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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-2022-00453

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

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

APPLICANT'S CONTENTIONS

He would like his record cleared. He never had a mental health diagnosis but his injury sustained while stationed in Work-Prod... played a part in his disappearance and his subsequent discharge.

In support of his request, the applicant provides a copy of a previous board's decision (Army BCMR) detailing his experience of being wounded in action on 29 Sep 50 while serving in Work-Product. He requested to have his Army DD Form 214, *Armed Forces of the United States Report of Transfer or Discharge*, reflect he was wounded as a result of action with enemy forces and to receive a medal/award for his injury. The ABCMR granted his request in a letter dated 19 Sep 08, and Permanent Orders Work-Prod... dated 9 Mar 09, indicating he was awarded the Purple Heart for the period of service of 29 Sep 50, for wounds received as the result of hostile action. He also submitted his Department of Veterans Affairs (DVA) disability rating decision showing a 20 percent service-connected rating for the injury that occurred during the Korean War, gunshot wound involving MG-17 with retained shrapnel.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 18 Jan 57, the convening authority published Special Court-Martial Order Number W... The order stated the applicant pled not guilty to one charge and one specification of absence without leave (AWOL) (Article 86). The applicant was sentenced to confinement at hard labor for two months and forfeiture of \$40.00 pay per month for 2 months. The following pertains to Special Court-Martial Number W...

**AFBCMR Docket Number BC-2022-00453
CUI//SP-MIL/SP-PRVCY**

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- a. Dated 26 Dec 56, DD Form 616, *Report of Return*, indicates the applicant was AWOL between the periods of 20 Nov 56 through 15 Dec 56.

Dated 20 Aug 57, a letter to the applicant's spouse indicates her husband's fraudulent enlistment was waived by higher headquarters on 28 May 57 and her allotment was reestablished. The letter revealed the applicant concealed part of his dependency status upon his enlistment in the Air Force in 1955.

On 3 Feb 58, the convening authority published Special Court-Martial Order Number [REDACTED]. The order stated the applicant pled guilty to one charge and one specification of AWOL (Article 86). The applicant was sentenced to confinement at hard labor for four months, forfeiture of \$44.00 pay per month for 4 months, and discharge from the service with a bad conduct discharge (BCD). The following pertains to Special Court-Martial Number [REDACTED].

- a. Dated 19 Oct 57, a memorandum indicates the applicant was apprehended by civilian authorities on 12 Oct 57 and returned to military control.
- b. Dated 17 Oct 57, DD Form 616, indicates the applicant was AWOL between the periods of 20 Jul 57 through 14 Oct 57.

On 3 Feb 58, the staff judge advocate's review recommended the applicant be sentenced to confinement at hard labor for 3 months, forfeiture of \$44.00 pay per month for 3 months, and discharge from the service with a BCD.

On 28 Feb 58, the convening authority published Special Court-Martial Order Number [REDACTED]. The order stated the applicant's sentence of confinement at hard labor for 3 months, forfeiture of \$44.00 pay per month for 3 months, and discharge from the service with a BCD as promulgated in Special Court-Martial Order Number [REDACTED] has been affirmed pursuant to Article 66 and no confinement remains to be served.

On 14 Mar 58, the applicant received a UOTHC discharge. His narrative reason for separation is "Sentence of Court-Martial" and he was credited with 2 years, 2 months, and 28 days of net service for that period.

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

POST-SERVICE INFORMATION

On 12 Sep 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.

APPLICABLE AUTHORITY/GUIDANCE

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 regarding courts-martial are limited to two types: 1) corrections reflecting actions taken by the reviewing officials pursuant to the UCMJ (for example, if a convening authority or appellate court took action but that action was not reflected in an Air Force record); and 2) action on only the sentence of the court-martial and solely 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 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

CUI//SP-MIL/SP-PRVCY

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 12 Sep 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit E).

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 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 did not provide any evidence of a mental health condition. Nor did he provide clear information about how his injury, specified as a gunshot wound involving MG-17 with retained shrapnel from his time in [Work-Pro...] had affected his disappearance. He also did not specifically identify or refer to any mental health conditions, issues, or symptoms that he may have had experienced except that he did not receive any mental health diagnosis. The applicant's available records find no evidence exist to support the applicant's contention that his prior Army service

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experience had a direct impact to his mental health condition and functioning in the Air Force resulting with his special court-martial conviction and discharge. There is no doubt the applicant was probably affected by his Army experience in some shape or form, but there was no evidence he had any mental health issues during his time with the Air Force. He never received any mental health evaluation, treatment, or mental disorder diagnosis during or post-service. His Air Force records revealed his court-martial conviction for his second AWOL was because he had marital and financial problems—he found out his wife was living with another man when he unexpectedly returned home from propeller school, and his wife stopped receiving monthly allotments from the Air Force for a three-month period because his paperwork got mixed up when he was in the process of getting a waiver because he intentionally and fraudulently enlisted into the Air Force without disclosing he had three dependents during his recruitment process. Furthermore, when he was AWOL, he went to work for a construction company to earn money and sent a portion of his earnings to his wife. He did not have any physical contact with her while he was AWOL and only sent her a letter. His marital and financial problems were significant stressors causing him to take drastic action of being AWOL but no evidence his stressors elevated or led to a mental health condition. These problems and stressors were the reasons reported and documented at the snapshot in time of service for his disappearance and not because of his injuries or experience from Korea. There was no evidence he was AWOL because he was affected by or was anxious, depressed, traumatized, etc, from his Army experience. The applicant testified he knew that being AWOL was wrong but did so anyway by his own accord and made no efforts to return to military control. He had no cognitive impairment issues or a thought disorder, and he knew the difference between right and wrong and to adhere to the right and refrain from the wrong. His judgment was impaired, but it was based on his poor decision-making skills or immaturity per his commander's report and not because of his mental health condition. Moreover, the applicant's injury from his time in the Army is considered as existed prior to service (EPTS). There is no evidence his military service with the Air Force had permanently aggravated his prior-service condition. His work performance was reported by his leadership during his special court-martial hearing as "above average" and there were no issues with his abilities to perform his Air Force duties. The applicant even testified he liked the service very much but as long as he had problems at home, he was unable to continue to do good work in the service. Therefore, and as a result of an extensive review of the available records, the Psychological Advisor finds no error or injustice with his discharge from the Air Force from a mental health perspective.

The Psychological Advisor opines liberal consideration is not required to be applied to the applicant's petition because his experience/injury from his Army service was EPTS with no evidence of service aggravation from his Air Force military service according to the Kurta memorandum. Should the Board choose to apply liberal consideration to his request, the following are responses to the four questions from the Kurta memorandum from 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 was injured during his Army military service and believes his injury played a part in his disappearance. He stated he never had a mental health diagnosis but checked a box on his application to the AFBCMR for "Other Mental Health." He did not clarify this "Other Mental Health."

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

There is no evidence his injury, gunshot wound involving MG-17 with retained shrapnel, had existed or occurred during his Air Force military service. This is a prior service condition from the Army considered as EPTS. There is no evidence he had any mental health conditions or received a mental health evaluation, treatment, or mental disorder diagnosis during his Air Force service.

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

The applicant's injury EPTS with no evidence it was aggravated by his Air Force service. There is no evidence he developed any mental health conditions from his EPTS condition. His objective military records indicated his disappearance was caused by his marital and financial problems and not because of his mental health condition or EPTS condition from the Army. His mental health condition and prior service injury/experience do not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

Since there is no evidence his mental health condition and prior service experience do not excuse or mitigate his discharge, his condition and experience also do not outweigh his original discharge.

The complete advisory opinion is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 2 Sep 22 for comment (Exhibit D), but has received no response.

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. 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, since there is no evidence his mental health condition or his injury sustained while in the Army 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. His marital and financial problems were significant stressors causing him to take drastic action of being AWOL but no evidence his stressors elevated or led to a mental health condition.

CUI//SP-MIL/SP-PRVCY

In the interest of justice, the Board considered upgrading the discharge based on fundamental fairness; however, given the evidence presented, and in the absence of post-service information and a criminal history report, the Board finds no basis to do so. 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.

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-2022-00453 in Executive Session on 30 Nov 22:

Work-Product [Redacted] Panel Chair
[Redacted], Panel Member
Work-Product [Redacted] Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 13 Jan 22.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFRBA Psychological Advisor, dated 1 Sep 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 2 Sep 22.
- Exhibit E: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 12 Sep 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.

12/10/2023

Work-Product [Redacted] _____

Board Operations Manager, AFBCMR
Signed by: *Work-Product* [Redacted]