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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02629

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

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

APPLICANT'S CONTENTIONS

At the time of his discharge, he received a great deal of harassment by a higher-ranking noncommissioned officer (NCO) while experiencing personal problems. The NCO was aware of his personal problems but made it his personal mission to make his life miserable to the extent of denying a promotion.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 2 Mar 01, the applicant's commander recommended the applicant be discharged from the AFR based on misconduct, specifically, drug abuse, under the provisions of AFI 36-3209, *Separation and Retirement procedures for Air National Guard and Air Force Reserve Member*, chapter 3, paragraph 3.21.3.2. The specific reason for the action was wrongful use of cocaine as evidenced by a urine specimen the applicant provided on 3 Feb 01, which specimen tested positive for cocaine.

On 4 Mar 01, the staff judge advocate found the discharge action legally sufficient.

On 17 Mar 01, the discharge authority directed the applicant be discharged for drug abuse, under the provisions of AFI 36-3209, Paragraph 3.21.3.2, Section 3D with an UOTHC service characterization without the offer of probation and rehabilitation.

On 23 May 01, the applicant requested an administrative discharge board hearing.

On 17 Oct 01, the Director of Military Law found the record of board proceedings regarding the applicant legally sufficient.

On 8 Mar 02, the discharge authority directed the applicant be discharged for Misconduct, Commission of a Serious Offense, Drug Abuse, with an UOTHC service characterization without the offer of probation and rehabilitation.

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On 29 Mar 02, according to Reserve Order Work-Prod... dated 8 Mar 02, the Air Force relieved the applicant from duty and discharged him from the United States Air Force Reserve with service characterized as UOTHC.

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

POST-SERVICE INFORMATION

On 9 Mar 22, the Board sent the applicant a request for post-service information, including a standard criminal history report from the Federal Bureau of Investigation (FBI); 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.

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

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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 paragraphs 6 and 7 of the Wilkie memorandum.

On 9 Mar 22, 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.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor completed a review of all available records and finds the applicant has not met the burden of proof to support his request. There was no evidence from his objective military records to support his contention of being harassed by an NCO or that the harassment by this individual caused his discharge from service. He was discharged from service for testing positive for cocaine on a random urinalysis test. The applicant did not address or explain his cocaine use that led to his discharge. He stated having personal problems and claimed he had mental health issues but again, no evidence exists to corroborate his contention. His service treatment records were not available or submitted for review, so there were no records he received any mental health evaluation, diagnosis, or treatment during service. There was no evidence his mental health condition had a direct impact to his misconduct and discharge. He did not initiate treatment with the Department of Veterans Affairs (DVA) until 20 years post-service. He was reported to have been diagnosed with bipolar disorder two years prior to his assessment, had anxiety, depressive symptoms, and sleep issues to the DVA. There was no evidence he had any of these conditions or symptoms during service. Additionally, he was a Reservist and there was no evidence his personal problems and mental health issues were caused by his military duties, had occurred in the line of duty or when he was on Reserve orders. Giving the applicant the benefit of the doubt, these issues were a factor to his misconduct, his cocaine use could not be excused or mitigated by his mental health condition. His benzoylecgonine (BZE) level was reported as 652 ng/ml and the Department of Defense (DoD) cutoff is 100 ng/ml. His BZE level was six times

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over the cutoff level indicating he used a large amount of cocaine within a few days of the test. With this level, it is very unlikely the test was inaccurate. Furthermore, it is not known from his records how often he used this substance but the amount detected from his urinalysis signified he used cocaine more than once or exceeded a single use. His misconduct was serious and was the reason for his discharge and service characterization. Therefore, there was no error or injustice identified with his discharge.

Liberal consideration is applied to the applicant's petition. The following are responses based on the available records to the four questions from the Kurta memorandum:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
The applicant contends he was harassed by an NCO, he had personal problems that the NCO was aware of and made it his (NCO) personal mission to make his (applicant) life miserable, and he had mental health issues. He did not clarify his mental health issues.
2. Did the condition exist or experience occur during military service?
There is no evidence he was harassed by the NCO and no evidence he received any mental health evaluation, diagnosis, or treatment during service. He initiated mental health treatment with the DVA 20 years post discharge for reports of bipolar disorder, anxiety, depressive symptoms, and sleep issues. There was no evidence any of these conditions or symptoms existed or occurred during his military service.
3. Does the condition or experience actually excuse or mitigate the discharge?
The applicant was discharged for testing positive for cocaine and he did not address or explain his misconduct leading to his discharge. There is no evidence his mental health condition was caused or had a direct impact to his misconduct. His mental health condition or experience does not excuse or mitigate his discharge.
4. Does the condition or experience outweigh the discharge?
Since his mental health condition or experience does not excuse or mitigate his discharge, it does not outweigh his original 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 17 Jan 23 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 and discharge upgrade requests are technically untimely. However, it would be illogical to deny such 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 unduly harsh or disproportionate to the offenses committed. Therefore, the Board concurs with the rationale of the AFBCMR Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. Furthermore, the Board applied liberal consideration to the evidence submitted by the applicant; however, it is not sufficient to grant the applicant's request. The applicant did not provide any evidence or records to substantiate his claim that a mental health condition in service caused his misconduct, thus his condition does not mitigate or excuse his discharge. The burden of proof is placed on the applicant to submit evidence to support his claim. In the interest of justice, the Board considered upgrading the discharge based on fundamental fairness; however, given the evidence presented, and in the absence of post-service information and a criminal history report, the Board finds no basis to do so. 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 the Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.5, considered Docket Number BC-2021-02629 in Executive Session on 22 Mar 23:

Work-Product [Redacted] Panel Chair
[Redacted], Panel Member
Work-Product [Redacted] Panel Member

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

- Exhibit A: Application, DD Form 149, dated 16 Jul 21.
- 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 9 Mar 22.
- Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 30 Nov 22.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 17 Jan 23.

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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.

12/27/2023

Work-Product

Board Operations Manager, AFBCMR

Signed by:

Work-Product