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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-2021-03754

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His DD Form 214, *Certificate of Release or Discharge from Active Duty*, be corrected to reflect the following:

1. His character of service be upgraded from general to honorable.
2. He was discharged in the grade of senior airman (E-4).
3. His narrative reason for separation be changed to remove Misconduct.

APPLICANT'S CONTENTIONS

His general discharge was the results of a summary court-martial decision made immediately preceding a documented head injury with mood change. His medical records show that he was in a fog with severe headaches during the time of his misconduct. He now receives 100 percent disability rating for his service connected head injury and mood changes from the Department of Veterans Affairs (DVA). He believes his uncharacteristic behavior was a result of his head injury or medication used to treat them.

In support of his request, the applicant provides a personal statement, copies of extracts from his medical records, numerous post-service certificates of achievement, graduation certificates, and various other documents related to his request.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

Between on or about 1 Jan 04 to on or about 31 Oct 04, the applicant stole various items of military property on divers occasions and wrongfully impeded an investigation by throwing various stolen items of military property into the river in an attempt to avoid prosecution.

On 12 Apr 05, the applicant received a Letter of Counseling for failing Initial RFL Quality Control Evaluation.

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Controlled by: SAF/MRB
CUI Categories: SP-MIL/SP-PRVCY
Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

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On 21 Apr 05, the applicant received a Letter of Admonishment for failing to go to his scheduled M-203 firing appointment.

On 27 Sep 05, according to the Offer for Pre-trial Agreement, the applicant pled guilty to one charge and one specification of larceny (Article 121). The applicant also pled guilty to one charge and one specification of obstruction of justice (Article 134).

On 19 Oct 05, according to DD Form 2329, *Record of Trial by Summary Court-Martial*, the applicant was arraigned on one charge of Article 121 and one charge of Article 134. The applicant was found guilty and sentenced to forfeiture of 2/3 pay for 1 month, 30 days of hard labor without confinement and reduction to the grade of airman basic (E-1).

On 17 Jan 06, the applicant's commander recommended the applicant be discharged from the Air Force for Misconduct: Commission of a Serious Offense, Other Serious Offenses. The authority for this action is AFD 36-32, *Military Retirements and Separations*, and AFI 36-3208, *Administrative Separation of Airmen*, paragraph 5.52.3.

On 24 Jan 06, the staff judge advocate found the discharge action legally sufficient.

On 2 Feb 06, the discharge authority directed the applicant be discharged for Misconduct: Commission of a Serious Offense, Other Serious Offenses, with a general (under honorable conditions) service characterization without the offer of probation and rehabilitation.

On 6 Feb 06, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct." He was credited with 3 years, 7 months, and 25 days of total active service.

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

POST-SERVICE INFORMATION

On 28 Feb 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 9 Mar 22 and provided an FBI report. According to the report, the applicant has had no arrests since discharge. The applicant also provided a personal statement dated 20 Mar 22.

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

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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 the supplemental guidance, paragraphs 6 and 7.

On 28 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 completed a review of all available records and finds the applicant has not met the burden of proof to support his request for the desired changes to his records from a mental health perspective. There was evidence the applicant sustained a head injury

during service caused by the hood of his car hitting his head and causing him to experience a brief loss of consciousness. He had developed chronic headaches as a result of his head injury and received medical treatment for his headaches. The extent of his head injury and residual effects from this injury; however, were not clear from his objective service treatment records. There was no clarifying information provided to explain the frequency and severity of these episodes, how long these episodes would last, whether they were temporary, permanent, or eventually dissipated through time, and how these episodes affected his functioning and behaviors in the military. His military records corroborated this report as his performance evaluations reflected no significant performance issues and no reports from his leadership existed of any noted behavioral issues even after his head injury. There were no reports of any mood changes caused by his head injury during his time in service, and he also never received any mental health treatment during service.

The applicant reported having attention deficit disorder (ADD) symptoms, anxiety, depressed mood, and sleep issues to his DVA provider a few months after he was discharged from service. The cause and onset of these symptoms were not reported in his treatment records and there could be many reasons for these symptoms. The fact he was able to attend school, graduate, and obtain employment as an EMT several months after his discharge indicated he had mild or no cognitive difficulties that would cause his poor judgment, decision-making skills, and misconduct. If the applicant had any long-term or permanent cognitive impairments following his head injury, the impairments would have affected his functioning post service. This reported information pertaining to his functioning within one year after his discharge is significant. He had received an evaluation from a DVA psychiatrist three years post discharge and reported having depressed mood, poor concentration, and sleep difficulties. He stated these symptoms have been ongoing for many years with no identifiable trigger or onset reported. There were no cognitive issues that may impair his personal, academic or occupational functioning post service reported by the applicant or his DVA providers.

It was unclear when the applicant's head injury had occurred in relation to his misconduct. The applicant's court-martial records reported he had stolen various military property items on more than one occasion over several months and impeded in the investigation in attempt to avoid prosecution. This described behavior indicated he knew what he was doing and his action could be considered as premeditated behavior. The applicant claimed his misconduct occurred after his head injury but based on these timeline of events, his first misconduct could have occurred prior to his head injury as well. Regardless of when his head injury had occurred, there was no evidence the residual effects of his head injury had a direct impact to his behaviors and misconduct resulting with his summary court-martial conviction and administrative discharge. Therefore, based on the review of the available records, the Psychological Advisor finds no error or injustice with his discharge from service.

Liberal consideration is applied to the applicant's request due to his reported head injury and mood changes. The following are responses based on information presented in the records to the four questions from the Kurta memorandum:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
The applicant contends his summary court-martial was the result of his behaviors following his

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head injury with mood changes and his records showed he was in a “fog” with severe headaches at the time of his misconduct.

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

There is evidence the applicant received treatment for his headaches and reported experiencing episodes of “fog” sustained from a head injury during military service. There was no evidence he reported having any mood changes during service and reported having ADD symptoms, anxiety, depression, and sleep difficulties a few months post service to his DVA providers. The onset or cause of these symptoms were not reported.

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

There was no evidence the applicant had any significant cognitive impairment or mood changes as a result of his injury and no evidence these conditions had a direct impact to his behaviors and misconduct resulting with his summary court martial conviction and discharge. His condition would not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

Since there was no evidence his mental health condition may excuse or mitigate his discharge, his condition also does not outweigh his 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 14 Jun 22 for comment (Exhibit F), 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, and the seriousness of the offenses committed. 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. Therefore the applicant’s requests to change his grade, narrative reason for separation and to upgrade his discharge are denied. 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 found to be

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premediated, the Board is satisfied that the application of liberal consideration does not warrant relief. Therefore, the Board recommends against correcting the applicant's record.



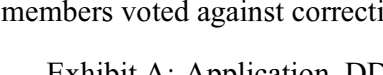
4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

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-2021-03754 in Executive Session on 24 Aug 22:


 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/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 28 Feb 22.
- Exhibit D: FBI Report, dated, 9 Mar 22.
- Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 7 Jun 22.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 14 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.

5/17/2023



Board Operations Manager, AFBCMR
Signed by: USAF