ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF: XXXXXXXXXXXXXX

DOCKET NUMBER: BC-2021-00414-2

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

He requests the following based on allegations of reprisal pursuant to DoDD 7050.06, *Military Whistleblower Protection*, and 10 U.S.C. § 1034:

1. He be medically retired.

2. He receive combat-related special compensation (CRSC).

3. He receive back pay and allowances from 14 Feb 17.

4. His separation pay in the amount of $24,056.49 not be recouped and his annual payments for recoupments be refunded.

5. In the alternative, he receive constructive service credit for active duty service.

RESUME OF THE CASE

The applicant is a former Air Force technical sergeant (E-6).

AF Form 3070A, *Record of Nonjudicial Punishment Proceedings (AB thru TSgt),* dated 4 Oct 12, shows the applicant received an Article 15 for failure to go his place of duty on or about 6 May 12.

The applicant received referral enlisted performance reports (EPRs) for the reporting periods ending 22 Nov 12, 30 Nov 15 and 30 Nov 16. The reasons for the referral EPRs include Article 15, behavior creating an unsafe situation, more focus required on supervisory responsibilities, unprofessional comments toward his command, disrespect for authority, letter of reprimand (LOR) and lawful order to cease entering a privately owned vehicle (POV) of a 3-skill level trainee.

AF Form 418, *Selective Reenlistment Program (SRB) Consideration for Airmen in the Regular Air Force/Air Force Reserve/Air National Guard*, dated 17 Aug 16, shows he was not selected for reenlistment by his commander. The reasons for denial of reenlistment include two LORs, two memorandums for record (MFR), suspension of watch supervisor ratings, referral EPR, unfavorable information file (UIF) and Article 15. On 18 Nov 16, his appeal was denied.

A Medical Evaluation Board (MEB) Narrative Summary (NARSUM) dated 19 Jan 17, shows the applicant underwent a mental health evaluation on 9 Jan 17. Psychological testing was conducted by the mental health provider to determine whether the diagnosis of post-traumatic stress disorder (PTSD) was indicated. He was currently engaged in therapy with a licensed clinical social worker

(LCSW) and medication management with a psychiatrist with the base mental health clinic. It was the opinion of the provider that the applicant did not meet diagnostic criteria for PTSD. Multiple assessment methods and standardized measures were utilized in the evaluation. The applicant's responses across various methods included intentional exaggeration of psychopathology and/or fabrication of symptoms. The severity of impairment and distress reported by the applicant was inconsistent with behavioral observations and his medical history. The applicant reported onset of PTSD symptoms, distress and impairment beginning upon his return from deployment in 2006. An individual genuinely experiencing the level of persistent trauma related impairment and distress reported by the applicant for over 10 years would not have been able to function even minimally in his occupation and as an active duty military member. Based on his self-report, psychological, emotional and behavioral problems would have been blatant and readily observable over the past 10 years even by individuals without professional mental health experience. The diagnoses of malingering and adjustment disorder with mixed disturbance of emotions and conduct was recommended. The evaluator stated an exposure to traumatic events was not enough to warrant a diagnosis of PTSD. Given the applicant's response tendencies, the provider stated it was difficult to determine what, if any, genuine symptoms he was experiencing. The applicant's commander recommended he not be retained. His commander stated he would not be able to perform duties in his Air Force Specialty Code (AFSC) 1C1X1, Air Traffic Controller, if prescribed medication not approved or a waiver obtained from flight medicine or if he is found mentally unfit.

On 1 Feb 17, AFPC Medical Standards returned the applicant's case without action stating he was not subject to MEB processing or a medical discharge since his conditions were unsuiting per DoDI 1332.18, *Disability Evaluation System (DES*), or the Medical Standards Directory. The applicant would be subject to an administrative discharge if the commander determines his condition to be interfering with duty performance or ability to deploy.

DD Form 2807-1, *Report of Medical History*, dated 8 Feb 17, shows the applicant noted traumatic experiences through nightmares, flashbacks, hallucinations and unwanted memories. He stated he received counseling from the mental health clinic due to several stressors from life threatening experiences and had also spoken with chaplains. He indicated he worried excessively and feared a hostile attack. He was diagnosed with PTSD due to stress from a deployment and other stressors; however, his diagnosis was changed to an adjustment disorder.

On 14 Feb 17, the applicant was honorably discharged from active duty with a narrative reason for separation of "Non-Retention on Active Duty" and Reentry (RE) code "2X." He was credited with 14 years and 4 months on service.

In consideration of clemency, on 7 Jul 21, counsel provided the applicant's FBI report dated 7 Jul 21, which showed the applicant had no prior arrest data at the FBI. Counsel also provided a personal statement from the applicant, blood donation information, academic transcript and degrees and volunteer history.

Counsel provides a DVA rating decision dated 31 Jan 20, showing his 100 percent combined rating for service-connected disability for his PTSD, with somatic symptoms disorder, with predominant pain, effective 8 Nov 19.

On 15 and 21 Sep 21, the Board considered and denied his requests. The Board agreed with the AFBCMR Psychological Advisor the applicant was not diagnosed with PTSD while in service and that there was insufficient evidence presented to grant the applicant a medical retirement. The Board considered the requests based on liberal consideration; however, concluded the applicant's mental health condition did not rise to a level of an unfitting condition while he was in service and did not mitigate or excuse his reason for separation. The Board also found the applicant's conditions did not meet the criteria established in 10 U.S.C. § 1413a and the DoDFMR for CRSC.

With respect to the request that his separation pay not be recouped, the Board noted separation pay was required to be recouped by law to receive DVA compensation; therefore, the Board could not waive recoupment. With respect to counsel's contentions the applicant was reprised and discriminated against on the basis of race, the Board noted that while the applicant submitted multiple inspector general (IG) and military equal opportunity (MEO) complaints, no allegations were substantiated to show the applicant was a victim of reprisal per 10 U.S.C. § 1034 or that he was discriminated against on the basis of race. The Board also conducted its own independent review and found no evidence of reprisal or discrimination.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letter and Record of Proceedings at Exhibit G.

On 3 Dec 21, counsel notified the AFBCMR the record of proceedings (ROP) and decision were received on 20 Oct 21. The ROP referenced an advisory opinion that was never received by their office.

On 23 May 22, the applicant was sent a copy of the AFBCMR Psychological Advisor's opinion dated 30 Jun 21 for comment and informed his case was re-opened for reconsideration due to an administrative oversight resulting in the advisory opinion not being received for 30-day review and response.

On 14 Jun 22, counsel contended the advisory opinion incorrectly characterized the applicant's interactions with the mental health system. The Psychological Advisor states the applicant presented to the mental health clinic in 2014 and 2016 and in both instances his complaints centered on work related stress. It is not correct that he did not relate to any mental health providers his deployments or combat experiences were the reasons for his visits. On 23 Jan 14, he completed an Air Force Web Based Health Assessment indicating he had 20 bad mental health days out of the past 30 days and had 15 days of inadequate sleep. Although he stated the issues were related to filing a reprisal and discrimination complaint, the automated report noted the symptoms were consistent with PTSD. His health care provider recommended a life skills consultation and the provider noted the applicant had sleeping difficulties before he submitted his discrimination complaint. Clearly he was suffering mental health symptoms unrelated to the discrimination complaint.

The applicant also indicated during his mental health clinic visit on 24 Feb 14 that controlling aircraft helped him to forget his stress. He returned to the clinic on 7 Apr 14 and was diagnosed with an "occupational problem" because he filed a complaint against his commander. His medical records reflect the visit to mental health was at the request of the flight surgeon's office. The applicant verbally acknowledged that if he did not feel he could safely control aircraft, he would self-identify. He acknowledged if at any time medications were prescribed for his anxiety symptoms, it would result in the designation of duties not involving controlling (DNIC). He now knew any further mental health issues would jeopardize his being able to perform his duties as an air traffic controller. It was not until the Air Force threatened to take away his duties, he reported undergoing mortar attacks, having a B-1B aircraft he was controlling crash, witnessing the murder of his neighbor who was shot to death, the harassment he felt at his duty location and feeling forced to file complaints against his leadership in an attempt to counteract the unfair and unequal treatment he received at work. Sadly, rather than investigating his symptoms in conjunction with the stressors he was undergoing, a base psychologist elected to label his behavior as malingering.

The diagnosis of malingering and adjustment disorder with mixed emotions and disturbances is erroneous. Diagnosing a service member as malingering has a long, sordid and embarrassing history, to include the controversy at Madigan Army Medical Center (MAMC). Ultimately, the Army released new guidelines for diagnosis of PTSD in Apr 12. The new policy stated that "Although the influence of secondary gain is an important clinical consideration in the differential

diagnosis, the diagnosis of malingering should not be made unless there is substantial and definitive evidence from collateral or objective sources that there are false or grossly exaggerated symptoms that are consciously produced for external incentives. Poor effort testing on psychological/neurological tests do not equate to malingering, which requires proof of intent." All patients whose diagnoses were reversed were offered re-evaluations and some had their PTSD diagnoses restored. Others whose diagnoses remained as an adjustment disorder were relegated to reduced or no benefits. Today, in recognition that PTSD can cause behavior that might otherwise appear as deliberate misconduct require that members of the Armed Forces reasonably asserting PTSD receive a medical examination prior to administrative separation. The applicability of the MAMC situation to the applicant is inescapable. Despite any claims certain tests demonstrated exaggerated symptoms to diagnose the applicant as a malingering, the Air Force was required to prove he was intentionally doing so and doing it for financial gain. There was absolutely no evidence presented on the applicant's intent.

The applicant in his response to the 9 Dec 16 referral EPR requested an extension to obtain his medical records to show he was diagnosed with PTSD. The applicant felt the diagnosis would provide the context for understanding his stress and the applicant sought to use a mental health diagnosis to mitigate or excuse his behavior.

It is shameful for the Psychological Advisor to write that if nothing is said, then one must not be suffering. This expresses the Catch-22 faced by military sufferers of PTSD and other mental health issues. Despite the advances demonstrated in the Kurta memorandum and its predecessors, the Air Force is still hardwired to discount the service member's experiences and to invent any way to deny the existence of PTSD.

In the applicant's case, the record shows he complained of PTSD like symptoms back in 2014, he downplayed the link to past traumatic episodes because he wanted to stay in the Air Force and when that became impossible, he explained his history, symptoms and their debilitating effect. Given this information, the Air Force then diagnosed him with malingering, though there was no proof of intent for gain. The Air Force also tried to explain his long term suffering with a diagnosis of adjustment disorder, a mental disease that should have resolved itself within six months.

The Psychological Advisor failed to consider the trauma of racial discrimination and its impact on the applicant. At the time of his discharge, he had been involved in a yearlong fight to clear his record and overturn an unfair and unjustified Article 15, LOR and referral EPRs. These events placed an inordinate amount of stress on the applicant, along with the continuing racial animus he suffered at his duty station, leading to his suffering from PTSD. His mental health care providers failed to recognize this. It is possible, a more racially attuned provider would have understood the long-term stress a minority service member undergoes and how bad it must have been for the applicant to take the drastic step of filing complaints against his commander. Counsel states it is imperative the Board review the Protect our Defenders and General Accountability Office (GAO) reports provided to understand the extent of unfair racial discrimination faced by minorities in the military and the Air Force in particular. The failure to consider the racial trauma aspect of the applicant's suffering continued throughout his time in the Air Force. His racial trauma as far back as 2014 was misdiagnosed as an "occupational problem." The DVA has noted continued racial trauma is a cause of PTSD. The applicant's mental health provider and the Psychological Advisor's failure to consider the racial trauma experienced by the applicant negates any diagnosis made by them or any opinion expressed by them.

The record demonstrates the applicant had PTSD before his discharge and he suffered trauma beginning in 2006 and demonstrated PTSD like symptoms at least as far back as 2014 and expressed PTSD symptoms in 2016. The applicant did not state he had full blown PTSD symptoms upon his return from deployment in 2006 but expressed he felt anxious and stressful. The applicant's situation most closely resembles delayed onset PTSD. Systematic reviews indicate

that of those people who develop PTSD, approximately 25 percent may be delayed onset cases. However, because his mental health provider could not accurately diagnose the applicant's symptoms, the mental health provider fell back on the diagnoses of adjustment disorder and that he just wanted money instead of treatment and if the Air Force was going to discharge him after 14 years of honorable service in retaliation for accusing his command of racism, he wanted the retirement to which he was entitled.

The diagnosis of adjustment disorder with mixed disturbance of emotions and conduct is clearly wrong. An adjustment disorder is a short term condition. The applicant had symptoms since 2006. The DVA diagnosis of PTSD clearly shows the symptoms did not abate more than two years after his discharge. The applicant described the same symptoms to his mental health provider in 2016 and in 2017 as he did to the DVA psychiatrist in 2019. Instead of the proper diagnosis, the mental health evaluator decided the applicant was exaggerating or lying about his symptoms. The DVA diagnosis is evidence the mental health evaluator was incorrect. The Board should realize the applicant was suffering from PTSD at the time of his review-in-lieu of (RILO) MEB and grant him the medical retirement he is entitled to.

The Air Force practice of using a RILO MEB violated the DoD's Disability Evaluation System (DES) and deprived the applicant of his rights. According to DoD directives and Public Law, the Air Force should have appointed an impartial psychiatrist to review the findings. However, because of the RILO process, the Air Force absurdly claimed the applicant had not met a MEB and was not entitled to the protections the DoD affords him. On 1 Feb 17, the AFPC Medical Standards Branch sent a note stating the applicant was not subject to MEB processing as his diagnosis was an "unsuiting" condition per DoDI 1332.18. It is unknown if AFPC ever saw the applicant's rebuttal requesting an independent review; however, they did not order one. Had the Air Force entered him into the DES process, he would have been seen by a DA psychiatrist who would have diagnosed him with PTSD, which is exactly what happened when he finally saw a DVA psychiatrist. Given the PTSD diagnosis, the applicant would have been retired.

The advisory opinion contains perfunctory responses to the four questions that the Kurta memorandum lists to determine if PTSD or another mental health condition is mitigating with regard to the applicant's discharge. The advisory dismisses the mental health issues and credits the mental health provider's erroneous diagnosis. A fuller set of answers to the questions is as follows:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge? The applicant was subjected to mortar attacks while in Iraq. A B-1 aircraft he was controlling had an after-landing accident, for which he felt unwarranted guilt. He witnessed a murder when he saw his neighbor shot in the head and killed. He spent years trying to fight what he truly perceived as racial animus and discrimination by his supervisors. He suffered wartime trauma, racial trauma, and the trauma of seeing an innocent person killed before his eyes. The cumulative effects of these incidents led to his PTSD. He should never have been discharged for "non-retention on active duty". His discharge should be changed to reflect that he was medically retired.

2. Did the condition exist or experience occur during military service? The applicant's traumatic experiences occurred during his military service. He sought mental health treatment while on active duty. Instead of giving his traumatic experiences the credit and effect they deserved, the military psychologist simply diagnosed a short-term adjustment disorder and accused him of malingering. The VA diagnosed him with PTSD shortly after his discharge based on the trauma that he experienced while in the military. It is nonsensical to opine that the PTSD did not exist during his time on active duty.

3. Does the condition or experience excuse or mitigate the discharge? The experience and condition should have resulted in a medical retirement and his discharge should reflect that.

4. Does the condition or experience outweigh the discharge? There is ample evidence that the applicant had unfitting mental health conditions while in service. He spoke of his experiences with the therapists he was seeing. He was prescribed Trazadone and Prozac for these mental health conditions. From Jul 17 he continued to speak of those same symptoms with mental health providers at the VA. It's not like he waited years to seek treatment and there is a possibility that he did not have PTSD in service but that the disease manifested years later. The applicant has consistently claimed the very symptoms that led to his diagnosis of PTSD and rating of 100 percent disabled.

Counsel provides a memorandum from the Air Force Central Command Historian's Office dated 4 Mar 22 stating the applicant requested evidence of enemy attacks while assigned to Iraq in May 06 to Oct 06, in support of a claim for combat-related special compensation (CRSC). Their office possessed records of airfield attacks for the period in question and there were personnel wounded in action, and the attacks damaged facilities and equipment on base; however, specific details remained classified. The applicant was awarded the Iraq Campaign Medal for his deployment from 12 May 06 to 11 Sep 06.

The applicant's complete submission is at Exhibit J.

On 27 Jun 22, counsel requested the applicant's case be considered by new Board members not involved in the first Board since the previous members negligently denied the applicant due process by failing to allow him to respond to the advisory opinion. It would be an injustice to allow them to decide on the upcoming board.

APPLICABLE AUTHORITY/GUIDANCE

On 25 Aug 17, the Under Secretary of Defense issued clarifying guidance (Kurta Memo) to military corrections boards considering requests by veterans for modification of their discharge due to mental health conditions, sexual assault or sexual harassment. It stated liberal consideration would be given to veterans petitioning for discharge relief when the application for relief is based in whole or part on matters relating to mental health conditions, including PTSD. AFI 36-2606, *Reenlistment and Extension of Enlistment in the United States Air Force*, paragraph 2.1, SRP Policy. Reenlistment in the Air Force is not an inherent individual right. Paragraph 2.6.7.1. The AF Form 418 documents non-selection for continued service an airman's reenlistment ineligibility due to unsatisfactory fitness.

On 25 Jul 18, the Under Secretary of Defense issued supplemental guidance (Wilke 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 the supplemental guidance, paragraphs 6 and 7.

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 reconsidered the applicant's case due to an administrative error resulting in the applicant not receiving the Psychological Advisor's opinion for review and comment. The applicant's case was re-opened and the Board reconsidered the applicant's case, to include counsel's rebuttal response to the advisory opinion dated 14 Jun 22. On 27 Jun 22, counsel requested the applicant's case be considered by new Board members not involved in the denial of the applicant's case as it would be an injustice to allow them to reconsider the case. In this respect, the Board notes AFI 36-2603, *Air Force Board of Correction to Military Records*, does not allow applicants to make specific requests as to the composition of an AFBCMR panel. When fitting, panel members may be recused from a specific case; however, the Board finds no reason in this case to recuse any panel members. The administrative error by the AFBCMR staff is insufficient to conclude any panel member acted arbitrarily or capriciously in the adjudication of the applicant's case. Moreover, due to the nature of the applicant's request, the case was considered by the Medical Board, which includes a physician and senior civilians adept in the issues pertaining to the applicant's case. Counsel is reminded the Board reviews and adjudicates requests based on the merits of each case.

Counsel contends in the rebuttal response, the Psychological Advisor incorrectly characterizes the applicant's interactions with the mental health system and that it was clear he was suffering from mental health symptoms. Counsel states the Air Force is hardwired to discount service member's experiences and cites the MAMC controversy leading to the Army's 2012 reissuance of guidelines in the evaluation of PTSD claims. Counsel contends the applicant's case is similar; however, he has provided insufficient evidence to substantiate the applicant's case is similar. The applicant was not evaluated at MAMC for his PTSD claims during the period in question. Further, while the Board acknowledges the applicant was exposed to traumatic events, as pointed out in the NARSUM dated 19 Jan 17 and the Psychological Advisor's opinion, exposure to traumatic events is not enough to warrant a PTSD diagnosis. The applicant underwent multiple psychological assessments and was diagnosed with malingering and adjustment disorder by a mental health evaluator. The detailed NARSUM and the results of the psychological testing showed the applicant was exaggerating his symptoms. As counsel states, it was not until the applicant was confronted with losing his career, he addressed PTSD symptoms, which he downplayed earlier. It is the opinion of the Board the applicant was aware he would be discharged as a result of the denial of reenlistment and in an attempt to save his career or be medically retired, he claimed PTSD and highlighted his exposure to traumatic events. The Board finds no error in the applicant's in-service diagnosis of an unsuiting rather than an unfitting condition. Accordingly, the applicant was not eligible for entry into the DES. Therefore, the Board finds counsel's assertions the Air Force violated the applicant's right to a medical board is without merit.

Counsel also references the Kurta memorandum and provides responses to the four questions in support of liberal consideration. However, the Board finds counsel has provided insufficient evidence to show the applicant's Article 15 in Oct 12, referral EPRs for periods ending 22 Nov 12, 30 Nov 15 and 30 Nov 16 or his denial of reenlistment on 17 Aug 16 were the result of anything other than the applicant's own misconduct and failure to perform his duties. Counsel has not provided substantial evidence to show a causation between his mental health and the personnel actions and the Board finds no mitigating factors to warrant granting the applicant's requests based on liberal consideration. Moreover, the applicant's denial of reenlistment as documented on the AF Form 418 dated 17 Aug 16, was in accordance with AFI 36-2606, which states reenlistment in the Air Force is not an inherent right. The denial of reenlistment was well-within his commander's

authority and discretion. The applicant was also afforded his right to appeal the decision and the denial of reenlistment was upheld by the appeal authority.

Counsel further states the Psychological Advisor's failure to consider the applicant's trauma due to racial discrimination should negate the recommendation to deny the applicant's requests. Counsel cites the Protect Our Defenders Report, the GAO and Air Force Racial Disparity Reports; however, there is no evidence to show the applicant himself was the victim of discrimination. Counsel wants the Board to believe the applicant was the victim of discrimination because he was a minority airman; however, the applicant's race is not sufficient to substantiate he was discriminated on the basis of race. The evidence shows the applicant submitted 14 IG complaints and two reprisal complaints; however, no evidence has been provided to show any allegations were substantiated to show the applicant was a victim of racial discrimination. Since the Board finds insufficient evidence to grant a medical retirement, the Board finds no evidence to grant the applicant CRSC. With respect to the request that the recoupment of his separation pay by the DVA be waived, this Board which serves on behalf of the Secretary of the Air Force, in the correction of military records is without authority to direct the DVA to not recoup separation pay, which is required to be recouped by law. In the alternative, counsel requests the applicant be awarded constructive service credit for a length of service retirement; however, the Board does not find it in the interest of justice to credit the applicant with a period of service he did not serve. 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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2021-00414-2 in Executive Session on 27 Jul 22:

, Panel Chair
, Panel Member
, Panel Member

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

Exhibit G: Record of Proceedings, w/ Exhibits A-F, dated 8 Oct 21.
Exhibit H: Counsel's letter, dated 3 Dec 21.
Exhibit I: Notification of Advisory, SAF/MRBC to Applicant, dated 23 May 22.
Exhibit J: Counsel's response, w/atchs, dated 14 Jun 22.
Exhibit K: Counsel's letter, dated 27 Jun 22.

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.