



Work-Product

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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-00481

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His under other than honorable conditions (UOTHC) discharge be upgraded to honorable.
2. His separation code of "KFS" and corresponding narrative reason for separation, "In Lieu of Trial by Court-Martial" be upgraded.
3. His reentry code (RE) code of "2B" which denotes "Separated with a general or under-other-than-honorable-conditions discharge" be changed to allow him to reenlist.

APPLICANT'S CONTENTIONS

He was accused by a civilian of things he did not do which led to his discharge. He initially decided to fight the allegations via a court-martial hearing but was informed by his legal counsel while it is easy to prove his innocence, someone claiming they felt threatened was harder to fight and the fact he is an African American and his accuser is white, he was already put at a disadvantage. His command was making it hard for him to continue in the same unit and his request to move was denied. He reported the gossip spreading and his reputation was being ruined when he was facing his issues. He was on heavy anti-depressants at the time and was willing to get out instead, so he decided with his legal counsel to proceed with a Chapter 4. His Chapter 4 request was initially denied until his accuser admitted she was lying and mistook him for someone else, but she refused to appear. His discharge request was then approved. He was under the impression, because of his circumstances, his request for an upgrade with the Air Force Discharge Review Board (AFDRB) would be easy. He served honorably and had he known the process would not be easy, he would have proceeded with the court-martial. He was having major depression which he felt pushed him to make quick decisions without fully understanding the hardship that would follow.

In support of his request for clemency, the applicant provides several letters of achievement/character statements.

The applicant's complete submission is at Exhibit A and F.

STATEMENT OF FACTS

AFBCMR Docket Number BC-2022-00481

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The applicant is a former Air Force staff sergeant (E-5).

On 4 May 21, the applicant received an UOTHC discharge. His narrative reason for separation is “In Lieu of Trial by Court-Martial” and he was credited with 4 years, 11 months, and 11 days of total active service.

On 4 Aug 21, the applicant submitted a request to the AFDRB for an upgrade to his discharge, RE code, and separation code and corresponding narrative reason for separation.

On 14 Dec 21, the AFDRB reviewed the entire record and found no evidence of impropriety or inequity to warrant an upgrade of the discharge. Furthermore, they found no conclusive indication any mental health issues had a direct impact on the applicant's misconduct or discharge. A review of the record revealed the applicant was charged with one charge of wrongful solicitation in violation of Article 82, Uniform Code of Military Justice (UCMJ), one charge and two specifications of communicating a threat in violation of Article 115, UCMJ, and one charge and two specifications of extortion in violation of Article 127, UCMJ. He submitted a Chapter 4 discharge request in lieu of trial by court-martial which was subsequently approved. The Board concluded the applicant made an informed decision when he requested the Chapter 4 discharge and the negative aspects of the applicant's service outweighed the positive contributions he made in his Air Force career. Therefore, the Board concluded the discharge received by the applicant was deemed to be appropriate and his request was not approved.

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

POST-SERVICE INFORMATION

On 18 Jul 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. Although the applicant did reply to the request for post-service information (Exhibit F), his response did not include an FBI background check or other criminal history data.

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, known as the Wilke Memo, 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 paragraphs 6 and 7 of the Wilke Memo.

On 18 Jul 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit C).

Department of the Air Force Instruction (DAFI) 36-3211, *Military Separations*, describes the authorized service characterizations.

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 concurring with the AFDRB's opinion there was no evidence his mental health condition had a direct impact to his misconduct and discharge. The circumstances surrounding his discharge were unclear in the available records because his official discharge paperwork was missing from his records and his court-martial charges reported in his AFDRB decisional documents were vague. Due to these issues, it is difficult to determine whether his mental health condition could have caused, excused, or mitigated his misconduct and discharge. Presumption of regularity would be applied in this situation indicating his discharge was proper. There was evidence the applicant sought mental health treatment during service for anxiety and depression that had predated his Office of Special Investigations (OSI) case, had existed prior to his service, triggered by personal problems during service and was exacerbated by his legal issues, but there was no evidence his mental health condition caused his behaviors and misconduct based on reports in his service treatment records. In fact, the applicant repeatedly denied the allegations made against him to the AFDRB and for this petition. If his claims were true or substantiated, it would not be possible his mental health condition caused his misconduct and discharge. The applicant contended he was on heavy anti-medications when he made the decision with his legal counsel to request a Chapter 4 discharge in lieu of a court-martial. There was evidence the applicant was prescribed 225 mg of Effexor and 5 mg of Buspar for his anxiety and depressive symptoms by his psychiatrist during his OSI investigation, it is however, unclear whether he was taking them at the time he had submitted his discharge request because his psychiatrist had reported he had poor medication compliance. It is noted his psychiatrist reported his mood would improve when he takes his medication as prescribed and so this information would be contrary to the applicant's contention

his anti-depressant medication affected his decision to proceed with a Chapter 4, which he felt was a quick decision and did not fully understand the hardship that would ensue for him. The medication would help improve not impair his judgment. If he was not taking his medication, his mental health status may have affected his decision, but it is reminded he was under significant stress from his legal problems and many individuals in a similar situation would have similar behavioral and emotional reactions. His choices between pursuing a court-martial or Chapter 4 for discharge were not 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. His 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 his mental health condition. Hypothetically if the applicant did engage in or was convicted for his reported misconduct of wrongful solicitation, communicating a threat, and extortion, his mental health condition would not excuse or mitigate his misconduct. These are serious offenses that could not be overlooked or overshadowed by his mental health condition.

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 contends he was on heavy anti-depressant medications when he made the decision to proceed with a Chapter 4 discharge. He had major depression that he felt pushed him to make a quick a decision without fully understanding the hardship that would follow for him.

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

There is evidence the applicant was anxious and depressed caused by personal problems during military service. He had anxiety that begun prior to service and his depression began when he arrived at **Work-Product** Air Force Base in 2017. His anxiety and depression had predated his OSI investigation for misconduct and later was exacerbated by his OSI investigation and legal issues.

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

The applicant had requested a Chapter 4 discharge in lieu of a court martial for charges of wrongful solicitation, communicating a threat, and extortion. There was no evidence his mental health condition had directly impacted or caused his reported misconduct and no evidence his mental health condition had impaired his decision to request for discharge. The applicant was well-aware of his situation and the consequences of his discharge when he requested for 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.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 5 Aug 22 for comment (Exhibit E), but has received no response.

ADDITIONAL AIR FORCE EVALUATION

AF/JAJI recommends denying the applicant's request finding insufficient evidence of an error or injustice. There is limited information in the case file regarding the details of the applicant's alleged misconduct while on active duty and the charges he faced. However, according to information found in the Air Force's Automated Military Justice Analysis and Management System (AMJAMS), in 2020, the applicant was investigated by the Air Force OSI after receiving information from the B--- C----- (Florida) Sherriff's Office (BCSO) regarding an allegation of solicitation of child pornography. The Air Force requested jurisdiction from BCSO, and BCSO relinquished jurisdiction. In addition to an interview with the alleged victim and other witnesses, AFOSI and BCSO extracted data from cell phones. The applicant was charged with one charge of wrongful solicitation, one charge with two specifications of communicating a threat, and one charge with two specifications of extortion. The applicant was represented by a defense attorney during the litigation process and submitted a request for administrative discharge in lieu of court-martial which was approved.

AF/JAJI notes the guidance for liberal consideration of mental health issues specifically noting the Kurta Memorandum which cuts against the requested correction to the applicant's discharge characterization as that would not be appropriate for the applicant's crimes according to the memorandum's standards. According to paragraph 19 of the attachment to the Kurta Memorandum, premeditated misconduct is not generally excused by mental health conditions ... Review Boards will exercise caution in assessing the causal relationship between asserted conditions or experiences and premeditated misconduct. Accordingly, the applicant's misconduct was premeditated misconduct. Therefore, even if the applicant has the asserted diagnoses, a discharge upgrade is not warranted.

The applicant has the burden of providing evidence in support of their allegation(s) of an error or injustice. As this is not a de novo review, AF/JAJI's scope is limited to determining whether there was an error to the detriment of the applicant and finds no error. The applicant had legal representation throughout the legal process and willfully made the decision to submit a request for administrative discharge in lieu of trial by court-martial. When making that decision, he had the opportunity to evaluate the government's evidence against him and knew he could receive an under other than honorable conditions discharge when submitting the request for discharge. While that may have been a stressful time and a decision he now regrets, AF/JAJI concludes there is insufficient evidence to demonstrate a material error or injustice has occurred.

The complete advisory opinion is at Exhibit G.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 17 Oct 23 for comment (Exhibit H), but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed.
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 which 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. The Board noted the applicant's contentions however, finds he had legal representation throughout the discharge process and willfully made the decision to submit a request for administrative discharge in lieu of a trial by court-martial.

Additionally, the Board concurs with the rationale and recommendation of AF/JAJI and the rationale of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board finds the applicant's misconduct of wrongful solicitation, communicating a threat, and extortion was premeditated, and he was well-aware of his situation and the consequences of his discharge. 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 nor had it impaired his decision to request a discharge, his condition or experience does not excuse, mitigate, or outweigh his discharge.

In the interest of justice, the Board considered upgrading the applicant's discharge; however, the applicant did not provide a criminal history background check. The Board contemplated the many principles included in the Wilke Memo to determine whether to grant relief based on an injustice or fundamental fairness. However, the Board does not find the evidence presented is sufficient to conclude the applicant's post-service activities overcame the misconduct for which he was discharged. This Board very carefully weighs requests to upgrade the character of a discharge and in doing so, considers whether the impact of an applicant's contributions to his or her community since leaving the service are substantial enough for the Board to conclude they overcame the misconduct that precipitated the discharge and whether an upgrade of the discharge would create a larger injustice to those who served honorably and earned the characterization of service the applicant seeks. 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 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 DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2022-00481 in Executive Session on 9 Apr 24:

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Panel Chair

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, Panel Member

Panel Member

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

Exhibit A: Application, DD Form 149, 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: Advisory Opinion, AFRBA Psychological Advisor, dated 28 Jul 22.

Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 5 Aug 22.

Exhibit F: Applicant's Response, w/atchs, dated 25 Aug 23.

Exhibit G: Advisory Opinion, AF/JAJI, dated 13 Oct 23.

Exhibit H: Notification of Advisory, SAF/MRBC to Applicant, dated 17 Oct 23.

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.

4/29/2024

Work-Product

Board Operations Manager, AFBCMR

Signed by:

Work-Product

AFBCMR Docket Number BC-2022-00481

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