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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-2021-03873

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

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

APPLICANT'S CONTENTIONS

During his time in the military, he was suffering severe depression and anxiety because of significant family issues and the divorce of his parents. He was young and feels his ignorance should not be held against him.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 27 Jun 79, the convening authority published Special Court-Martial Order Number █. The order stated the applicant pled guilty to one charge and one specification of absenting himself from his organization on or about (o/a) 22 Jan 79 until o/a 25 May 79 (Article 86). The applicant was sentenced to be discharged with a bad conduct discharge but was changed to the lesser punishment of confinement at hard labor for six months and forfeitures of \$279.00 per month for six months.

On 17 Jul 79, according to DD Form 1479, *Prisoner Assignment and Clemency Board Action*, the board, based on the applicant's statement that he did not desire to return to duty, recommended the applicant be discharged from the Air Force.

On 30 Jul 79, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFM 39-12, *Separation for Unsuitability, Misconduct, Resignation, or Request for Discharge for the Good of the Service and Procedures for the Rehabilitation Program*, for frequent involvement of a discreditable nature with civil or military authorities with an under other than honorable conditions discharge. The specific reasons for the action were:

a. He was absent without leave (AWOL) from o/a 7 Nov 78, until o/a 14 Nov 78, o/a 28 Nov 78 until o/a 1 Dec 78; and on 4 Dec 78, he failed to go to his appointed place of duty. As a result, he was issued nonjudicial punishment (NJP) action pursuant to Article 15, Uniform Code of Military Justice (UCMJ).

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b. On 13 Dec 78, 0730 hours to 14 Dec 78, 0745 hours, he failed to report for duty or to sick call. As a result, he was issued a letter of reprimand (LOR).

c. He was AWOL from o/a 22 Jan 79 until o/a 25 May 79. As a result, he was convicted by a Special Court-Martial.

On 23 Aug 79, the Chief, Legal Assistance and Preventative Law found the discharge action legally sufficient. It was noted the applicant, upon consulting counsel, submitted an unconditional waiver of his right to a hearing before an administrative discharge board.

On 4 Sep 79, the discharge authority accepted the applicant's waiver and directed the applicant be discharged under other than honorable conditions. Probation and rehabilitation were not approved due to the applicant's stated desire not to return to duty.

On 19 Sep 79, the applicant underwent a mental status evaluation and the results indicated he did not have a significant mental illness, was mentally responsible, able to distinguish between right and wrong, able to adhere to the right, and had the mental capacity to understand and participate in board proceedings.

On 4 Oct 79, the applicant received an under other than honorable conditions discharge with narrative reason for separation of "misconduct - frequent involvement with civil/military authorities - board waiver." He was credited with 11 months and 4 days of total active service with multiple periods of lost time.

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

POST-SERVICE INFORMATION

On 19 Jan 22, the Board sent the applicant a standard request for post-service information. This letter informed the applicant that a Federal Bureau of Investigation (FBI) background check would assist the Board in evaluating his case under clemency. Although the applicant did reply to the request for post-service information (Exhibit D) his response did not include an FBI background check or other criminal history data. In the applicant's response, he provided a personal statement, copies of letters of support, and state security officer and firearms identification cards.

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

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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 19 Jan 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit C).

Department of the Air Force (DAFI), *Administrative Separation of Airmen*, describes the types of service characterization:

Honorable. The quality of the member's service generally has met DAF 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 a member's service has been honest and faithful, this characterization is warranted when negative aspects of the member's conduct or performance of duty outweigh positive aspects of the member's military record.

Under Other than Honorable Conditions. This is used 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 members. 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.

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- Acts or omissions that endanger the health and welfare of other members of the DAF.
- 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 abuse of a child, sexual harassment, 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 an upgrade of his character of service to general (under honorable conditions) from a mental health perspective. The Board however, may consider applying clemency to the applicant's request due to time lapse since discharge.

The applicant acknowledged he did not seek mental health treatment or counseling during service but when he was evaluated during his separation physical, he denied having any anxiety, depression or any other mental health related issues at the time. There were also no mental health issues reported at the time of his confinement admission evaluation. The applicant contends he did not find a good therapist until the 1980's, potentially several years post discharge, and these records were not submitted for review. Nevertheless, there was no evidence his personal problems caused him to develop any mental health issues/conditions or that his mental health condition had a direct impact on his functioning and misconduct resulting with his discharge. Besides his personal testimony, the applicant did not provide any records to support his contentions and he also did not discuss specifically how his anxiety and depression caused his misconduct and discharge or how severe his symptoms were to cause his misconduct and numerous AWOLs. During his brief time in service, the applicant was AWOL a total of three times to include being AWOL for several months resulting with his Special Court-Martial conviction and had failed to go twice. These are serious offenses and again, there was no evidence he was anxious or depressed causing these misconduct. His military records consistently reported the applicant no longer wanted to be in the military, did not want to return to duty, and believed the military was not a good fit for him. He also reported during his confinement admission evaluation the primary reason he was AWOL was because he was bored with his duty/job. These were very plausible and compelling explanations and more likely than not, were the actual reasons for his behaviors and misconduct as documented. Giving the applicant the benefit of the doubt that it was plausible he was anxious and depressed caused by his family problems, the Psychological Advisor opines his repeated pattern of misconduct and offenses were serious and is rather difficult to be excused or overlooked by his mental health condition. After an exhaustive review of the available records, the Psychological Advisor finds no error or injustice with his discharge from a mental health perspective.

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 had anxiety and depression caused by his parent's marital problems and separation. He joined the military to please his parents and stated he was young and immature at the time.

2. Did the condition exist or experience occur during military service? There was no evidence the applicant had anxiety or depression during military service. He denied having any anxiety, depression, or any other mental health issues during his separation physical and

confinement admission evaluation. He reported he sought therapy for these mental health issues in the 1980's for over a year and these records were not available for review.

3. Does the condition or experience excuse or mitigate the discharge? There was no evidence the applicant's mental health condition had a direct impact to his behaviors and misconduct resulting with his special court-martial conviction and discharge. He reported at the snapshot in time of service he was bored with his job and had personal issues to solve as the reasons for his last AWOL. There was no indication his personal issues caused him to develop any anxiety, depression or other mental health concerns. His 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 22 Jun 22 for comment (Exhibit F), and the applicant replied on 24 Jun 22. In his response, the applicant indicated he contacted his former psychologist and was told records are not kept as far back as the 1980s. He is unable to meet with the psychologist now due to the high fees, coming off Covid, and his work was affected. He indicates he regrets his actions during his military time and asks the Board to consider upgrading his discharge under clemency.

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 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, to include the applicant's response to the advisory opinion, 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 UCMJ. 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 a mental health condition and the Board finds insufficient evidence his condition had a direct impact on his behaviors and misconduct resulting with his discharge. In the interest of justice, the Board also considered the passage of time, the overall quality of the applicant's service, the seriousness of the offenses committed, and the applicant's post-service conduct. However, given the evidence presented and in the absence of a criminal history report, the Board finds no basis for clemency in the case. The applicant retains the right to request reconsideration of this decision. The applicant may provide post-service evidence depicting his good citizenship since his discharge and a criminal history report, in the

consideration for an upgrade of discharge characterization due to clemency. Therefore, the Board recommends against correcting the applicant's records.

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 DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2021-03873 in Executive Session on 21 Sep 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 10 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 19 Jan 22.
- Exhibit D: Applicant's Response, w/atchs, dated 26 Mar 22.
- Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 21 Jun 22.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 22 Jun 22.
- Exhibit G: Applicant's Response, w/atchs, dated 24 Jun 22.

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.

6/27/2023

X **Work-Pro...**

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