



**CUI//SP-MIL/SP-PRVCY**

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

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**RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2021-01151

*Work-Product*

**COUNSEL:**

*Work-Product*

**HEARING REQUESTED:** NO

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**APPLICANT'S REQUEST**

His under other than honorable conditions (UOTHC) discharge be upgraded to honorable or general (under honorable conditions).

**APPLICANT'S CONTENTIONS**

It was initially assumed he was under the influence of drugs causing his motor vehicle accident resulting with an investigation by the Office of Special Investigation (OSI). It was later determined he had undiagnosed narcolepsy causing the accident and he had a false positive drug screen for amphetamine from a local hospital. Although cleared of any wrongdoing, he was ostracized, singled out, and investigated for several Uniform Code of Military Justice (UCMJ) violations but always cleared after his motor vehicle accident. Weeks before his original discharge date of 4 Sep 00, a laptop from a mock exercise was lost or stolen and another investigation ensued. He was cleared early in the investigation but during the investigation process, it was reported he may have engaged in indecent acts with a teenage child which included providing alcoholic wine cooler to her. Another investigation was opened into this allegation causing him to be placed on a legal hold. He did not have a romantic relationship with a minor and one of the witnesses lied about the alcohol. During an Article 32 hearing for the indecent act allegations, the investigating officer recommended he receive an Article 15 and be permitted to be discharged since he had extended his current enlistment. He was not offered the Article 15 at the hearing and instead, received new charges for obstruction of justice for requesting one of the witnesses to lie about his act. The Security Forces investigators were on a fishing expedition against him. Feeling alone, shunned by his fellow airmen, and with no support from his command, he opted to request a discharge in lieu of a court-martial because he wanted to go home, was downtrodden, depressed, and sleep deprived. His request was immediately approved. His service related disability contributed to his poor decision making that contributed to his discharge. He had conditions of narcolepsy and sleep apnea, which could affect one's ability to function properly to include judgment. Due to the stress of multiple investigations causing sleep deprivation, stress, lack of support, and a feeling of hopelessness, his judgment was impaired causing him to make a poor decision to request a discharge. He made a poor decision under poor circumstances. His career spiraled out of control after the motor vehicle accident but his many contributions and accolades during service and his post service achievements were reasons for an upgrade of his discharge.

**AFBCMR Docket Number BC-2021-01151  
CUI//SP-MIL/SP-PRVCY**

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**CUI//SP-MIL/SP-PRVCY**

In support of his request for clemency, the applicant provides a personal statement, numerous post service appreciation letters and letters of recommendation, medical records, academic records, and his complete military record.

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 25 Dec 99, the applicant received counseling for failing to attend mandatory appointments.

On 14 Feb 00, the applicant received a Letter of Reprimand (LOR) for an unauthorized overnight guest in his dormitory room.

On 22 May 00, AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, indicates the applicant received nonjudicial punishment (NJP), Article 15 for avoiding his military duties via an intentional injury. He received a reduction in grade to airman first class (E-3), 15 days of extra duty, and forfeiture of pay of \$695.00 for 1 month, suspended until 21 Nov 00.

On 31 Oct 00, the applicant, through his Area Defense Counsel (ADC), requested a discharge in lieu of a trial by court-martial. His counsel contends he was on the verge of separating with an honorable discharge; his term of service expired on 3 Sep 00. He was already involuntarily extended nearly two months due to the investigation, a significant punishment in itself. He served honorably and well for the vast majority of his enlistment as evidenced by his Enlisted Performance Reports (EPR), awards and decorations, and the numerous letters of appreciation that he has received. He was such an outstanding performer, that he was recommended for promotion to senior airman (E-4) below the zone. In light of his record and the minor nature of the offenses, even if the applicant were to be convicted of something, he would undoubtedly receive little or no punishment, especially when the court members were informed of the Investigating Officer's (IO) recommendations. Thus, a court-martial would be a massive waste of resources with little to show for it.

On 6 Nov 00, the applicant's commander recommended the applicant be discharged from the Air Force with an UOTHC characterization of service in lieu of a trial by court-martial stating "Although the charged offenses are serious, there are substantial mitigating factors. The evidence consists essentially of one person's word against another's. Furthermore, it may be severely traumatic for the young prosecution's witness to testify." The specific reasons for the action were:

- a. Dated 28 Aug 00, DD Form 458, *Charge Sheet*, indicates the applicant was charged with taking indecent liberties with a minor (female under 16 years of age) who was not his wife by fondling her breasts and placing his hand upon her private parts, with intent to gratify his sexual desires.

**CUI//SP-MIL/SP-PRVCY**

b. Dated 2 Oct 00, in the Article 32 investigation of the applicant conducted on 26 Sep 00, the IO concluded the conduct alleged failed to justify a general court-martial and recommended withdrawing the charge and offering the accused an Article 15 NJP, imposing whatever punishment the commander deemed appropriate, and allowing his enlistment to end.

c. Dated 27 Oct 00, DD Form 458, indicates the applicant was charged with impeding an investigation by asking a material witness to lie for him.

On 14 Nov 00, the Staff Judge Advocate found the request for discharge in lieu of a trial by court-martial legally sufficient.

On 20 Nov 00, the discharge authority directed the applicant be discharged in lieu of a trial by court-martial and be administratively discharged with an UOTHC service characterization.

On 30 Nov 00, the applicant received an UOTHC discharge. His narrative reason for separation is "Triable by Court-Martial" and he was credited with 4 years, 2 months, and 27 days of total active service.

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

**POST-SERVICE INFORMATION**

On 23 Jul 21 and again on 9 Mar 22, the Board sent the applicant a standard 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 or not 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. This letter informed the applicant that a FBI background check would assist the Board in evaluating his case however, he has not replied.

**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.

**CUI//SP-MIL/SP-PRVCY**

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 9 Mar 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit F).

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

**CUI//SP-MIL/SP-PRVCY**

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. Although it is plausible and compelling that the applicant's decision to request a discharge in lieu of a court martial was affected by being overly stressed and depressed, having no support, and feeling homesick as a result of his legal issues, there was no evidence his mental health condition caused his behaviors resulting with his legal issues surrounding the indecent act. It is very common for an individual who has been under investigation and possibly facing court-martial to experience extreme stress, sleep disturbances, alterations of mood, etc., but the decompensation of his mental health condition was the result of his own alleged misconduct. There is evidence the applicant was depressed following his motor vehicle accident in Apr 00 and had received mental health treatment for depression, but there was no evidence his depression had caused any impairment to his overall functioning. It was not until he was informed an investigation into his alleged indecent act with a minor was initiated that his depressive symptoms worsen causing him to have active suicidal thoughts necessitating a higher level of care from inpatient psychiatric hospitalization. The applicant had denied he had any inappropriate relationship with a minor and so therefore, his mental health condition could not have been a factor to this misconduct and investigation. Hypothetically, even if this impression was possible that a nexus between his mental health condition and misconduct had existed, his mental health condition would *not* have excused or mitigated his misconduct. The egregious nature of the misconduct or incident involving a minor child is too serious to be able to overlook the circumstances. The comprehensive OSI investigation report negated the applicant's contention and found otherwise that a misconduct had existed. The applicant's ADC at the time had even concurred with the findings and recommendations from the investigator. The investigation did not find the incident was serious enough to warrant pursuing a general court-martial but did find enough evidence to recommend an Article 15. Before the final decision was made to pursue a court-martial or Article 15, the applicant had elected to request a discharge in lieu of a court martial. The applicant received a character of service of UOTHC based on review of his entire military service.

**CUI//SP-MIL/SP-PRVCY**

In addition to his alleged indecent act with a minor and asking a witness to lie for him, the applicant had other serious behavioral and disciplinary issues during service. He received a prior Article 15 for malingering - intentionally hurting himself to get out of work, which the applicant and his legal counsel had acknowledged and did not dispute, although the applicant did minimize his serious intent behind the matter. There was speculation his behaviors leading up to this behavior may be caused by his sleep issues stemming from his conditions of narcolepsy and sleep apnea. It was reported he had difficulties reporting to duty on time because of his sleep problems, but there was no evidence he received any reprimands or disciplinary actions for being late to work during that time frame and following his motor vehicle accident. His act of purposefully injuring himself to get out of work was not caused by his sleep issues. He may have demonstrated poor judgment and decision making skills, but they were not caused by a mental health condition or a cognitive impairment. His behaviors were deliberate and would be constituted as premeditated. The applicant also received an LOR for allowing a guest to spend the night in his dormitory room. The said guest was confirmed to be a “*newly 16-year old female*” according to the legal review of his discharge. This information failed to be acknowledged or addressed by the applicant and his counsel. There was no evidence his mental health condition caused any of his documented misconduct during service that would result with his discharge. These cumulative behaviors and misconduct were the reasons he was recommended and furnished with an UOTHC discharge.

Liberal consideration is applied to the applicant’s request due to the contention of a mental health condition. The following are responses to the four questions in 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 and his legal counsel contend that due to the stressors and lack of support during his investigation and legal proceedings, the applicant requested a discharge in lieu of a court martial because he felt depressed and hopeless, had sleep issues, and was homesick. His decision to request a discharge was impaired at the time due to these issues.

2. Did the condition exist or experience occur during military service?  
There is evidence the applicant was depressed following his motor vehicle accident in Apr 00, and there is evidence his accident was most likely caused by narcolepsy according to his records. He had received mental health treatment from 15 May 00 to 13 Nov 00 for depression, sleep disturbances, and legal issues. His depression worsen after he was placed under investigation for an indecent act in Aug 00 causing him to have active suicidal ideation and being admitted to inpatient psychiatric hospitalization for safety monitoring and stabilization. He was hospitalized from 17 to 20 Aug 00. All of these events occurred during military service.

3. Does the condition or experience excuse or mitigate the discharge?  
There is evidence his depression and sleep disturbances may cause him to have some difficulties in service and may cause him to request a discharge in lieu of a court-martial, but there was no evidence his mental health condition caused any of his documented misconduct. His depression had been exacerbated by the stressors of this [sic] legal issues but did not cause the behaviors causing him to be investigated and a possible court-martial. His condition or experience does not excuse or mitigate his discharge.

4. Does the condition or experience outweighs the discharge?

Since the applicant's mental health condition or experience does not excuse or mitigate his discharge, they also do not outweigh his discharge. There is no error or injustice identified with his discharge.

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 9 Mar 22 for comment (Exhibit E), and the applicant replied on 19 Apr 22. In his response, the applicant's counsel contends he was depressed, tired and not using sound judgement and instead of waiting for the convening authority's decision, he impulsively requested an UOTHC discharge in lieu of court-martial. Had the convening authority accepted the recommendation of the Article 32 IO, then the applicant would have received NJP and immediately discharged with honorable and/or general (under honorable conditions) discharge as he was on legal hold. Since he was on legal hold, if the decision was anything other than convening a court-martial, he would have been immediately discharged. His request for an UOTHC discharge was premature but accepted by the Convening Authority as the advisory opinion states. This impulsivity is a direct result of the applicant's poor mental health as recognized by the advisory opinion.

Furthermore, the advisory opinion seeks to link the allegation of indecent acts with a minor with another event where the applicant let an authorized guest stay in his barracks room. The implication in the advisory opinion is all too clear. The advisory opinion is taking two unrelated incidents in an attempt to support the allegation of indecent acts with a minor. The advisory opinion is trying to establish a pattern. A pattern that did not exist and was not supported by the evidence as demonstrated by the Article 32 IO's recommendation to a lesser forum for disposition.

In conclusion, the applicant is worthy of granting clemency and an honorable discharge. The advisory opinion recognized he suffered from mental health problems and recognized it was plausible that his mental health conditions contributed to his request for discharge in lieu of court martial. The applicant's post-service conduct has been excellent. While working full time as Post Master, the applicant attended nursing school and successfully completed his education. He intends to put his degree to work by helping veterans. He has a demonstrated track record of assisting persons with problems and going above and beyond his duties to make sure the customer needs are met.

The applicant's complete response is at Exhibit G.

#### **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.

**CUI//SP-MIL/SP-PRVCY**

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 and recommendation of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. In the interest of justice and fundamental fairness, the Board considered upgrading the discharge based on clemency; however, given the evidence presented and in the absence of a criminal history report, the Board finds no basis to do so. Furthermore, the Board notes the applicant's contention that he believes his mental health condition contributed to his premature request for a discharge in lieu of court martial and that if he had waited for the convening authority's decision, he would have been given an Article 15 and a general or honorable discharge. However, the Board does not find the evidence presented sufficient to conclude that his mental health condition excuses, mitigates, or outweighs his original discharge. Therefore, the Board is satisfied that the application of liberal consideration does not warrant relief. Accordingly, the Board recommends against correcting the applicant's records.

**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-2021-01151 in Executive Session on 25 May 22:

**Work-Product**, Panel Chair  
**Work-Product**, Panel Member  
**Work-Product**, Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 21 Jan 21.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Clemency Guidance), dated 23 Jul 21.
- Exhibit D: Advisory Opinion, AFBCMR Psychological Advisor, dated 2 Feb 22.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 9 Mar 22.
- Exhibit F: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 9 Mar 22.

**AFBCMR Docket Number BC-2021-01151**

**CUI//SP-MIL/SP-PRVCY**



Exhibit G: Applicant's Response, dated 19 Apr 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.

3/17/2023

*Work-Product*

Board Operations Manager, AFBCMR  
Signed by: USAF