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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-03607

Work-Product

COUNSEL: *Work-Product*

HEARING REQUESTED: YES

APPLICANT'S REQUEST

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

APPLICANT'S CONTENTIONS

He was diagnosed with Post-Traumatic Stress Disorder (PTSD) that was developed from his deployments to Iraq in 2003 and 2005. He developed symptoms in 2003 and did not receive professional treatment and mental health counseling until 2006. He received disciplinary action for a minor infraction in 2003; appropriating a compact disc player early in his career, the same year he did his first tour in Iraq and began having symptoms of PTSD. He subsequently got reprimanded for riding along with another airman on Internal Security Patrol instead of being in his own vehicle and did not report to duty because he had a scheduled appointment that he informed his superiors about. He was ultimately discharged from service in 2006 for a gun investigation that the government eventually dropped due to lack of evidence and forced statement, which was also the same year he was formally diagnosed with PTSD. He gave his handgun to a friend to hold for him before he deployed to Iraq in 2003. Months later, while he was in Iraq, his friend gave away the handgun and it ended up being used in the commission of a crime with the serial number scratched off. He was out of the country at the time and was unaware of this situation. For the second incident when he sold a different handgun in 2005, he was told the purchaser was over 21 years old and was not a felon. These two incidents occurred while he was in the service when he developed PTSD. On 28 Jun 06, while he was getting ready to deploy for the third time to Iraq, he was surprisingly interrogated without counsel by the Bureau of Alcohol, Tobacco, and Firearms (ATF) agents. His commander ordered him into a small room where ATF agents coerced him into writing a second statement stating he knew the individual was a convicted felon. He was given a Letter of Reprimand (LOR) for being investigated and not convicted of a crime. His case got dismissed at trial in 2008 due to the ATF agents' unlawful coercive tactics and lack of evidence and was only given community service. Due to his early career misconduct accompanied with a serious investigation and an ill-got investigation, his commander used these incidents to administratively separate him from the Air Force. After he was discharged from service, he attended group therapy for PTSD and has received a 100 percent rating for PTSD by the Department of Veterans Affairs (DVA). None of his three infractions were serious and all

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three occurred when he was having PTSD symptoms. His character of service should be upgraded to honorable based on liberal consideration.

In support of his request for clemency, the applicant provides a personal statement and copies of military kudos, his resume, and several character reference letters. Additionally, the applicant provided a Federal Bureau of Investigation (FBI) background check dated 21 Jun 13 showing he was arrested on 30 Jun 07 for a weapons offense. The applicant's case was dismissed without prejudice and he was ordered to perform 80 hours of community service.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 25 Jul 06, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFI 36-3208, *Administrative Separation of Airmen*, paragraphs 5.50.1 and 5.50.2 for a pattern of misconduct, conduct prejudicial to good order and discipline and discreditable involvement with military or civil authorities. The specific reasons for the action were:

- a. On 25 Oct 85, AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, indicates the applicant received nonjudicial punishment (NJP), Article 15 for theft of property and making a false statement. He received a reduction in grade to airman (E-2), suspended until 24 Oct 03, and forfeiture of \$200.00 pay for 2 months.
- b. On 1 Jun 04, a Letter of Counseling (LOC) was issued for failure to adhere to instructions and failure to meet security requirements.
- c. On 10 Dec 04, a LOR was issued for failure to go.
- d. On 17 Jul 06, a LOR was issued for the unlawful sale of firearms.

On 2 Aug 06, the Staff Judge Advocate found the discharge action legally sufficient.

On 7 Aug 06, the discharge authority directed the applicant be discharged for a pattern of misconduct, conduct prejudicial to good order and discipline and discreditable involvement with military or civil authorities, with a general service characterization. Probation and rehabilitation were considered, but not offered.

On 9 Aug 06, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Pattern of Misconduct" and he was credited with four years, six months, and four days of total active service.

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

POST-SERVICE INFORMATION

On 16 Mar 22, 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 replied on 8 Apr 22 and provided a more current FBI report. According to the report, the applicant was arrested on 30 Jun 07 for a weapon offense which was dismissed on 27 Feb 08.

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?

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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 16 Mar 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 completed a review of all available records and finds insufficient evidence to support the applicant's request for the desired changes to his record. A review of the available records finds there was evidence the applicant had deployed to Iraq in 2003 and 2005 respectively, had developed PTSD symptoms from his deployment experiences, was diagnosed with PTSD, and briefly received treatment for PTSD during service. His legal counsel reported he had developed PTSD symptoms in 2003 from his first deployment and while this scenario may have occurred, records reflected he did not report having PTSD symptoms until Jul 06, near the time of his discharge. Regardless of when his PTSD symptoms actually began, what matters most is whether his mental health condition/PTSD had affected and caused his behaviors and misconduct leading to his discharge from service. There is no evidence to support this notion. The applicant may have experienced PTSD symptoms at the time of his misconduct but no compelling evidence exists to support his misconduct was caused or influenced by his condition of PTSD. The applicant's first documented misconduct for wrongfully appropriating a compact disc player occurred on 22 Mar 03. His records however, indicated he received the Air Force Achievement Medal for his outstanding achievement as a Fire Team member while assigned at Kirkuk AB, Iraq from the period of 13 Aug 03 to 14 Nov 03. Based on this timeline of events,

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his misconduct had predated his first deployment to Iraq and thus, it would not be possible his condition of PTSD, allegedly began from this deployment, had caused this early career misconduct resulting with an Article 15.

For the applicant's LOC for riding with another airman instead of in his own vehicle, he explained in his response to his LOC during service the facts were inaccurate and the verbiage was completely untrue. He later understood the seriousness of his action when he was counseled. It appeared he had a misunderstanding of the situation that was able to be clarified and he did not engage in similar incidents afterwards, signifying this misconduct was not caused by his mental health condition. His LOR for failure to report appeared to be caused by miscommunication because the applicant and his legal counsel clarified he had informed all necessary parties involved he had an appointment to repair his vehicle. The applicant had made plans in advance and took appropriate actions for his scheduled appointment according to him to prevent any issues. His actions and decision making surrounding this scenario appeared to be rational and were not congruent to an individual suffering from a mental health condition or emotional distress.

Lastly, pertaining to his investigation involving his weapons, the applicant had explained in his response to his LOR at the snapshot in time of service he knowingly gave his gun to his friend out of concern for his friend's safety and for the friend's protection. He did not know his gun would be used in a crime and the serial number was intact when he gave it to his friend. He also expected to retrieve the gun from his friend when he returned from Work-... and learned after returning from deployment his friend was convicted of a felony by his friend's mother. He denied having knowledge his friend was a convicted felon before the applicant gave him the gun. His legal counsel reported the applicant had given his gun to his friend to hold it for him in 2003 before he deployed, which was a different version of the event. Nevertheless, the applicant did willingly give his gun to his friend. The applicant also explained in his statement to his LOR he purchased his second gun in Dec 05 or Jan 06 and was informed by the store owner that in order to sell it, the buyer needs to be 21 years old and have no felonies. He remembered this information when he sold the gun to a buyer who had told him (applicant) he was 21 years old and had no felonies. His written statement to the ATF agents showed he acknowledged buying the gun knowing he would sell it when he needed the money, which he eventually did when he sold the gun to an individual in Work-Product. The circumstances regarding his handguns were not caused by his mental health or PTSD. He knowingly made the decision to give his gun to his friend for a specific purpose of protection and sold his other gun to a friend who he had vetted to be 21 with no felonies and these behaviors are not consistent to an individual with mental health issues. There was no evidence the applicant had impaired judgment, impulsive behaviors, thought/cognitive issues, etc. which may typically be symptoms of a mental health condition causing any of his behaviors and misconduct during service. He knew what he was doing at the time of each misconduct and although the inadvertent consequences of his decisions were not desirable, he made the decision with thought and consideration that he believed was adequate at the time. He may have already developed PTSD symptoms from his deployment when most of his misconduct had transpired, but there was no evidence his PTSD symptoms had caused him to engage in any of his documented misconduct. They appear to be two mutually exclusive events that had no nexus to one another (mental health condition and misconduct). As such, there was no evidence his mental health condition had a

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direct impact to his discharge and no error or injustice was identified with his discharge from a mental health perspective.

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?

The applicant's legal counsel on behalf of the applicant contends he developed PTSD from his deployments to Iraq in 2003 and 2005. His legal counsel believes his misconduct occurred when he was having PTSD symptoms resulting with his discharge.

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

There is evidence the applicant was diagnosed and received brief treatment for PTSD caused by his deployment experiences in Jul 06, during his military service.

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

The applicant's mental health condition to include PTSD was assessed to have not caused any of his misconduct causing his discharge. His statements in response to his disciplinary actions at the time of service and from his legal counsel's contentions find he had knowingly and purposefully made decisions he believed were appropriate. There was no evidence he had impaired judgment, impulsive behaviors, thought/cognitive issues, or other mental health symptoms causing his behaviors. There was no evidence his mental health condition had a direct impact to his discharge or influenced his behaviors. 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 condition also does not outweigh his original discharge.

The complete advisory opinion is at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 26 Oct 22 for comment (Exhibit F), and the applicant replied on 23 Nov 22. In his response, the applicant's counsel contends the advisory opinion from the AFBCMR Psychological Advisor is flawed when applying the liberal consideration standards, the four questions, to the applicant's mental health contention. The advisor's responses appear to make clear she has not carefully assessed the applicant's petition and condition and has not appropriately applied the memo's guidance and inaccurately frames the applicant's onset of PTSD symptoms. The timing of the applicant's deployments, the onset of the PTSD, and when the applicant may have suffered from PTSD symptoms in relation to his misconduct, are absolutely critical to the Kurta analysis and the outcome of his petition. The advisor completely disregards why service members frequently delay reporting symptoms, and the stigma around seeking behavioral and mental health treatment particularly at that time.

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Considering the importance of all of this for his application, the applicant deserves the utmost care and attention to detail to ensure he is receiving the intended liberal consideration as contemplated by the Memo's guidance.

The applicant provided the following evidence to support his claim. A sworn affidavit from the applicant attesting to his PTSD and the reasons for his delayed mental health treatment and a medical research paper titled *How Trauma Impacts Decision-Making*.

The applicant's complete response is at Exhibit G.

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 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 and recommendation 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, there is no compelling evidence his PTSD symptoms had a direct impact on his behaviors and misconduct resulting with his discharge. Therefore, 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, the Board finds no basis to do so. Based on the available evidence of record, it appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. The applicant has provided no evidence which would lead the Board to believe his service characterization was contrary to the provisions of the governing regulation, unduly harsh, or disproportionate to the offenses committed. In support of his request for an upgrade, the applicant provided an FBI report, character statements, and his resume. The Board contemplated the many principles included in the Wilke Memo to determine whether to grant relief based on an injustice or fundamental fairness. However, the Board does not find the evidence presented is sufficient to conclude the applicant's post-service activities overcome the misconduct for which he was discharged. This Board very carefully weighs requests to upgrade the character of a discharge and in doing so, considers whether the impact of an applicant's contributions to his or her community since leaving the service are substantial enough for the Board to conclude they overcame the misconduct that precipitated the discharge and whether an upgrade of the discharge would create a larger injustice to those who served honorably and earned the characterization of service the applicant seeks. While the applicant has presented some supporting statements indicating he has apparently made a successful post-service transition, the Board does not find the documentation sufficient to conclude they

should upgrade the applicant's discharge at this time. Therefore, the Board recommends against correcting the applicant's records.

The applicant retains the right to request reconsideration of this decision. The applicant may provide post-service evidence depicting his current moral character, occupational, and social advances, in the consideration for an upgrade of discharge characterization due to clemency based on fundamental fairness.

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 the Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2021-03607 in Executive Session on 25 Jan 23:

 <i>Work-Product</i>	Panel Chair
 <i>Work-Product</i>	, Panel Member
 <i>Work-Product</i>	Panel Member

All members voted against correcting the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 3 Nov 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 16 Mar 22.
- Exhibit D: Applicant's Response w/FBI Report, dated, 8 Apr 22.
- Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 25 Oct 22.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 26 Oct 22.
- Exhibit G: Applicant's Response, w/atchs, dated 23 Nov 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.

12/22/2023

Work-Product

Board Operations Manager, AFBCMR

Signed by: *Work-Product*