



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02836

Work-Product

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His bad conduct discharge (BCD) be upgraded to honorable.

APPLICANT'S CONTENTIONS

A BCD continues to haunt him to this day. He still has dreams of his court-martial and of being a prisoner in a military jail. This incident happened during the Persian Gulf War when he was stationed overseas on a special duty assignment in a remote location. He had a promising career in the Air Force with a perfect military record, an honorable first enlistment completed, and had just reenlisted, when a one-time isolated incident occurred and took everything away from him. He has paid dearly for this mistake, starting with the time he spent in confinement, followed by a BCD and termination of his military career prematurely. He was reduced in rank to airman basic, lost all pay while he was in confinement, and the next two years, right up to his discharge. When he got out of jail, he was behind on all his bills, his car was repossessed, and his home was in foreclosure because he could not make the mortgage payment.

He has completed his associate's degree in computer information systems, his bachelor's degree in management information systems, and his master's degree in information technology. He is currently drug- and alcohol-free and is a successful network technician.

It will soon be 30 years since this happened. He has made his life better and learned from his mistakes. He is truly sorry for what he did and what it cost him. Since he has made his life better and learned from his mistakes, it is time to move past this BCD and upgrade it to an honorable discharge. It is only then that he will be able to sleep at night and finally put this mistake behind him.

In support of his request for clemency, the applicant provides a personal statement, copies of college graduation certificates, and character reference letters.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 23 Jul 92, according to AF Form 2098, *Duty Status Change*, the applicant's duty status changed from Present for Duty to Confinement (Military). The applicant was tried and found guilty by

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general court-martial for violation of Article 112a [Wrongful use, possession, etc. of controlled substances], Uniform Code of Military Justice (UCMJ), and reduced to airman basic (E-1), forfeiture of all pay and allowances, BCD, and 90 days confinement.

On 12 Oct 92, according to AF Form 2098, the applicant's duty status changed from Confinement (Military) to Present for Duty.

On 17 Oct 93, according to General Court-Martial Order (GCMO) Number [REDACTED] the applicant's sentence to a BCD, confinement for 90 days, total forfeitures, and reduction to airman basic (E-1), as promulgated in GCMO Number [REDACTED], dated 25 Aug 92, has been finally affirmed. Article 71(c) having been complied with, the BCD will be executed. The sentence was adjudged on 23 Jul 92.

On 8 Apr 94, the applicant received a BCD. His Narrative Reason for Separation is "Court-Martial", and he was credited with eight years, seven months, and four days of total active service, with dates of time lost: 23 Jul 92 – 11 Oct 92.

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

POST-SERVICE INFORMATION

On 31 Jul 24, the Board sent the applicant a 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 (Exhibit C). The applicant provided an FBI report. According to the report, the applicant has had no arrests since discharge. The applicant also provided a personal statement, character statements, and college degree certificates with his original application.

The applicant's complete response is at Exhibit D.

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, known as the Wilkie 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 paragraphs 6 and 7 of the Wilkie Memo.

On 31 Jul 24, Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit C).

Department of the Air Force Instruction (DAFI) 36-3211, *Military Separations*, describes the authorized service characterizations.

Honorable. The quality of the airman's service generally has met Department of the 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.

General (Under Honorable Conditions). 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 member's military record.

Under Other than Honorable Conditions. This characterization 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 EVALUATION

The AFRBA Psychological Advisor finds insufficient evidence to support the applicant's request for an upgrade of his discharge based on his mental health condition.

A review of the applicant's available records finds there is no evidence or records to support the notion that his mental health condition, including PTSD, had a direct impact or was a contributing factor to his BCD. The applicant did not clarify his mental health condition of PTSD and how this condition caused his discharge. There are no records to substantiate he had any mental health conditions, including PTSD, during service and no records to confirm he was ever diagnosed with PTSD by a duly qualified mental health provider during his lifetime. The applicant reports in his testimony he still has dreams of his court-martial and being a prisoner in a military jail. From this statement, these experiences appeared to be his traumatic experiences, which were in response to, or the result of, the consequences of his misconduct and court-martial conviction. There are no records corroborating he had a mental health condition prior to his misconduct, at the time of his misconduct, or that his mental health condition caused his misconduct leading to his subsequent BCD. Moreover, the applicant was discharged from service for being convicted at a general court-martial and claims he had a one-time isolated incident. His court-martial records detailing his convicted charge(s) or offense(s) are not available or submitted for review, so his claim is not corroborated by any objective records. It is possible the applicant was involved in and was convicted at a general court-martial for more than one offense. Since the nature of his actual misconduct(s) or offense(s) is unknown at this time, it could not be assessed or determined whether his mental health condition could excuse or mitigate his discharge. Therefore, the presumption of regularity is applied in this situation to conclude there is no error or injustice with his discharge. A conviction at a general court-martial is a serious matter and this psychological advisor finds his testimony for this petition to be insufficient and not compelling to support his request for an upgrade of his discharge, especially without records to support his claims and contentions. After an exhaustive review of the available records, this psychological advisor finds no identifiable error or injustice with the applicant's discharge from service from a mental health perspective.

Liberal consideration is applied to the applicant's request due to his contention of having a mental health condition. It is reminded liberal consideration does not mandate an upgrade per policy guidance. The following are answers to the four questions from the Kurta Memorandum from the available records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?

The applicant marked "PTSD" on his application and contends he still has dreams of his court-martial and being a prisoner in a military jail. He claims it was a one-time incident occurring during the Persian Gulf War when he was stationed overseas on a special duty assignment in a remote location. The applicant did not clarify the one-time incident and did not discuss how his mental health condition may excuse or mitigate his discharge.

2. Did the condition exist, or experience occur, during military service?

There is no evidence or records his mental health condition, including PTSD, had existed or occurred during his military service. His service treatment records are not available or submitted for review. There are no records reflecting the applicant was ever diagnosed with PTSD by a duly qualified mental health professional.

3. Does the condition or experience actually excuse or mitigate the discharge?

There is no evidence or records the applicant's mental health condition, including PTSD, was a contributing factor or had a direct impact on his general court-martial conviction and BCD. His traumatic experiences were in response to, or the result of, the consequences of his misconduct

and court-martial conviction based on his statement. There are no records corroborating the applicant had a mental health condition prior to his misconduct, at the time of his misconduct, or that his mental health condition caused his misconduct leading to his subsequent BCD. Therefore, his mental health condition does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

Since the applicant's mental health condition does not excuse or mitigate his discharge, his mental health condition also does not outweigh his original discharge.

The complete advisory opinion is at Exhibit E.

AF/JAJI recommends denying the application. After a thorough review of the available documents, no additional information has been provided by the applicant to suggest clemency in the form of a discharge upgrade is warranted.

As a preliminary matter, since this application pertains to a court-martial, Board action can only be on the basis of clemency and not on the basis of error or injustice. The Air Force Board for Correction of Military Records (AFBCMR) authority stems from Title 10, United States Code § 1552 (10 USC § 1552). In accordance with Section 1552 (f), the AFBCMR cannot correct court-martial records unless the correction is one of two types of action: 1) correction of a record to reflect an action taken by review authorities under "chapter 47 of this title" (i.e., the UCMJ); or 2) action on the sentence of a court-martial for purposes of clemency. Hence, AFBCMR corrections can merely reflect actions regarding a court-martial that were already taken by review authorities under the UCMJ (such as convening authority clemency, or appellate corrections); or the AFBCMR can take action only on the sentence, but even then, only on the basis of clemency (not any alleged error or injustice).

On 8 Apr 94, the applicant was discharged as an airman basic (E-1) from the Air Force with a BCD. The BCD characterization was the result of a general court-martial finding the applicant guilty of violating Article 112a, UCMJ in 1992. AF Form 2098 is the only document to mention the type of misconduct: Article 112a, UCMJ. Article 112a, UCMJ is wrongful drug use, possession, etc. The facts of the misconduct are not provided by any documents attached to this application. The applicant served some amount of confinement, 90 days or less, with the actual amount of confinement served unknown.

The applicant contends he paid dearly for the mistake he made during the Persian Gulf War while on a special duty assignment to Panama, a remote location at the time, that led to his court-martial, confinement, and BCD. He states the mistake was a one-time isolated event, that he suffered the consequences, and now he is drug- and alcohol-free and a successful network technician. It has been more than 30 years since the incident, and the applicant contends he has made his life better and learned from his past. He states he is truly sorry for what he did and what it cost him. He states he has dreams of his court-martial and being a prisoner in a military jail, and he wants to get past this part of his life for good. Upgrading his discharge characterization to honorable, he asserts, would accomplish that for him. On his DD Form 149, *Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section 1552*, the applicant selected "PTSD" in Box 13 on page 1; however, he did not provide any information relating to PTSD in his application or attachments.

In support of his request, the applicant attached a copy of his associate's degree diploma, his bachelor's degree diploma, his master's degree diploma, three character letters, his DD Form 214 from his last discharge from enlistment, a supporting document with additional information about

his request to upgrade his BCD to an honorable discharge, and his FBI fingerprint search results, totaling 14 pages.

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant on 31 Jul 24 for comment (Exhibit G) but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed. Given the requirement for passage of time, all discharge upgrade requests under fundamental fairness or clemency are technically untimely. However, it would be illogical to deny a discharge upgrade 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 USC § 1552(b).

2. The applicant exhausted all available non-judicial relief before applying to the Board.

3. After reviewing all Exhibits, the majority of the Board concludes the applicant is the victim of an injustice. While the majority of the Board notes the rationale of the AFRBA Psychological Advisor and rationale and recommendation of AF/JAJI against correcting the record, the Board finds a preponderance of the evidence substantiates the applicant's contentions in part. While the applicant selected "PTSD" on his DD Form 149, he does not discuss or provide any supporting evidence of this mental health condition and the role it plays in his request for upgrade. Additionally, there are no records to substantiate he had any mental health conditions, including PTSD, during service and no records to confirm he was ever diagnosed with PTSD by a duly qualified mental health provider during his lifetime. Liberal consideration was applied; however, the applicant's mental health condition does not excuse or mitigate his discharge. Additionally, the Board finds no evidence the sentence of the military court was improper or that it exceeded the limitations set forth in the Uniform Code of Military Justice.

However, based on the passage of time, the overall quality of the applicant's service, and the applicant's post-service conduct, the majority of the Board concludes relief is warranted on grounds of clemency. Specifically, the applicant has provided character references and copies of his diplomas awarded for his associate in applied science degree, bachelor of science degree, and master of science degree, which is sufficient to justify granting the applicant's request to upgrade his service characterization. In accordance with paragraph 7 of the Wilkie Memo, the Board considered the length of time since discharge, the applicant's acceptance of responsibility and remorse, and evidence of rehabilitation. While the nature of his misconduct warranted trial by court-martial, his pursuit of higher education post-service reflects his efforts to leave this misconduct in the past. Finally, the positive character references and the absence of any reported criminal activity since his discharge supports his intent to be a law-abiding member of his community.

However, for the remainder of the applicant's request, the evidence presented did not demonstrate an error or injustice, and the Board therefore finds no basis to recommend granting that portion of the applicant's request. Therefore, the majority of the Board recommends correcting the applicant's records as indicated below.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to the APPLICANT be corrected to show that on 8 Apr 94, he was discharged with service characterized as general (under honorable conditions), and a separation code and corresponding narrative reason for separation of JFF (Secretarial Authority).

However, regarding the remainder of the applicant's request, the Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the application will only be reconsidered upon receipt of relevant evidence not already considered by the Board.

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-2021-02836 in Executive Session on 16 Oct 24:

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Panel Chair

Work-Product

Panel Member

Work-Product

Panel Member

A majority of the panel voted to correct the record. Work-Product voted not to correct the record. Work-Product did not provide a minority opinion. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 13 Aug 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 31 Jul 24.

Exhibit D: FBI Report, dated, 26 Jan 22.

Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 3 Jun 24.

Exhibit F: Advisory Opinion, AF/JAJI, dated 9 Jul 24.

Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 31 Jul 24.

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.

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