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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-03576

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His bad conduct discharge (BCD) be changed to an under other than honorable conditions discharge.

APPLICANT'S CONTENTIONS

His discharge was inequitable because it was based on one isolated incident in over 72 months of service. His military conduct, performance, attitude and appearance was impeccable prior to his deployment overseas. After returning from deployment, he suffered from undiagnosed/untreated Post-Traumatic Stress Disorder (PTSD) and severe depression which resulted in him acting out of character.

In support of his request, the applicant provides a copy of his Department of Veterans Affairs (DVA) rating decision and three character references.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 29 Dec 97, the convening authority published Special Court-Martial Order Number 1. The Order stated the applicant pled guilty to one charge and two specifications of larceny and wrongful appropriation (Article 121). The applicant was sentenced to confinement 45 days, reduction to the grade of airman basic, and discharged from the service with a BCD.

On 18 Aug 98, according to Special Court-Martial Order Number 12, the sentence to confinement for 45 days, reduction to the grade of airman basic (E-1) was affirmed. As a result, the discharge from the service with a BCD was executed.

On 30 Sep 98, the applicant received a BCD. His narrative reason for separation is "Court-Martial Order No. 12." He was credited with two years and seven days of total active service.

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Controlled by: SAF/MRB
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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 post-service information, including a standard criminal history report from the Federal Bureau of Investigation (FBI); however, he has not replied (Exhibit C).

APPLICABLE AUTHORITY

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

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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 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.

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 finds the applicant has not met the burden of proof to support his request for an upgrade of his discharge. Although it is conceivable he had developed emotional distress, PTSD, and/or severe depression in response to his experiences overseas in Saudi Arabia, the serious offenses of which he had been tried and convicted at special court martial are difficult to overlook or be excused by his mental health condition. The applicant was convicted for stealing on at least three occasions to include stealing a round trip airline ticket that he may have used to travel and commit another act of stealing merchandise according to the timeline of these two events. These two specific events may be considered as premeditated behaviors due to the elaborate scale of committing these acts. His third misconduct of stealing occurring a few months later may or may not be premeditated, but there was a pattern of his behaviors involving theft. His misconduct/behaviors do not appear to be impulsive acts and are not typical behaviors seen in individuals with PTSD or severe depression. There was no evidence he was experiencing an anxiety, PTSD, depressive, manic, psychotic, etc. episode that may cause him to have impaired

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judgment affecting his behaviors. There was no objective evidence to substantiate he had any mental health conditions or concerns during his time in military service. The applicant received service connection by the DVA for PTSD with major depressive disorder that was related to his military duties in Saudi Arabia effective 24 Jun 21, almost 23 years post discharge. There were no explanations provided for how his service connected conditions had caused or affected his behaviors resulting with his discharge. The applicant vaguely contends he was “acting out” but this explanation was found not sufficient enough to excuse or mitigate his discharge. Therefore, the Psychological Advisor finds no error or injustice with his discharge from a mental health perspective.

The Psychological Advisor opines liberal consideration is not required to be applied to the applicant’s petition due to his misconduct possibly being premediated based on the policy’s guidance. Should the Board elect to apply liberal consideration to the applicant’s request due to his contention of a mental health condition, the following are responses based on information presented in the records to the four questions in the Kurta memorandum:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
The applicant contends he suffered from PTSD and severe depression caused by his experiences performing mortuary affairs duties while in Saudi Arabia causing him to act out and saying and doing things that were out of his character.
2. Did the condition exist or experience occur during military service?
The applicant’s service treatment records were unavailable and not submitted for review and so there was no objective evidence to substantiate his condition of PTSD and severe depression had existed during military service. His DVA decision rating letter reported he was given service connection for PTSD with major depressive disorder over 20 years post discharge from his experiences in Saudi Arabia. No specific explanations or symptoms were provided for how he met diagnostic criteria for these conditions.
3. Does the condition or experience excuse or mitigate the discharge?
Giving the applicant the benefit of the doubt that is plausible his condition of PTSD and severe depression may have developed from his military duties while in Saudi Arabia, the nature of his misconduct is not consistent to individuals with PTSD and/or severe depression. His behaviors appeared to be deliberate and not impulsive acts. Due to these reasons, his mental health condition was found to not excuse or mitigate his discharge.
4. Does the condition or experience outweigh the discharge?
Since his mental health condition may not excuse or mitigate his discharge, it also does not outweigh his discharge.

The complete advisory opinion is at Exhibit D.

APPLICANT’S REVIEW OF EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 23 Jun 22 for comment (Exhibit E), but has received no response.

FINDINGS AND CONCLUSION

1. The application is not 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. The Board also considered the passage of time, the overall quality of the applicant's service, the seriousness of the offenses committed. 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. In the interest of justice, the Board considered upgrading the discharge based on fundamental fairness; however, given the evidence presented, the Board finds no basis to do so. Finally, giving the applicant's misconduct and behaviors were possibly premeditated, the Board is satisfied that the application of liberal consideration does not warrant relief. Therefore, the Board recommends against correcting the applicant's record.
4. The applicant has not shown that 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-2021-03576 in Executive Session on 24 Aug 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, w/atchs, dated 7 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 10 May 22.

Exhibit E: Notification of advisory, SAF/MRBC to applicant, dated 23 Jun 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.

5/16/2023

Work-Product

Board Operations Manager, AFBCMR

Signed by: USAF