

## RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2021-03209

COUNSEL: NONE

HEARING REQUESTED: NO

### APPLICANT'S REQUEST

His bad conduct discharge (BCD) be upgraded to an unspecified character of service.

### APPLICANT'S CONTENTIONS

He requests an upgrade to his discharge in order to receive Department of Veterans Affairs (DVA) benefits for mental and medical treatment by virtue of service completed and awards given during his four-year tenure of which time he served faithfully and in line of duty assisting with transporting treatment of service men and women on medevac flights stateside. He was not aware of the right to appeal due to mental instability and shock of outcome.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

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

According to General Court-Martial Order Number Wo... dated 6 Mar 92, the applicant was found guilty of the following charges and specifications, sentenced to a BCD, confinement for 18 months, and reduction in grade to airman basic:

Charge I: Article 129:

Specification 1: Did, on or about (o/a) 13 Jul 91, in the nighttime, unlawfully break and enter the dwelling of \*\*\*\*\* (name withheld) with intent to commit indecent assault.

Specification 2: Did, between o/a 24 May 91 and o/a 31 May 91, in the nighttime, unlawfully break and enter the dwelling of \*\*\*\*\* (name withheld) with intent to commit indecent assault.

Specification 3: Did, between o/a 1 May 91 and o/a 30 Jun 91, in the nighttime, unlawfully break and enter the dwelling of \*\*\*\*\* (name withheld) with intent to commit indecent assault.

Specification 4: Did, o/a 15 Aug 91, in the nighttime, unlawfully break and enter the dwelling of \*\*\*\*\* (name withheld) with intent to commit indecent assault.

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Work-Product

Controlled by: SAF/MRB

Work-Product

Limited Dissemination Control: N/A

POC: [SAF.MRBC.Workflow@us.af.mil](mailto:SAF.MRBC.Workflow@us.af.mil)

Specification 5: Did, between o/a 2 Aug 91 and o/a 16 Aug 91, unlawfully break and enter the dwelling of \*\*\*\*\* (name withheld) with intent to commit indecent assault.

Charge II: Article 134:

Specification 1: Did, o/a 13 Jul 91, commit an indecent assault upon \*\*\*\*\* (name withheld).

Specification 2: Did, between o/a 24 May 91 and o/a 31 May 91, commit an indecent assault upon \*\*\*\*\* (name withheld).

Specification 3: Did, between o/a 1 May 91 and o/a 30 Jun 91, commit an indecent assault upon \*\*\*\*\* (name withheld).

Specification 4: Did, o/a 15 August 1991, commit an indecent assault upon \*\*\*\*\* (name withheld).

Specification 5: Did, between o/a 2 Aug 91 and o/a 16 Aug 91, commit an indecent assault upon \*\*\*\*\* (name withheld).

Specification 6: Did, on divers occasions between o/a 24 Jul 91 and o/a 15 Aug 91, unlawfully enter the dwelling of \*\*\*\*\* (name withheld).

On 29 Jul 94, the applicant received a BCD with narrative reason for separation of, "Court Martial (Other)." He was credited with 5 years, 5 months, and 14 days of active service and time lost from 9 Jan 92 to 14 Mar 93.

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

## **POST-SERVICE INFORMATION**

On 3 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**

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 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 paragraphs 6 and 7 of the Wilkie Memorandum.

On 3 Mar 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit C).

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

**Honorable.** The quality of the member'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 EVALUATION

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 his discharge. The applicant has not met the burden of proof to support his request. The applicant did not specifically or clearly contend his mental health condition had a direct impact to his behaviors and misconduct resulting with his BCD. He is requesting to receive mental health and medical treatment and benefits from the DVA and said his delayed appeal was due to mental instability and shock of outcome. Again, he did not clarify his mental instability such as his actual condition and/or when his mental instability had occurred affecting his behaviors during service and the shock of outcome, possibly referring to his court-martial conviction. Either way, there were no records or evidence presented to support he had a mental health condition during service. Hypothetically even if he had made a contention his mental health condition had impacted his behaviors, his mental health condition could not and does not excuse his discharge. This is because his numerous misconducts occurring over several months on more than one occasion and possibly involving multiple individuals, and for which he had been convicted at a general court-martial, were egregious. These behaviors could not be disregarded or mitigated even by his mental health condition. Therefore, the Psychological Advisor finds no error or injustice with his discharge from service.

The Board may elect to apply liberal consideration to the applicant's request. The following are responses to the four questions from the Kurta memorandum 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 is requesting to receive DVA benefits for mental health and medical treatment as he had served faithfully for four years and was not aware of the right to appeal due to mental instability and shock of outcome. He did not make any specific contentions his mental health condition had impacted or caused his behaviors and discharge.

2. Did the condition exist or experience occur during military service? The applicant's service treatment records were not available for review and so there were no objective service records to substantiate he had any mental health condition that had existed or was experienced during military service. There were no post-service treatment records submitted as well.

3. Does the condition or experience excuse or mitigate the discharge? The applicant's numerous behaviors and misconduct for which he was convicted at a general court-martial were egregious and serious offenses. Due to these reasons, 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 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 23 Aug 22 for comment (Exhibit E) but has received no response.

## FINDINGS AND CONCLUSION

1. The application is timely. 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 limitations 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 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. However, given the lack of evidence including the absence of post-service information and a criminal history report, the Board finds no basis for clemency in the case. Furthermore, the Board considered liberal consideration based on the applicant's contention of a mental health condition. However, 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. Specifically, the Board does not find evidence the applicant's mental health condition excused or mitigated his serious behaviors and misconduct resulting with his BCD. Therefore, 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 DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2021-03209 in Executive Session on 30 Nov 22:

Work-Product

, 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/atch, dated 23 Sep 21.

Exhibit B: Documentary Evidence, including relevant excerpts from official records.

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Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 3 Mar 22.

Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 17 Aug 22.

Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 23 Aug 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.

12/5/2023

X

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Board Operations Manager, AFBCMR

Signed by: Work-Product