



**CUI//SP-MIL/SP-PRVCY**

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

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**RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2022-00088

*Work-Product*

**COUNSEL:** *Work-Product*

**HEARING REQUESTED:** YES

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**APPLICANT'S REQUEST**

1. His under other than honorable conditions (UOTHC) discharge be upgraded to honorable.
2. His narrative reason for separation and corresponding separation code be upgraded to "Secretarial Authority" and "JFF."
3. His reentry (RE) code be upgraded.

**APPLICANT'S CONTENTIONS**

He did not engage in the alleged misconduct and believes the complainants lied in their statements to the Office of Special Investigations (OSI). He believes his counsel at the time failed to pursue various lines of questioning that would have exposed these lies during the Article 32 investigation. He became suicidal because of the result of his Post-Traumatic Stress Disorder (PTSD), stress of his legal case, and the prospect of losing his ability to see his children. Although he did not believe he was guilty of the alleged offenses, he requested a Chapter 4 discharge because he felt he had no other option at the time and his mental state had become clouded by PTSD and related symptoms. Since his discharge, he has been able to maintain a clean record, pursued higher education, and has supported and cared for his children and family.

In support of his request for clemency, the applicant provides a personal statement from him and his current spouse, copies of military kudos, a post-service certificate and character references, college transcripts, medical records, and 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 staff sergeant (E-5).

Dated 22 Mar 10, a legal review, provided by the applicant, of his court-martial case indicates the Staff Judge Advocate recommended all charges and specifications be referred to a trial by court-martial. He was charged with three specifications of sexual assault of his wife and one

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specification of digitally penetrating the genital opening of a female airman while deployed. His commander preferred an additional charge and specification of committing forcible sodomy on his wife.

On 30 Apr 10, the applicant requested a discharge in lieu of a trial by court-martial, indicating he understood, if approved, would result in an UOTHC discharge and confirmed he was counseled by his appointed Area Defense Counsel (ADC).

On 24 May 10, the discharge authority directed the applicant be discharged in lieu of trial by court-martial for misconduct, specifically, spousal sexual assault on multiple occasions and sexually assaulting a female airman in violation of Article 120 of the Uniform Code of Military Justice (UCMJ), with an UOTHC service characterization without the opportunity for probation and rehabilitation.

On 28 May 10, the applicant received a UOTHC discharge. His narrative reason for separation is "Triable by Court-Martial" and he was credited with 10 years, 2 months, and 13 days of total active service.

On 9 Mar 16, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge.

On 1 Feb 17, the AFDRB concluded the discharge was consistent with the procedural and substantive requirements of the discharge regulation and was within the discretion of the discharge authority and the applicant was provided full administrative due process. Furthermore, the Board found no indication that any mental health issues had an impact on the applicant's misconduct or on his discharge.

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

**POST-SERVICE INFORMATION**

On 29 Jul 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 22 Aug 22 and provided an FBI report. According to the report, the applicant has had no arrests since discharge.

The applicant's complete response is at Exhibit G.

**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

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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 the supplemental guidance, paragraphs 6 and 7.

On 29 Jul 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:

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**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 completed a review of all available records and finds insufficient evidence to support the applicant's request for the desired changes to his record. The applicant was never diagnosed with PTSD during service according to his service treatment records. He began to receive mental health treatment as a result of his legal and childhood issues; his legal issues were his primary stressors. His emotional reaction to his legal problems was not unexpected and many individuals in similar circumstances may react in a similar fashion. Through time, his anxiety and depressive symptoms had improved as he had learned and used appropriate coping skills to manage his stressors and his legal issues were resolving. He was given a diagnosis of an Adjustment Disorder with Anxiety and Depressed Mood due to his situational stressor. There was no evidence the applicant experienced any PTSD or PTSD-like symptoms during service and no evidence his PTSD or any other mental health conditions caused his misconduct, legal issues, and subsequent discharge. The applicant was not diagnosed with PTSD caused by his deployment experiences until several years post-discharge. His clinical presentation and presenting problems during and post-service were significantly different—he had anxiety and depressive symptoms from adjusting to his legal and childhood issues during service and he had PTSD symptoms from his deployment experiences post-service. The applicant had completed numerous Post Deployment Health Assessments (PDHA) during service and he did not report having any PTSD symptoms relating to his deployment experiences at those various times. He appeared to have experienced a delayed onset of PTSD that began post-service and is not an unusual occurrence.

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There was no evidence he had PTSD during service that may cause his behaviors and misconduct. The applicant's legal counsel alleges the applicant's mental health condition of PTSD had clouded his mental state when he requested a Chapter 4 for discharge in lieu of court-martial because he felt he had no other options. Again, there was no evidence he had PTSD at the time of his discharge. The applicant was possibly stressed, anxious, and depressed at the time of his decision, and his emotional reaction was not uncommon considering his situation. It is reminded that his options were a UOTHC discharge or a potential court-martial conviction or exoneration. These options may not be ideal to him, but he did have legal representation when he applied for a discharge and so he was well-informed of his options when he made the decision. The applicant's Area Defense Counsel (ADC) stated in the request for discharge memorandum dated on 30 Apr 10, "Despite his long record of honorable service, he believes this discharge decision would be the best solution for both the Air Force and himself. He has essentially had to put his life on hold since the investigation into the alleged misconduct began in Feb 09, and he would like to move on so he can address the pending divorce and custody case. He understands that this request may result in an UOTHC service characterization and the stigma that comes with such a discharge; nonetheless, he has chosen to submit the instant request." From this statement, the applicant appeared to be well-aware of his situation and reason for his discharge request. His UOTHC discharge may not be the type of discharge he would ultimately desire to have, but it was a choice he willfully made at the time for various reasons and no evidence his decision was impaired by PTSD or his mental health condition.

The applicant had repeatedly denied the allegations made against him. If his claims were true or substantiated, it would not be possible that his mental health condition caused his misconduct and discharge. There was no evidence he had a mental health condition at the time of any of his reported misconduct. The Psychological Advisor concurs with the AFDRB's previous decision and finds there was no evidence his mental health condition had impacted his misconduct and discharge. Additionally, 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 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 and his legal counsel contend the applicant did not engage in the alleged misconduct identified as sexual assault and sexual misconduct with his wife and another airman. He became suicidal because of his PTSD, legal issues, and possibly not being able to see his children. They contend his decision to request a discharge was related to his PTSD and related symptoms and he had no other options.

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

There is evidence the applicant was anxious, depressed, and had suicidal thoughts primarily in response to his legal and personal problems causing him to seek mental health treatment during service. There was no evidence he had PTSD or similar conditions during military service. He

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was diagnosed with PTSD several years post-discharge by the Department of Veterans Affairs (DVA) and community psychologist.

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

The applicant had requested a discharge in lieu of a court-martial for charges of sexual assault and sexual misconduct. There was no evidence he had any mental health conditions to include PTSD at the time of any of his reported misconduct causing his behaviors and no evidence his mental health condition impaired his decision to request for discharge. The applicant was well-aware of his situation and the consequences of his UOTHC discharge when he requested a discharge. Therefore, his mental health condition does 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 this discharge, his condition also does not outweigh his discharge.

The complete advisory opinion is at Exhibit D.

DAF/JA recommends denying the application finding insufficient evidence of error or injustice tending to undermine his voluntary request to be discharged, the characterization of his service, the narrative reason for separation, the separation code, or the reentry code. As a preliminary matter, DAF/JA advises the Board that they do not analyze the merits of the applicant's mental health claims, as that is beyond their scope. A robust analysis of those claims has already been provided in a mental health advisory to the Board that recommended denial. Rather, their review considers whether his alleged mental health issues, including any diagnosis of PTSD, present legal mitigation per the guidance memorandum regarding discharge upgrades for mental health issues. They conclude it does not. The question before is whether the alleged mental health conditions invalidate the discharge. It is plain from the applicant's 30 Apr 10 letter and his defense counsel's accompanying letter that the applicant understood the consequences of his voluntary request. There is no question as to its voluntary nature, and there is no indication from the record that his analysis was clouded by the presently alleged external factors. Considering that the applicant was a member of the Security Forces, it further supports their conclusion that he understood the weight of the evidence against him, and he clearly weighed the likelihood of conviction against the consequences of his request for separation. As for the applicant's allegations that the complainants lied to AFOSI about his sexual assaults, the voluntary request for discharge make those allegations moot.

The complete advisory opinion is at Exhibit E.

**APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinions to the applicant on 19 Aug 22 for comment (Exhibit F), and the applicant replied on 9 Sep 22. In his response, the applicant's counsel contends both opinions are conclusory and biased opinions and are entirely unhelpful to the Board and should be disregarded. These advisory opinions cannot be used by the Board to abdicate its responsibility to carefully evaluate the evidence and argument submitted by the applicant. The Board is charged

with evaluating the justice, fairness, and equity of a discharge and these advisory opinions entirely ignore this charge and responsibility. The applicant provided evidence and argument in support of his request. The applicant has provided additional evidence to support his request to include a personal statement, his background check from the Office of Personnel Management, and his DVA disability rating.

The applicant's complete response is at Exhibit H.

## **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, the Board concludes the applicant is not the victim of an error or injustice. 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 that 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. Furthermore, 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. Specifically, the Board did not find any evidence the applicant suffered from PTSD during his time in the service. Nevertheless, 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. Nor did the Board find any evidence that his mental health condition impaired his decision to request a discharge in lieu of a court-martial.

In the interest of justice, the Board considered upgrading the discharge. In support of his request for an upgrade, the applicant has provided a personal statement from himself and his current spouse, an FBI report with no evidence of arrests since his discharge, and his college transcripts. He also contends he has been a model citizen; pursuing higher education and supporting and caring for his children and family. However, the evidence he provides lacks references that demonstrate his service to the community or any degree of remorse pertaining to his in-service conduct which he continues to deny. The Board contemplated the many principles included in the Wilke Memo to determine whether to grant relief based on an injustice or fundamental fairness. Furthermore, the Board considered the applicant's post-service conduct and achievements, length of time since the misconduct, his character and reputation, service to the community, job history and degree of contrition. However, given the evidence presented, the Board determined relief is not warranted.

The applicant retains the right to request reconsideration of this decision, which could be in the form of 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. 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 (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.5, considered Docket Number BC-2022-00088 in Executive Session on 26 Oct 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 28 Dec 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 29 Jul 22.
- Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 26 Jul 22.
- Exhibit E: Advisory Opinion, DAF/JA, dated 19 Aug 22.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 19 Aug 22.
- Exhibit G: FBI Report, dated, 22 Aug 22.
- Exhibit H: Applicant's Response, w/atchs, dated 9 Sep 15.

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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.

5/23/2023

*Work-Product*

Board Operations Manager, AFBCMR  
Signed by: USAF