



CUI//SP-MIL/SP-PRVCY

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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02041

Work-Product

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

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

APPLICANT'S CONTENTIONS

There was an injustice due to the allegations being baseless and unfounded. He received no punishment and was never convicted of a crime. His chain of command threatened prison and a felony conviction for life. He was too young and low in rank to stand up for himself.

In support of his request for clemency, the applicant provides three character reference letters, numerous post-service certificates of achievement and a Federal Bureau of Investigation (FBI) background check.

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 12 Mar 04, the applicant received an UOTHC discharge. His narrative reason for separation is "Triable by Court-Martial." He was credited with 1 year, 7 months, and 27 days of total active service.

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

POST-SERVICE INFORMATION

On 18 Aug 22, the Board sent the applicant a request for any additional post-service information he may wish the Board to consider; however, he has not replied (Exhibit C). However, the applicant did provide an FBI Identity History Summary Check, dated 10 Aug 20, with his initial application. According to the report, the applicant has had no arrests since his discharge (Exhibit A).

APPLICABLE AUTHORITY/GUIDANCE

**AFBCMR Docket Number BC-2022-02041
CUI//SP-MIL/SP-PRVCY**

Controlled by: SAF/MRB
CUI Categories: SP-MIL/SP-PRVCY
Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

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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 paragraphs 6 and 7 of the Wilkie Memorandum.

On 30 May 23, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit G).

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.

CUI//SP-MIL/SP-PRVCY

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

AF/JAJI recommends denying the application. There was sufficient evidence for the applicant's commander to refer charges to court-martial. The applicant voluntarily offered to separate with a UOTHC discharge in exchange for those court-martial charges being dropped. As a result of his voluntary offer to accept an UOTHC, his commander withdrew and dismissed the court-martial charges, and he did not receive any punishment such as reduction in grade, incarceration or a fine. Therefore, AF/JAJI finds no evidence to support the allegations of an error or injustice.

The complete advisory opinion is at Exhibit D.

The AFRBA Psychological Advisor completed a review of all available records and finds insufficient evidence the applicant's mental health condition was a mitigating factor to his discharge. His misconduct was the actual reason behind the cause of his discharge for triable offenses by court-martial. There was no evidence he had any mental health issues at the time of his sexual indiscretion and no evidence his mental health condition caused his illicit behavior that led to his AFOSI investigation and subsequent request and approved discharge in lieu of court-martial or triable offenses by court-martial. There was no evidence he had impaired judgment or poor decision-making skills caused by his mental health condition or cognitive deficit issues. Therefore, 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 his contention of a mental health condition. The following are answers to the four questions from the Kurta memorandum based on the available records for review:

CUI//SP-MIL/SP-PRVCY

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?

The applicant contends he was traumatized by the threats he received from his chain of command due to being under investigation and claimed the allegations were not true. He informed the Department of Veterans affairs (DVA) he was charged with carnal knowledge in the summer of 2003. It has been almost 20 years since his discharge, and he is still being treated for his mental health conditions he did not specify.

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

The applicant's service treatment records were not available for review and so there is no evidence he had any mental health conditions or issues that existed or occurred during his military service. He claims he is still treating his mental health condition developed from service, but no treatment records were submitted to corroborate this claim.

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

There is no evidence the applicant's mental health condition had a direct impact to his behaviors and misconduct of sexual intercourse with a minor that he was under investigation for that resulted with his request and approval for discharge in lieu of a court-martial. He reported being traumatized by his chain of command's threats relating to the investigation and allegation of his misconduct. His statement indicated his mental health condition was developed from this experience but did not cause his behaviors/misconduct causing his investigation and subsequent reason for discharge. His alleged misconduct was a serious offense and too egregious and could not be excused or mitigated by his mental health condition, even if there was a possibility his mental health condition was a factor to his behaviors and misconduct. Again, the records do not support his mental health condition caused his behaviors and misconduct. His mental health condition does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

Since the applicant's mental health condition does not excuse or mitigate his discharge, his condition also does not outweigh his original discharge.

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinions to the applicant on 7 Mar 23 and 30 May 23 for comment (Exhibit E and H) but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed. Given the requirement for passage of time, all clemency and discharge upgrade requests are technically untimely. However, it would be illogical to deny such 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 DAF/JA and the rationale of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. Therefore, the Board recommends against correcting the applicant's records. The Board does not find the evidence presented sufficient to conclude his mental health condition excuses, mitigates or outweighs his bad conduct discharge. The Board is satisfied that the application of liberal consideration does not warrant relief. In the interest of justice, the Board considered upgrading the discharge based on fundamental fairness; however, given the evidence presented the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's records.

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-2022-02041 in Executive Session on 21 Jun 23:

Work-Product [Redacted] Panel Chair
Work-Product [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 16 Jun 22.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Clemency Guidance), dated 18 Aug 22.
- Exhibit D: Advisory Opinion, AF/JAJI, dated 6 Mar 23.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 7 Mar 23.
- Exhibit F: Advisory Opinion, AFRBA Psychological Advisor, dated 11 Apr 23.
- Exhibit G: Letter, SAF/MRBC, w/atchs (Liberal Consideration Guidance), dated 30 May 23.
- Exhibit H: Notification of Advisory, SAF/MRBC to Applicant, dated 30 May 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.

10/10/2024

Work-Product [Redacted Signature]

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