

Work-Product

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-00951

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

Her bad conduct discharge (BCD) be upgraded to general (under honorable conditions).

APPLICANT'S CONTENTIONS

As a young 18-year-old away from home for the first time, she caved into pressure and used alcohol and controlled substances. She was coerced into unwanted sexual encounters and these traumatic experiences subsequently affected her life for over a decade. During technical training school, a senior airman took advantage of her by coercing and manipulating her to do unforsaken acts or be reprimanded. She began to drink daily to mask the pain, her disease progressed, and her behaviors became unmanageable. Her addiction worsened when she injured her back while on duty and was prescribed Vicodin and Darvocet, taking her addiction to another level, using them to avoid pain and to feel better internally. She experienced another traumatic event when a service member who she was dating, was in a horrific motorcycle accident in front of her. She sought help for mental health but struggled with her invisible illness and her disease further progressed. She used cocaine one night to try numbing herself and tested positive on a random urinalysis test. She was court-martialed, demoted with no pay, and sent to prison. She was offered no help during any of her troubles, which may have proven to be beneficial.

After her discharge, between 2003 to 2014, she continued using alcohol and drugs to help avoid negative thoughts and feelings and she was eventually convicted on drug related charges and ended up in prison for approximately one year, followed by mental health court, and re-sentenced for 2-3 more years. In 2015, she was released from prison and sworn into a county veteran's court. She participated in programs at the Department of Veterans Affairs (DVA) medical center for military sexual trauma (MST), post-traumatic stress disorder (PTSD), substance abuse programs, 12-Step program, and Self-Management and Recovery Training. Once she had 18 months sober, she took her recovery seriously and obtained numerous certifications to help others struggling with addiction. She is currently a veteran's court mentor and works alongside the treatment team and county probation officers and judges and serves on Boards for Veteran's Promise and Do it for Dame. She takes accountability for her past actions and humbly asks for an upgrade to her discharge of character so that she can continue her path to help empower addicts overcome addiction.

In support of her request for clemency, the applicant provides a personal statement, post service certificates of achievement/training, and character letters.

The applicant's complete submission is at Exhibit A.

AFBCMR Docket Number BC-2021-00951

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Controlled by: SAF/MRB

Work-Product

Limited Dissemination Control: N/A

POC: SAF.MRBC.Workflow@us.af.mil

STATEMENT OF FACTS

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

On 9 Aug 00, according to Order **Work-Pr...**, the applicant entered active duty.

On 16 Apr 02, the applicant was offered non-judicial punishment (NJP) action pursuant to Article 15, Uniform code of Military Justice (UCMJ) in violation of Article 92, for derelict in the performance of her duties in that she willfully failed to provide proper documentation. As a result, she was reduced to the rank of airman (E-2), suspended until 21 Oct 02, and 30 days correctional custody.

On 25 Apr 02, the applicant was offered NJP action pursuant to Article 15, UCMJ in violation of Article 86, for failure to go at the time prescribed to her appointed place of duty. As a result, she was reduced to the rank of airman (E-2) with a new date of rank of 1 May 02.

On 24 Jul 02, the applicant was offered NJP action pursuant to Article 15, UCMJ in violation of Article 86, for failure to go at the time prescribed to her appointed place of duty; violation of Article 92, for violation of a lawful general regulation; and violation of Article 34, for making inappropriate statements.

On 24 Jan 03, the convening authority published Special Court-Martial Order Number 5. The Order stated the applicant pled guilty to three charges and was sentenced to confinement for six months, forfeiture of \$100.00 pay per month for six months and a BCD. The specific charges were:

Charge I: Article 112a, on or about (o/a) 19 Apr 02 and o/a 23 Apr 02, the applicant wrongfully used cocaine.

Charge II: Article 86, o/a 10 Jul 02, the applicant absented herself from her unit without authority until o/a 13 Jul 02.

Charge III: Article 134, between o/a 28 May 02 and 3 Sep 02, the applicant dishonorably failed to pay a debt to Bank of America in the amount of \$267.70 and o/a 2 Sep 02 she broke restriction.

On 11 Aug 04, according to Special Court-Martial Order **Work-Product**, the sentence was affirmed, and the BCD was executed.

On 29 Oct 20, the applicant submitted DD Form 149, *Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552*. On 24 May 21, the Board staff closed the applicant's case as non-viable and notified the applicant her case would require an FBI report for consideration under clemency. On 8 Jun 21, the applicant provided an FBI report, and the Board staff re-opened her case.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisories at Exhibits F and H.

POST-SERVICE INFORMATION

On 24 May 21, the Board sent the applicant a request for any additional post-service information she may wish the Board to consider and advised the applicant she was required to provide a Federal Bureau of Investigation (FBI) Identity History Summary Check for clemency consideration, which would indicate whether or not she 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 replied on 8 Jun 21 and provided an FBI report. According to the report, the applicant was arrested/charged on four separate occasions after her discharge:

1. 15 Aug 08, charge 1 - simple assault; charge 2 - harassment.
2. 5 Apr 10, charge 1 - criminal attempt; charge 2 - drug, device and cosmetic act.
3. 1 Aug 11, charge 1 - escape.
4. 20 Sep 16, charge 1 - forgery; charge 2 - theft by deception; charge 3 - access device fraud; charge 4 - theft by deception; charge 5 - theft by unlawful taking or disposition.

The applicant's complete response is at Exhibit D.

APPLICABLE AUTHORITY/GUIDANCE

This Board is without authority to reverse, set aside, or otherwise expunge a court-martial conviction. Rather, in accordance with Title 10, United States Code, Section 1552(f), actions by this Board are limited to corrections reflecting actions taken by the reviewing officials and action on the sentence of the court-martial for the purpose of clemency.

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 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 25 Jun 21, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit E).

Department of the Air Force (DAFI) 36-3211, *Military Separations*, describes the types of service characterization:

Honorable. The quality of the airman's service generally has met DAF 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 a member's service has been honest and faithful, this characterization is warranted when negative aspects of the member's conduct or performance of duty outweigh positive aspects of the member's military record.

Under Other than Honorable Conditions (UOTHC). This 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 EVALUATIONS

The AFRBA Psychological Advisor completed a review of all available records and finds insufficient evidence to support the applicant's request for an upgrade of her discharge. The applicant may consider submitting new evidence, especially her discharge paperwork and service treatment records, for a reconsideration of her petition in the future. The Board may also consider applying clemency to the applicant's request due to her BCD discharge and post service accomplishments.

The psychological advisor opines the applicant's personal statement is too vague and not sufficient enough to explain her misconduct and discharge especially in the absence of available essential records. The psychological advisor acknowledges her personal statements are somewhat consistent to her reports to her DVA providers causing her to use substances during service and post service. Nevertheless, the burden of proof is placed on the applicant to support her contentions and request. Due to the missing discharge paperwork/treatment records, the psychological advisor could not discern with certainty her MST experience and mental health condition could cause or mitigate some, all, or none of her misconduct and eventual discharge. More information is needed from the applicant in order to make a more definitive determination. At this time, presumption of regularity is applied and there is no error or injustice identified with her discharge.

The Board may elect to apply liberal consideration to the applicant's request. The following are answers to the four questions from the policy based on the available records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge? The applicant contends she was pressured, coerced, and manipulated into doing unforsaken acts during tech school by a senior airman, witnessed her boyfriend being in a horrific motorcycle accident, and was prescribed Vicodin and Darvocet causing her to develop dependency issues and coped with her traumatic experiences with substances.

2. Did the condition exist or experience occur during military service? There is evidence the applicant was convicted at Special Court-Martial for wrongful cocaine use. There is no service treatment records available to corroborate she had a mental health condition or reported her MST experience during service. She reported her MST experience to the DVA several years post discharge.

3. Does the condition or experience excuse or mitigate the discharge? The applicant contends she experienced MST and other traumatic experiences that caused her to cope with substances. Her discharge paperwork and service treatment records are not available for review to determine whether her mental health condition caused by her MST and other traumatic experiences may cause, excuse, or mitigate her discharge.

4. Does the condition or experience outweighs the discharge? Since her discharge paperwork and service treatment records are not available for review, presumption of regularity is applied and there is insufficient evidence to support her mental health condition caused by her MST and other traumatic experiences may outweigh her discharge.

The complete advisory opinion is at Exhibit F.

AF/JA recommends denying the application. The applicant's premeditated misconduct is not excused by any of the presently alleged mental health conditions, and the record contains insufficient evidence or allegation of error or injustice tending to undermine the applicant's BCD.

Even if there were credible evidence of mental health issues, and even if liberal consideration were given, the guidance is clear that the court's punishment, including discharge, was appropriately administered. According to section 19 of the memorandum [Kurta memorandum]: "Premeditated misconduct is not generally excused by mental health conditions... Review Boards will exercise caution in assessing the causal relationship between asserted conditions or experiences and premeditated misconduct." Accordingly, the Applicant's act of using illegal drugs, her unauthorized absence, her failure to pay a debt, and her breaking restriction were all premeditated. Any alleged PTSD, even a serious case, neither excuses/mitigates nor outweighs the discharge.

There was no error or injustice by the commander, and there was no error or injustice in the court-martial findings or sentence. Appellate review was conducted, and no error is found. Therefore, AF/JA find no basis to overrule the military court's sentence.

The complete advisory opinion is at Exhibit H.

APPLICANT'S REVIEW OF AIR FORCE EVALUATIONS

The Board sent copies of the advisory opinions to the applicant on 3 Feb 22 and on 28 Feb 22 for comment (Exhibits G and I), and the applicant requested her case be administratively closed on 14 Mar 22 to allow more time to gather her medical records. On 15 Mar 22, the Board staff closed the applicant's request. On 20 Jul 22, the applicant requested her case be re-opened and contended the additional medical documentation is proof from the doctors that should piece it all together. She was unable to get records of the sexually transmitted infection she was given by the individual. In support of her request, the applicant provided copies of her Air Force enlistment exam and various medical documentation.

The applicant's complete response is at Exhibit L.

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, to include the applicant's response containing copies of her medical records, the Board concludes the applicant is not the victim of an error or injustice. The Board finds no evidence that the sentence of the military court was improper or that it exceeded the limitations set forth in the Uniform Code of Military Justice. The Board concurs with the rationale of the AFRBA Psychological Advisor and AF/JA and finds a preponderance of the evidence does not substantiate the applicant's contentions. Liberal consideration was applied to the applicant's request due to her mental health condition and her sexual assault experience and finds insufficient evidence her condition nor her experience had a direct impact on her behaviors and misconduct resulting with her discharge. In the interest of justice, the Board also considered the passage of time, the overall quality of the applicant's service, the seriousness of the offenses committed, and the applicant's post-service conduct. However, given the evidence presented and her 2016 arrest, the Board finds no basis for clemency in the case. 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-2021-00951 in Executive Session on 11 May 23:

Work-Product	Panel Chair
	Member
	Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 29 Oct 20.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Letter, SAF MRBC, w/atchs (Post-Service Request), 24 May 21.
- Exhibit D: Applicant’s Response, (FBI Report), dated 8 Jun 21.
- Exhibit E: Letter, SAF/MRBC, w/atchs (Liberal Consideration Guidance), dated 25 Jun 21.
- Exhibit F: Advisory Opinion, AFRBA Psychological Advisor, dated 5 Oct 21.
- Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 3 Feb 22.
- Exhibit H: Advisory Opinion, AF/JA Advisor, dated 24 Feb 22.
- Exhibit I: Notification of Advisory, SAF/MRBC to Applicant, dated 28 Feb 22.
- Exhibit J: Applicant’s Response, dated 14 Mar 22
- Exhibit K: Letter, SAF MRBC, dated 15 Mar 22.
- Exhibit L: Applicant’s Response, w/atchs, dated 20 Jul 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.

10/8/2024	
X	Work-Product
Board Operations Manager, AFBCMR Signed by: USAF	