



**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-2021-03315

*Work-Product*

**COUNSEL:** NONE

**HEARING REQUESTED:** YES

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**APPLICANT'S REQUEST**

1. His bad conduct discharge (BCD) be upgraded to honorable.
2. His reentry (RE) code of "2M," which denotes "Serving a sentence or suspended sentence of court-martial; or separated while serving a sentence or suspended sentence of court-martial" be upgraded.
3. He be given a medical separation.

**APPLICANT'S CONTENTIONS**

He suffered from undiagnosed Post-Traumatic Stress Disorder (PTSD) during the time of the incident which was the direct reason for his conviction. He was self-medicating with alcohol at the time and the Air Force did not provide to him the proper medical attention for his disability. Statements made at his trial and in court documents clearly show the Air Force was aware of his behavior before his conviction. He is currently rated at 100 percent permanent and totally disabled from the Department of Veterans Affairs (DVA) and has not had any issues with alcohol since his conviction. He has continued to receive treatment for PTSD from the DVA for the past 16 years.

The applicant's complete submission is at Exhibit A.

**STATEMENT OF FACTS**

The applicant is a former Air Force Reserve senior airman (E-4).

On 3 Jul 02, the convening authority published General Court-Martial Order **w.** The order stated the applicant pled guilty to one charge and four specifications of indecent assault, drunk and disorderly misconduct, and use of derogatory language (Article 134). The applicant was sentenced to confinement for eight months, reduction to the grade of senior airman (E-4), and discharged from the service with a BCD. The forfeiture of \$837.00 pay per month was waived and was directed to be paid for the benefit of the accused's dependent children.

**AFBCMR Docket Number BC-2021-03315  
CUI//SP-MIL/SP-PRVCY**

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

On 30 Jun 04, the convening authority published General Court-Martial Order [REDACTED] This order rescinded the previous order and reduced his confinement to seven months, which was noted as having been served.

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

**POST-SERVICE INFORMATION**

On 5 May 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?

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

- 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 5 May 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit E).

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.
- 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. The applicant's medical records from the military were not available for review and the applicant did not submit any records. Since these vital records are unavailable, it deprives this psychological advisor an opportunity to assess them and be able to compare and contrast his objective military files to his contentions for this petition. His DVA records however, dispute the applicant's contentions. His DVA records reported he had a history of PTSD, alcohol dependency, depression and anxiety to including receiving alcohol and psychiatry services prior to his first encounter with the DVA for mental health treatment in Oct 01. Additionally, he reported to his DVA provider he began to experience PTSD symptoms in the 1980's and was prescribed Paxil for PTSD and was diagnosed with Bipolar Disorder and PTSD in 1998 or 1989 while at Meadows Edge Recovery Center. This information collected from different DVA providers at various times indicate the applicant was treated for and diagnosed with PTSD prior to his misconduct in Mar 01, negating his claim of having undiagnosed PTSD at the time of the incident.

In regards to the military being aware of his condition and mental health treatment, this impression is questionable. The applicant was a traditional Reservist for the majority of his military career and so his contact with military providers was probably minimal. This is speculative as his service treatment records are unavailable; however, this psychological advisor finds it highly doubtful they were aware of his mental health condition. If the military had knowledge of his extensive mental health history consisting of inpatient treatment in 1998, being diagnosed with Bipolar Disorder and PTSD, and taking a psychotropic medication like Paxil as he reported to the DVA, a review of his treatment records would be warranted and he would require a waiver to remain in the service. Based on the applicant's contention, it did not appear these actions had occurred but notwithstanding assuming that the applicant's report to the DVA was true and accurate. His treatment records prior Oct 01 were also unavailable and it appeared the applicant may be an unreliable historian based on inconsistent reports documented in his DVA records. Despite this anomaly, the fact is his service treatment records are missing and without them, could not demonstrate an error or injustice had occurred with his records and presumption of regularity is applied. The applicant claimed the military was aware of his behaviors during his court-martial, but his court-martial proceeding records were also unavailable for review. Existing records find the applicant had informed his DVA provider he began to have PTSD symptoms in the 1980's presumably from his active duty service as a fire fighter. If this was the case that he developed PTSD from his active duty service, his condition would be considered as a prior service impairment since he had later transferred to the Reserve. It appeared his condition of PTSD did not impact his functioning on his active duty service as he was able to successfully complete his obligation and earned an honorable discharge. The applicant was determined to be fit for duty because he was able to meet accession standards in order to transfer to the Reserve after his discharge from active duty. His DVA records reported his condition of PTSD was also caused by his deployment experiences to Iraq, twice. There were no records supporting he was ever deployed to Iraq and if he did, there was no positive in line of duty (ILOD) or line of duty (LOD) determination found in his military records for his mental health condition. This is especially relevant since he was a Reservist and would be required for consideration for a medical discharge. There was no evidence

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

his prior service impairment was aggravated by his military duties with the Reserve, and no records supporting his mental health condition had impaired his ability to reasonably perform his military duties in accordance to his office, grade, rank or rating. Indeed, the applicant had stated he had stellar performance ratings and a review of all his available Airman/Enlisted Performance Reports from 12 Dec 85 until his last report ending on 31 Aug 99 substantiates his report. He had received maximum ratings on all performance evaluations signifying there were no impairments to his occupational functioning especially by a mental health condition. There were no records of any duty limiting conditions profiles for his mental health condition in place, and no statements in his records declaring he was not worldwide qualified. The applicant had received mental health treatment and diagnosis prior to his misconduct according his DVA records, but receiving treatment and a diagnosis do not automatically make his mental health condition as unfitting for continued military service. There was no evidence mental health condition had elevated to potentially unfitting that would meet criteria for a referral to the medical evaluation board (MEB) for a possible medical discharge. As such, there is insufficient evidence to support his request for a medical discharge for PTSD or any other mental health condition.

For awareness since the applicant reported receiving service connected disability from the DVA. The military's Disability Evaluation System (DES), established to maintain a fit and vital fighting force, can by law, under Title 10, U.S.C., only offer compensation for those service incurred diseases or injuries which specifically rendered a member unfit for continued active service and were the cause for career termination; and then only for the degree of impairment present at the "snapshot" time of separation and not based on post-service progression of disease or injury. To the contrary, the DVA, operating under a different set of law, Title 38, USC, is empowered to offer compensation for *any* medical condition with an established nexus with military service, without regard to its impact upon a member's fitness to serve, the narrative reason for release from service, or the length time transpired since the date of discharge. The DVA may also conduct periodic reevaluations for the purpose of adjusting the disability rating awards as the level of impairment from a given medical condition may vary [improve or worsen] over the lifetime of the veteran.

The applicant is also requesting an honorable discharge. It is acknowledged that at the time of his misconduct, the applicant was intoxicated and his DVA records show he had pre-existing alcohol dependency problems. Alcohol abuse and dependency problems are considered to be unsuited for service. It is very plausible he was self-medicating as he contended, but this psychological advisor opines that the egregious nature of his misconduct, which included assaulting and violating an individual and endangering and threatening her safety and others on an airplane, resulting in his court martial conviction could not be overlooked. These are very serious offenses that could not be excused or mitigated by his mental health condition. As a result, this psychological advisor finds insufficient evidence an error or injustice had existed with this 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?

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

The applicant contends he had undiagnosed PTSD and was self-medicating with alcohol at the time his misconduct. He believed he should have been medically discharged for PTSD.

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

His DVA records reported he had received a diagnosis of PTSD as early as in 1998 and had received mental health treatment for PTSD and other mental health conditions prior to his misconduct, which disputes the applicant's contention of having undiagnosed PTSD. It is uncertain if the applicant had ever informed his military providers of his condition and treatment as he was a traditional Reservist and he was receiving treatment from off base and non-military providers. His DVA records also reported he began experiencing PTSD symptoms in 1980's presumably coinciding with his time on active duty service rendering his condition as a prior service impairment. His service treatment records are not available for review to corroborate any of these information.

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

There is no evidence his mental health condition was determined to be unfitting for continued military service and no records his mental health condition had interfered with his ability to perform his military duties. There is no evidence his prior service impairment sustained from active duty service was aggravated by his military duties with the Reserve, and there was no ILOD or LOD determination for his mental health condition. Therefore, his request for a medical discharge for his mental health condition could not be supported. There is evidence the applicant had alcohol dependency issues and was intoxicated at the time of his misconduct and it is possible he was self-medicating as the applicant claimed. However, due the egregious and serious nature of 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 C.

**APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 4 May 22 for comment (Exhibit D), but has received no response.

**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. 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 of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. Liberal consideration was applied to the applicant's request due to the contention of a mental health condition, however, since there is no evidence his mental health condition had a direct impact on his behaviors and misconduct resulting with his discharge, his condition or experience does not excuse, mitigate, or outweigh his discharge. Furthermore, 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. The Board also considered the passage of time, the overall quality of the applicant's service, and the seriousness of the offenses committed, however, in the absence of post-service information and a criminal history report, the Board finds no basis for fundamental fairness in the case. 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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2021-03315 in Executive Session on 22 Jun 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, dated 14 Sep 21.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFRBA Psychological Advisor, dated 27 Jan 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 4 May 22.
- Exhibit E: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 5 May 22.

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

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.

3/16/2023



Board Operations Manager, AFBCMR  
Signed by: USAF