

**RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2022-00479

XXXXXXXXXXXX

**COUNSEL:** NONE

**HEARING REQUESTED:** YES

**APPLICANT'S REQUEST**

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

**APPLICANT'S CONTENTIONS**

He is a victim of reprisal in violation of Title 10 U.S.C., Section 1034. On 30 May 18, he sought legal counsel for what he perceived to be fraudulent activities within the acquisitions management office to which he was assigned. He first informed his leadership of the suspicion and when he attempted to seek legal counsel, he was charged with absence without leave (AWOL) and insubordination to which he plead guilty. He was confined and shortly thereafter, resigned his commission and requested a discharge in lieu of a court-martial with a general service characterization.

In support of his request for a discharge upgrade, the applicant provides a personal statement, copies of military kudos, his biography, college graduation certificates and transcripts, 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 first lieutenant (O-2).

On 17 May 18, (application dated 22 May 18) the applicant filed an Inspector General (IG) complaint, XXXXXX, alleging the E-3 Joint Worldwide Intelligence Communications System (JWICS) program was not advancing as fast or given the attention it required. The complainant further stated there was a potential security violation on 11 Apr 18 that was under review. In the complaint analysis, it is noted the complainant could not identify any specific violation but thought it was possible there was fraud or waste within the program. Furthermore, he was reluctant to express adverse action against himself. He took responsibility for the possible security irregularity that was under review. It was explained that the change in duties could be an adverse action, the complainant was unclear if he was removed from the position for cause, retaliatory or if he was simply reassigned. It was determined the best office to resolve his issues was the XXXX to which his case was transferred. On 14 Jun 18, the case was closed due to the complainant being charged with desertion. It was decided the case would remain closed and reopened if and when the complainant returned to work.

On 9 Aug 18, AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, indicates the applicant received nonjudicial punishment (NJP), Article 15 for AWOL and disobeying a lawful order. He received a forfeiture of \$1,000.00 pay per month for 2 months.

On 15 Mar 19, the applicant received an UOTHC discharge. His narrative reason for separation is "In Lieu of Trial by Court-Martial" and he was credited with three years, nine months, and five days of total active service.

On 5 Aug 19, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge.

On 18 Jun 20, the AFDRB concluded the discharge received by the applicant was deemed to be appropriate finding insufficient evidence of an inequity or impropriety that would warrant a change to the applicant's discharge. The applicant contended, through counsel, the discharge was inequitable and improper because his discharge was the result of his seeking legal counsel to report fraudulent, abusive and wasteful practices within the program management office he was assigned to. A review of the military record indicated the applicant's security clearance was revoked after a series of violations. He was also removed from his duties as a Joint Worldwide Intelligence Communications System (JWICS) Program Manager and ordered to stop all involvement with the program, an order which he violated by scheduling a conference call relating to the program. While being escorted to his supervisor's office to discuss this incident, the applicant ran out of the building and disappeared from the local area, and remained absent for eight days until apprehended by civilian law enforcement. His command subsequently placed him in pretrial confinement. Upon release from pretrial confinement, the applicant's commander offered him an Article 15 for absence without leave and failure to obey a lawful order, in violation of Articles 86 and 92, UCMJ. The applicant accepted the Article 15 and received punishment of forfeitures and a reprimand. Approximately two months later the applicant fled from his duty location and attempted to seek asylum in Canada. Canadian authorities denied his request and returned him to U.S. customs and Border Protection (CBP). He was released back to military control and was again placed in pretrial confinement. Court-martial charges were preferred and the applicant submitted a Resignation In Lieu Of (RILO) trial by court-martial, which was approved and he was separated with a UOTHC discharge. The AFDRB found the applicant's contentions regarding the impropriety and inequity of his discharge without merit. Furthermore, due to evidence of mental health conditions found in the applicant's medical record, the board considered the case based on the liberal consideration standards required by guidance from the Office of the Under Secretary of Defense for Personnel and Readiness and/or 10 U.S.C. Section 1553. A thorough review of the service record and input from the board's psychiatrist/psychologist, revealed the applicant's mental health condition was a mitigating factor to his misconduct; however, it could not completely explain or excuse the misconduct sufficiently to warrant upgrading the discharge. Therefore, the board concluded the applicant's misconduct was a significant departure from the conduct expected of all military members.

On 15 Sep 21, the applicant submitted another request to the AFDRB for an upgrade to his discharge, to change his narrative reason to "Secretarial Authority" and to change his reenry (RE) code to "2C" or "3K."

On 2 Dec 21, the AFDRB found insufficient evidence of an inequity or impropriety that would warrant a change to the applicant's discharge. The Board determined the applicant received due process and did not note any error or injustice. Additionally, a thorough review of the service record and input from the board's psychiatrist/ psychologist, revealed the applicant's mental health was evaluated and he was found fit for duty and to stand trial. Furthermore, the applicant himself denied the presence of any mental health condition that mitigated his misconduct. The Board found the negative aspects of the applicant's willful misconduct outweighed the positive aspects of his military service and concluded the characterization of the discharge received by the applicant was deemed to be appropriate.

For more information, see the excerpt of the applicant's record at Exhibit B and IG case files at Exhibit D.

### **POST-SERVICE INFORMATION**

On 18 Jul 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. He did however submit post-service information with his original application.

### **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?

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 18 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:

**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.

## **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. It appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. Nor was the discharge unduly harsh or disproportionate to the offenses committed. Liberal consideration was applied to the applicant's request due to evidence of mental health conditions, however, the Board agreed with the AFDRB findings that found the negative aspects of the applicant's willful misconduct outweighed the positive aspects of his military service and concluded the characterization of the discharge received by the applicant was deemed to be appropriate. In the interest of justice, the Board considered upgrading the discharge based on fundamental fairness; however, given the evidence presented, and in the absence 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.

4. The applicant alleges he has been the victim of reprisal and has not been afforded full protection under the Whistleblower Protection Act (10 USC § 1034). The Board noted the applicant filed an IG complaint; however, it was annotated in the complaint analysis the applicant was reluctant to express adverse action against himself. The definition of Reprisal and Restriction was discussed with the applicant and he seemed to understand and had no further questions. Nevertheless, in accordance with 10 USC § 1034, the Board reviewed the evidence of record to reach its own independent determination of whether reprisal occurred. Based on the Board's review, they do not conclude the applicant has been the victim of reprisal. The applicant's case was closed due to being charged with desertion which was the cause of his discharge. Therefore, the Board does not find the applicant has been the victim of reprisal pursuant to 10 U.S.C. Section 1034.

5. 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-2022-00479 in Executive Session on 26 Oct 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 15 Jan 22.  
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 18 Jul 22.  
Exhibit D: IG Case File – WITHDRAWN.

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.\

**X**

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Board Operations Manager, AFBCMR