

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2022-01398

XXXXXXXXXX

**COUNSEL:** NONE

**HEARING REQUESTED:** NO

### APPLICANT'S REQUEST

His bad conduct discharge be upgraded to general (under honorable conditions).

### APPLICANT'S CONTENTIONS

He submitted a humanitarian reassignment request, which was denied because the letter from his wife's doctor was not detailed enough regarding her cancer treatment. The doctor indicated his wife needed follow-up treatment for 12 months to ensure the cancer did not return. After his request for the humanitarian reassignment was denied, he believes he had a nervous breakdown and acted out. He told his commander that he was not mentally stable, and the commander did not take him seriously. To this day, he truly believes he was discriminated against because he is Afro-American. If he was white he would have been treated differently.

In support of his request for liberal consideration, the applicant provided a letter of support from a Department of Veterans Affairs (VA) clinical social worker.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The applicant is a former Air Force airman first class (E-3).

On 19 Sep 81, according to applicant memorandum, he requested a humanitarian reassignment due to his wife's need for close medical supervision.

On 12 Nov 81, according to message traffic R XXXXX Nov 81, HQ AFMPC/MPCHPH1, the applicant's request for humanitarian reassignment was denied, as his request did not meet the criteria for approval under existing policy.

On 30 Sep 82, according to General Court-Martial Order (GCMO) No. XX, dated 17 Dec 82, the applicant was arraigned and tried before a general court-martial.

On 30 Sep 82, according to AF Form 1359, *Report of Result of Trial*, the applicant was found guilty by General Court-Martial of: two specifications of larceny of government property, in violation of Article 121, Uniform Code of Military Justice (UCMJ); possession of drug paraphernalia, in violation of Article 92, UCMJ; and possession of marijuana, in violation of Article 134, UCMJ.

The applicant was sentenced to a bad conduct discharge, confinement at hard labor for 13 months, forfeiture of \$200 per month for 8 months, and reduction to E-3.

On 30 Sep 82, according to AF Form 2098, *Duty Status Change*, the applicant's duty status changed from Present for Duty to Confinement (Military).

On 6 Oct 82, according to AF Form 2098, the applicant's duty status changed from Military Confinement to Present for Duty.

On 11 Oct 82, according to AF Form 2098, the applicant's duty status changed from Present for Duty to Military Confinement.

On 5 Aug 83, according to AF Form 2098, the applicant's duty status changed from Military Confinement to Present for Duty.

On 26 Oct 83, according to GCMO No. XX, the applicant's sentence to a bad conduct discharge, confinement at hard labor for one year and one month, forfeiture of \$200 per month for eight months, and reduction to E-3, as promulgated in GCMO No. XX, dated 17 Dec 82, was affirmed.

On 18 Nov 83, the applicant received a bad conduct discharge. His narrative reason for separation is "Conviction by Court-Martial (Other than Desertion)" and he was credited with 9 years, 4 months, and 3 days of total active service, with Dates of Lost Time: 30 Sep 82 to 5 Oct 82 and 11 Oct 82 to 4 Aug 83.

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

#### **POST-SERVICE INFORMATION**

On 3 Aug 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). In the alternative, the applicant could provide proof of employment in which background checks are part of the hiring process (Exhibit C). The applicant did not respond to this request.

#### **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 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 3 Aug 22, 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 Department of the 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.

**General (Under Honorable Conditions).** 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 member's military record.

**Under Other than Honorable Conditions.** This characterization 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.

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, having considered the entire record, including the applicant's submissions and contentions and all pertinent materials, finds there is insufficient evidence to support the applicant's request for a discharge upgrade. The applicant is petitioning the Board to change the characterization of service from a bad conduct discharge to honorable [sic<sup>1</sup>]. The applicant contends he believes he had a nervous breakdown after his hardship was not approved and he was discriminated against. There is no evidence in available records that the applicant had any mental health disorder during his time in service that would mitigate his misconduct that led to his bad conduct discharge. His diagnosis of generalized anxiety disorder (GAD) has an effective date of 2019, approximately 36 years after discharge, with his first mental health encounter occurring in 2017. While he was referred for a psychological evaluation when he was in service, which was likely ordered as a condition of his upcoming confinement, there are no documented results from this referral.

His post-service mental health encounters all document that the cause of his mental health diagnoses and symptoms stem from workplace stressors that began occurring between 2015 and 2017, and with some stressors related to family and school issues.

The document supplied by the licensed clinical social worker, that stated the applicant is working on processing traumatic events regarding his experiences in the Air Force, does not document these in his mental health records. The notes all indicate he is discussing and being treated for symptoms that relate to current occupational and family situations. This provider advocates that "it is likely that the effects of his experiences led to behavior that warranted his discharge." All of his mental health records, including previous and later provider notes, do not support this nexus statement. His most recent mental health notes again support that his diagnosis of GAD is the result of recent stressors that began in 2015-2017.

The applicant's own assertion in his self-authored statement does not support that his behavior was the result of mental health issues ("nervous breakdown"). His behavior seems to be the result of financial issues. The applicant noted on a document titled Statement (undated-around the time of his court martial proceedings) that, "We were having, and still have money problems around the time of these offenses." and "I knew of someone else who had done something similar, and that person had just paid the money back. I was buying time and figured I could just pay the money back." While the applicant stated he did not know why he took the items, he references money problems throughout his statement, rather than mental health concerns, as the reason for his multiple larceny offenses.

Likewise, there does not seem to be a mental health reason for his possession of drug paraphernalia and marijuana possession other than the contention that his wife had a prescription based on her chemotherapy treatment (which he contended was subsequently misplaced). The applicant also contends that he was the victim of racial discrimination. There does not appear to be any evidence of this in his military or medical record. In addition, a review of the available records finds no evidence to suggest the applicant had any mental health condition that would mitigate his misconduct. Liberal consideration is applied to the applicant's petition due to the contention of a mental health condition. The following are responses to the four questions from the Kurta Memorandum based on information presented in the records:

**1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?** The applicant contends that he had a nervous breakdown after he was denied a humanitarian hardship.

---

<sup>1</sup> The applicant requests an upgrade to general (under honorable conditions)

**2. Did the condition exist or experience occur during military service?** There is no evidence the applicant was suffering from any mental health condition while he was in the military. The applicant was diagnosed with unspecified anxiety disorder and GAD approximately 34 years after his military service. While a licensed social worker contends in a letter that it is likely the effects of his experiences led to behavior that warranted his discharge, there is no evidence for this in this provider's mental health notes or from other providers, post-service.

**3. Does the condition or experience excuse or mitigate the discharge?** There is no evidence in available records that the applicant had any mental health disorder during his time in service that would mitigate his misconduct that led to his bad conduct discharge. His diagnosis of GAD has an effective date of 2019, approximately 36 years after discharge with his first mental health encounter occurring in 2017.

**4. Does the condition or experience outweigh the discharge?** Since the applicant's mental health condition does not excuse or mitigate his discharge, the applicant's condition also does not outweigh the original 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 26 Jul 23 for comment (Exhibit E) 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 opinion of the AFRBA Psychological Advisor that there is insufficient evidence the applicant had a mental health condition during his military service that would be considered a mitigating factor for the misconduct that caused his discharge. The applicant also suggests he experienced discrimination during his service; however, no evidence was provided to substantiate the discrimination, nor to reflect the applicant initiated a discrimination complaint through the appropriate command channels. Therefore, the Board finds a preponderance of the evidence does not substantiate the applicant's contentions.

In the interest of justice, the Board considered upgrading the applicant's discharge based on the Wilkie Memo and fundamental fairness; however, given the evidence presented, the Board finds no basis to do so. Should the applicant provide documentation pertaining to his post-service accomplishments, including an FBI Identity History Summary Check or in the alternative, proof of employment in which background checks are part of the hiring process, this Board would be willing to review the materials for possible reconsideration of his request based on fundamental fairness. Finally, the Board is satisfied that the application of liberal consideration does not warrant relief. In view of the forgoing, the Board recommends against correcting the applicant's record.

## 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-2022-01398 in Executive Session on 16 Nov 23:

, 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/atch, dated 26 Apr 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 3 Aug 22.  
Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 25 Jul 23.  
Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 26 Jul 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.

X

---

Board Operations Manager, AFBCMR