applicant's personal statements are considered as evidence, the personal statements alone are not compelling enough in this instance to determine if the applicant's discharge could be mitigated by personal circumstances at the time of his discharge. Additional evidence, including discharge paperwork and a timeline of personal events the applicant claims to be mitigating along with corroborating records are needed to determine if the personal circumstances or experiences mitigate some of the applicant's misconduct in service.

Liberal consideration is applied to the applicant's request due to the contention of a mental health condition. The following responses are based on information provided in the recorded 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 contends he had a "variety of mental health issues" during the time his wife was ill and was self-medicating with substances and alcohol while on active duty.

2. Did the condition exist or experience occur during military service? There is no objective evidence or medical records to indicate the applicant had any mental health conditions in service. The applicant contends he used drugs and alcohol to cope with his wife's illness, although this is not supported in the medical records, and no timeline of the applicant's drug use or of the spouse's illness was provided, thus this cannot be substantiated against his time in service.

3. Does the condition or experience excuse or mitigate the discharge? The applicant's discharge paperwork was not available for review; without review of the discharge paperwork, no opinion can be rendered about the applicant's mental health conditions, substance use, and/or mitigating the applicant's discharge.

4. Does the condition or experience outweigh the discharge? There is no evidence the applicant had any mental health conditions in service, and with no evidence from the applicant to the contrary, a presumption of regularity finds no error in the applicant's resignation in lieu of court martial.

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 7 Dec 21 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 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. 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 characterization unduly harsh or disproportionate to the offenses committed. The Board notes the applicant elected to resign in lieu of facing a court-martial which may have addressed his extenuating circumstances. Therefore, 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. The Board considered liberal consideration and finds the applicant's medical condition is not warranted to process through DES as a matter of equity or good conscience IAW DoDI 1332.18, *DES*, Appendix 1 to Enclosure 3, paragraph 4. Specifically, the applicant's mental health condition was not a medical basis for career termination nor entry into Integrated DES (IDES). Furthermore, we find no evidence that the applicant's mental health condition mitigated his actions which ultimately led to his discharge and therefore does not warrant a medical discharge nor medical retirement. 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.

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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2021-00287 in Executive Session on 26 Jan 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 3 Sep 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), dated 12 Mar 21.

Exhibit D: Applicant's Response, w/atchs, dated 16 Mar 21.

Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 25 May 21.

Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 7 Dec 21.

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.

X

Board Operations Manager, AFBCMR