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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2021-03447

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His general (under honorable conditions) discharge be upgraded to honorable.

APPLICANT'S CONTENTIONS

Upon discharge in Jun 99, he suffered from an untreated mental health condition, insomnia, while in service. He never intended for his undiagnosed mental health condition to affect his overall performance while serving. After his overseas tour, he often experienced unexplained chronic fatigue and behavioral changes that resulted in reduction in grade, pay and administrative actions. He should have been discharged for medical reasons and not administratively discharged. He fully acknowledges his conduct was inappropriate and unbecoming of a service member. Since his discharge, he earned three college degrees, became a devoted father, and currently certified as a law enforcement officer, police instructor and arson investigator.

In support of his request, the applicant provides numerous post service certificates of achievement, graduation certificates and various other documents related to his request for upgrade.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman (E-2).

On 1 Jun 99, the applicant's commander recommended he be discharged from the Air Force, for a Pattern of Misconduct, under the provisions of AFD 36-32, *Military Retirements and Separations* and AFI 36-3208, *Administrative Separation of Airmen*, chapter 5, section H, paragraph 5.50. The specific reasons for the action were:

- a. On 22 Oct 98, the applicant received a Letter of Reprimand (LOR) for falling asleep on post and failing to acknowledge his radio during a routine security status check.

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Controlled by: SAF/MRB
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- b. On 31 Oct 98, the applicant received a Letter of Counseling for responding inappropriately, being non conducive to teamwork, lacking respect for a senior ranking airman and failing to follow simple instructions. As a result, the applicant was verbally reprimanded.
- c. On 19 Nov 98, the applicant received an Article 15 for sleeping on post while posted as a sentinel. As a result, the applicant was demoted to the grade of airman, forfeiture of \$100.00 pay per month for 2 months and an Unfavorable Information File (UIF) was established.
- d. On 9 Feb 99, the applicant received vacation of suspended nonjudicial punishment for failing to remain alert and vigilant in securing his area of responsibility. As a result, the applicant's suspended reduction to the grade of airman was vacated with a new date of rank of 19 Nov 98.
- e. On 4 Apr 99, the applicant received a LOR for being disrespectful towards a flight chief.
- f. On 6 May 99, the applicant received an Article 15 for failing to go at the prescribed time to his appointed place of duty and being disorderly. As a result, the applicant was ordered forfeiture of \$300.00 pay per month for 2 months and reprimanded. The forfeiture of pay was remitted on 24 May 99. The applicant was also restricted to the base.

In an undated memorandum the staff judge advocate found the discharge action legally sufficient.

In an undated memorandum, the discharge authority directed the applicant be discharged for a Pattern of Misconduct, under the provisions of AFD 36-32, chapter 5, section H, paragraph 5.50, with a general (under honorable conditions) service characterization. Probation and rehabilitation were considered, but not offered.

On 23 Jun 99, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Pattern of Misconduct." He was credited with one year, five months, and three days of total active service.

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

POST-SERVICE INFORMATION

On 25 Feb 22, the Board sent the applicant a request for any additional post-service information he may wish the Board to consider (Exhibit C); however, he has not replied. However, the applicant did provide numerous post-service certificates of achievement, graduation certificates and other documents related to his request for upgrade with his initial application (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 (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.

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On 25 Feb 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.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor finds no error or injustice with the applicant's discharge and finds insufficient evidence to support his request for an upgrade to honorable and/or for a medical discharge.

The applicant's contentions are not supported by his objective military records and his post-service Department of Veterans (DVA) treatment records. The applicant was found to have fallen asleep while on post at least twice while he was deployed. Upon his return from deployment, his leadership having recognized a potential problem, took initiative and had him evaluated by a medical provider for potential sleep issues. A Memo for Record dated on 20 May 99 by his first sergeant reported, "The medical report showed that there was no physical reason to cause the airman to sleep or be inattentive on post" and was returned to flight. Although his service treatment records were unavailable to corroborate his first sergeant's report, his Compensation and Pension (C&P) exam performed by the DVA substantiated this report. The C&P evaluator performed a records review of his service treatment records and discovered the medical evaluation performed during service found no evidence of a sleep disorder and his sleep complaints were attributed to his varying shift work schedule. The evaluator added there was no evidence of a sleep disorder after discharge as well. This information would dispute the applicant's contention that he had an undiagnosed and untreated sleep disorder because he was actually evaluated and was not found to have a sleep disorder. He was not undiagnosed because his sleep condition had been ruled out, and he was not untreated because there was no sleep disorder that had existed to be treated. There was also no evidence he had any mental health conditions such as anxiety, depression, etc. during service. The applicant reported in his response to his discharge action he voluntarily sought counseling for anger management but this does not indicate he had a mental health condition or mental disorder. He also stated he was evaluated by a mental health provider in the same statement and said the provider informed him there was "no need for alarm" and recommended he be returned to duty. The C&P evaluator substantiated this report and found he did not have any chronic psychiatric conditions but had occupational problems, which is not a mental disorder. There was no evidence he had or was diagnosed with any mental health conditions to include various forms of a sleep disorder during service; therefore, his mental health condition did not have a direct impact or caused his behaviors and misconduct resulting with his discharge from service. The

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applicant had engaged in numerous misconducts and submitted multiple statements to his disciplinary and discharge actions. He never reported he had any mental health conditions such as anxiety, depression, etc. that caused his behaviors at the snapshot in time of service and no evidence existed to support this notion.

Addressing the applicant's request for a medical discharge, the applicant was reported to not have any mental disorders or conditions during service. Since there was no mental disorder diagnosis, he would not have any potentially unfitting mental health conditions to include insomnia or any variation of a sleep disorder that would warrant a referral to the Medical Evaluation Board for a possible medical discharge. There was no evidence he was ever placed on a duty limiting conditions profile and never declared not worldwide qualified due to his mental health condition. His leadership did have concerns over potential physical or mental health concerns associated with his sleep behaviors on duty but, these issues had been ruled out through both a medical and mental health evaluation. There were no reports from his leadership of any observed mental health concerns that may have impacted his ability to reasonably perform his military duties in accordance to his office, grade, rank or rating. The applicant was not diagnosed with any mental or psychiatric disorders. He was diagnosed with general anxiety disorder (GAD) and sleep apnea by his DVA psychiatrist over 10 years post discharge. His condition of GAD was reported to be caused by his post service stressors and not his military service. His condition of sleep apnea appeared to have developed post-service and there was no evidence of any sleep disorders during service. The applicant cited he is receiving service-connected disability from the DVA for his mental health condition.

For awareness, the military's Disability Evaluation System (DES) established to maintain a fit and vital fighting force, can by law, under Title 10, United States Code (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 future progression of injury or illness. On the other hand, operating under a different set of laws (Title 38, U.S.C.), with a different purpose, the DVA is authorized to offer compensation for any medical condition determined service incurred, without regard to and independent of its demonstrated or proven impact upon a service member's retainability, fitness to serve, or the length of time since date of discharge. The DVA is also empowered to conduct periodic re-evaluations for the purpose of adjusting the disability rating awards (increase or decrease) over the lifetime of the veteran.

Liberal consideration is applied to the applicant's request due to his contention of a mental health condition. The following are answers 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 contends he suffered from undiagnosed and untreated insomnia and sleep disturbances causing his behaviors and misconduct resulting with his discharge.
2. Did the condition exist or experience occur during military service?

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There is no evidence the applicant had any mental health conditions to include insomnia or a sleep disorder causing his behaviors and misconduct during military service. He was evaluated by a medical provider during service and was not found to have any physical conditions that would cause his sleep or inattentive issues. He was also evaluated by a mental health provider during service and was not found to have any chronic mental or psychiatric disorders.

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

Since there is no evidence he had any mental health conditions or disorders during service that had impacted or caused his behaviors and misconduct, his mental health condition does not excuse or mitigate his discharge. There was also no evidence he had any unfitting mental health conditions to include insomnia or a sleep disorder that would warrant a medical discharge.

4. Does the condition or experience outweigh the discharge?

Since his mental health condition does not excuse or mitigate his discharge, it also 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 23 Jun 22 for comment (Exhibit E), and the applicant replied on 5 Nov 23. In his response, the applicant contends he recently discovered a letter as part of a settlement agreement in a class action lawsuit where the Department of the Air Force agreed to reconsider service-connected members with evidence of mental health conditions while serving to an automatic upgrade to an honorable characterization of service. He includes his DVA rating showing he is 90 percent disabled, medical records regarding his sleep apnea, and copies of his degree certificates and other training certificates.

The applicant's complete response is at Exhibit F.

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 applications 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. Specifically, the Board finds no evidence to support the applicant had an unfitting mental health condition to include insomnia or a sleep disorder which would warrant a referral to the Medical Evaluation Board for a possible medical separation. 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. In the interest of justice, the Board considered upgrading the discharge based on fundamental fairness; however, given the evidence presented, and in the absence a criminal history report, 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, which could be in the form of a personal statement, character statements, or testimonials from community leaders/members specifically describing how his efforts in the community have impacted others. Should the applicant provide documentation pertaining to his post-service accomplishments and activities, this Board would be willing to review the materials for possible reconsideration of his request 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 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-2021-03447 in Executive Session on 24 Aug 22 and 4 Dec 23:

 Work-Product	Panel Chair
 Work-Product	Panel Member
 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, w/atchs, dated 29 Sep 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 25 Feb 22.
- Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 28 Apr 22.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 23 Jun 22.

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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.

12/15/2023

Work-Product

Board Operations Manager, AFBCMR
Signed by: *Work-Product*