

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02635

COUNSEL: YES

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His general (under honorable conditions) discharge be upgraded to honorable, and his reenlistment (RE) code be changed from RE-2B (separated with a general or under other than honorable conditions discharge) to RE-1 series (eligible for immediate reenlistment).

APPLICANT'S CONTENTIONS

His chain of command made a material error of discretion by giving him an unduly harsh characterization of service based on false accusations. The Air Force Discharge Review Board (AFDRB) later partially upgraded his discharge due to an injustice, and yet the alcohol related issues for which he was disciplined properly at the time, are still being held against him. His first incident of underage drinking was due to him being immature and young. The second underage incident; however, was caused by false allegations against him for sexually assaulting his sister which were later dismissed after his discharge from service. Furthermore, he has persevered to support his family, refrain from alcohol abuse, and contributed positively to his community as a model citizen.

In support of his request for clemency, the applicant provides a Federal Bureau of Investigation (FBI) Identity History Summary Check, resume and letters of support.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 7 Mar 17, the applicant entered the Regular Air Force.

On 12 May 18, the applicant's duty status changed from present for duty to civilian confinement (under arrest/pending trial/awaiting sentencing) and on 6 Jun 18, the applicant was released from confinement on bail and returned present for duty.

On 19 Nov 18, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of Air Force Policy Directive (AFPD) 36-32, *Military Retirements and Separation*, and AFI 36-3208, *Administrative Separation of Airmen*, for misconduct – sexual assault and minor disciplinary infractions. The specific reasons for the action were:

- a. Between on or about (o/a) 1 Mar 17 and 4 May 18, he committed five lewd and/or sexual acts on a child who had attained the age of 12 years, but had not attained the age of 16 years.
- b. O/a 18 Sep 17, he failed his room inspection. As a result, he received a record of individual counseling (RIC).

c. On divers occasions, between o/a 9 Oct and 21 Oct 17, he failed to maintain appearance standards, failed to report to his military training leader, and carried unauthorized food items while marching. He received a letter of counseling for these misconducts.

d. O/a 28 Oct 17, he willfully refrained from consuming alcohol while under the age of 21 and wrongfully possessed a military identification card, which bore altered information concerning his date of birth. As a result, he received nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), with reduction to the grade of airman (E-2) and a reprimand.

e. O/a 16 Aug 18, he was absent from mandatory physical training and failed a room inspection. As a result, he received an RIC.

f. O/a 25 Aug 18, he willfully refrained from consuming alcohol while under the age of 21. As a result, he received nonjudicial punishment under Article 15, UCMJ, with reduction to the grade of airman basic (E-1), restrictions to the Base for 45 days, and a reprimand.

On 6 Dec 18, the Staff Judge Advocate found the discharge action legally sufficient.

On 19 Dec 18, the discharge authority directed the applicant be discharged for sexual assault with an under other than honorable conditions service characterization without the offer of probation and rehabilitation.

On 20 Dec 18, the applicant received an under other than honorable conditions discharge with a narrative reason for separation of "misconduct (serious offense)." He was credited with 1 year, 9 months, and 14 days of total active service with lost time from 12 May 18 to 5 Jun 18.

On 16 Dec 19, the applicant submitted an application to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge to honorable conditions and change his narrative reason for separation to "Secretarial Authority."

On 28 Apr 20, the AFDRB voted unanimously to deny the applicant's request and found insufficient evidence of an inequity or impropriety that would warrant a change to the applicant's discharge.

On 24 Jun 20, the applicant appealed to the AFDRB for an upgrade to his discharge to general or honorable, change his narrative reason for separation to "Secretarial Authority," change his RE code, and exercised his right to make a personal appearance before the AFDRB.

On 16 Feb 21, the AFDRB voted unanimously to approve the applicant's request to upgrade his discharge characterization to general and to change his narrative reason for separation to "Secretarial Authority." The Board voted 2 to 1 to deny changing the RE code to 2C / 3K. The Board did not find an inequity with the discharge but found sufficient evidence the discharge was improper. The Board also concluded that due to previous infractions in the applicant's record, the applicant's service could not be characterized as honorable. The Board considered the case based on the liberal consideration standards based on evidence of mental health conditions found in the applicant's medical record.

On 19 Dec 21, the applicant was issued a new DD Form 214, *Certificate of Release or Discharge from Active Duty*, reflecting a general (under honorable conditions) service characterization with a narrative reason for separation of "Secretarial Authority," and RE code of 2B.

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

POST-SERVICE INFORMATION

On 7 Apr 22, the Board sent the applicant a request for any additional post-service information he may wish the Board to consider; however, he has not replied (Exhibit C). The applicant did however, provide an FBI Identity History Summary Check, dated 27 Apr 21, with his initial application. According to the report, the applicant has had no arrests since his discharge (Exhibit A).

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 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 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 13 Apr 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit D).

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.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor finds insufficient evidence to support the applicant's request for an upgrade to honorable and change of RE code to RE-1 from a mental health perspective. While there was evidence the applicant had engaged in his second underage drinking due to emotional distress in response to his legal issues, there was no evidence his mental health condition had caused or had a direct impact on his other numerous misconduct. For his first underage drinking incident that included his altered date of birth on a military identification card, he reported to the Alcohol and Drug Abuse Treatment (ADAPT) evaluator he was drinking with friends to celebrate and have fun. These were the reasons that caused him to drink even though he knew his behaviors were inappropriate and his act of using a modified date of birth on a military identification card in order to drink or purchase alcohol was deliberate. One could argue this latter behavior could be considered as a premeditated behavior. There were no explanations offered to his other misconduct and so his mental health condition could not explain, excuse, or mitigate most of his misconduct.

Liberal consideration is applied to the applicant's request. The following are responses to the four questions in the policy based on the available records for review:

a. Did the veteran have a condition or experience that may excuse or mitigate the discharge? The applicant through his legal counsel contends a material error had existed when he was continuously punished after his second underage drinking incident because of false sexual assault accusations made against him. His legal counsel alluded to his stressful legal situation he was experiencing at the time that caused his second underage drinking behavior.

b. Did the condition exist or experience occur during military service? There was evidence the applicant was command referred to ADAPT after his first underage drinking incident and was found not to have any alcohol abuse issues. The applicant received mental health treatment for stress, anxiety, and depression after he was accused of sexual assault. There was evidence he drank to cope with his emotional distress causing his second alcohol related incident during military service.

c. Does the condition or experience excuse or mitigate the discharge? The applicant's mental health condition was reported to have decompensated due to the stressors of his ongoing investigation and legal troubles. There was evidence he drank to cope with his emotional distress resulting with his second underage drinking incident. His mental health condition caused his legal issues (that was later dismissed) would excuse and mitigate this misconduct. However, his mental health condition was not found to have caused most and his remaining numerous misconduct does not excuse or mitigate his discharge.

d. Does the condition or experience outweigh the discharge? Since his mental health condition does not excuse or mitigate his discharge, his condition also does not outweigh his discharge.

The complete advisory opinion is at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 18 Apr 22 for comment (Exhibit F), but has received no response.

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 concludes the applicant is not the victim of an error or injustice. 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 notes the relief already granted by the AFDRB and opines further relief is not warranted based on the totality of his misconduct which best represents a general (under honorable conditions) service characterization. Liberal consideration was applied to the applicant's request due to evidence of his mental health treatment while in service; however, since there is no evidence his mental health treatment had a direct impact on all of his behaviors and misconduct resulting in his discharge, the condition or experience does not excuse, mitigate, or outweigh his discharge. While it has been just four years since his discharge, the Board, in the interest of justice, 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 records. The applicant retains the right to request reconsideration of this decision. The applicant may provide post-service evidence depicting his good citizenship, accomplishments and activities since his discharge in the consideration for an upgrade of discharge characterization due to clemency based on fundamental fairness.

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-2021-02635 in Executive Session on 11 May 22 and 18 May 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 29 Apr 21.
Exhibit B: Documentary Evidence, including relevant excerpts from official records.

- Exhibit C: Letter, SAF/MRBC, w/atch (Post-Service Request), dated 7 Apr 22.
Exhibit D: Letter, SAF/MRBC, w/atch (Liberal Consideration Guidance),
dated 13 Apr 22.
Exhibit E: Advisory Opinion, AFBCMR Psychological Advisor, dated 14 Apr 22.
Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 18 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.

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Board Operations Manager, AFBCMR