



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2022-02055

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

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

APPLICANT'S CONTENTIONS

He was defending himself and requested on multiple occasions to be transferred. He experienced anxiety and nightmares and feared for his life. He reported this to his superiors and a mental health doctor. Prior to the incident to which he was discharged, his performance evaluations were remarkable and he took pride in his uniform. He was 19 years old at the time of the incident and was not given a fair chance to defend himself.

In support of his request, the applicant provides two Department of Veterans Affairs (DVA) claim support statements from himself and his spouse attesting to his mental health problems and his entire military and medical records.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman (E-2).

On 24 Oct 74, AF Form 909, *Airman Performance Report (APR)*, indicates the applicant was given a referral APR for the period of 2 Feb 74 thru 14 Oct 74. Comments made include the applicant's performance required almost constant supervision, demonstrating a negative attitude. Further comments indicate he was late for duty on numerous occasions, failed to make mandatory appointments, and failed to update his personnel information. He continuously scheduled both his and his dependent's appointments during his duty hours and got very belligerent when he could not make these appointments. He was not recommended for retention. The additional endorser's comments indicate he was counseled but no improvement was made.

On 22 Nov 74, DD Form 458, *Charge Sheet*, indicates the applicant plead not guilty to one charge and two specifications of failure to go (Article 86) but was found guilty by a Summary Court-

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POC: SAF.MRBC.Workflow@us.af.mil

Martial and was sentenced to a reprimand. It is noted the applicant was permitted but elected to refuse punishment under Article 15.

On 18 Jul 75, AF Form 2098, *Duty Status Change*, indicates the applicant was absent without leave (AWOL) after a search of his room and phone calls were made to his home in [Attorney-C...] with negative results.

On 25 Jul 75, AF Form 2098, indicates the applicant's duty status was changed from AWOL to civil confinement after he was arrested for possession of a dangerous weapon.

On 28 Jul 75, AF Form 2098, indicates the applicant was released from civil confinement with all charges dropped. He was turned over to military authorities and was placed into confinement.

On 5 Aug 75, the convening authority published Special Court-Martial [Work-Product] The Order stated the applicant pled guilty to one charge and one specification of committing assault by striking another airman with a loaded M-16 rifle (Article 128). He was also charged with pointing the weapon at the airman; however, he plead not guilty and was found not guilty of this offense. The applicant was sentenced to confinement at hard labor for four months, reduction to the grade of airman, and discharge from the service with a bad conduct discharge.

Dated 23 Oct 75, AF Form 2098, indicates the applicant will be released from confinement on 31 Oct 75 for completion of his sentence.

On 31 Oct 75, the applicant received an UOTHC discharge. His reason for separation is "JJD" which denotes "Court-Martial (Other)" and he was credited with 2 years, 5 months, and 15 days of total active service.

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

POST-SERVICE INFORMATION

On 1 Mar 23, 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 D), his response did not include an FBI background check or other criminal history data. The post-service information he did supply was the same DVA support statements he submitted with his original application and a statement contending his discharge was not a dishonorable discharge. It has been 50 years since the incident; he was a teenager and regrets what happened.

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, U.S.C., 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 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 1 Mar 23, 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 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 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. There is insufficient evidence the applicant had a mental health condition while he was in military service that would mitigate his misconduct which resulted in a special court-martial conviction and discharge from the Air Force. The applicant was seen by mental health on 1 Nov 74 for what appears to be occupational related issues. One encounter indicates difficulty adjusting to work. The other appears related to getting reprimanded for misconduct and wanting out of his job. Neither encounter references nightmares, anxiety, nor fear for his life. He was not diagnosed with any mental health condition and was returned to duty. Medical records also indicate the applicant was fit for duty during his time in the Air Force and at discharge as evidenced by his S-1 rating.

Additionally at discharge, the applicant denied any mental health symptoms including sleep issues, anxiety, and depression. There is no evidence of post-service mental health conditions. After considering the entire record and contentions, there is insufficient evidence to suggest the applicant had any mental health condition that would mitigate his misconduct and special court-martial for assault with a dangerous weapon. A review of the available records finds no error or injustice with the applicant's discharge.

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 experiencing anxiety and nightmares, and was in fear for his life.

2. Did the condition exist or experience occur during military service?
The applicant was never diagnosed with a mental health condition during or after discharge from the military. There is no evidence from available records the applicant was suffering from any mental health condition.

3. Does the condition or experience excuse or mitigate the discharge?
There is insufficient evidence the applicant had a mental health condition while he was in military service which would mitigate his misconduct that resulted in a special court-martial conviction and discharge from the Air Force with an UOTHC.

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 E.

AF/JAJI recommends denying the application finding insufficient evidence of error in the applicant's UOTHC service characterization that would warrant a discharge upgrade. With regard to the applicant's allegations he suffered from mental health issues, AF/JAJI does not opine on this matter. However, they noted the AFBCMR's Psychological Advisor provided a thorough analysis to the Board finding no evidence to support the applicant's contention. As a result, AF/JAJI finds no grounds for clemency based on mental health. Furthermore, the guidance for liberal consideration of mental health issues in the Kurta Memorandum cuts against the requested corrections. According to paragraph 19 of the attachment to the Kurta Memorandum, premeditated misconduct is not generally excused by mental health conditions and review boards will exercise caution in assessing the causal relationship between asserted conditions or experiences and premeditated misconduct. The applicant's documented performance deficiencies, his summary court-martial conviction, his special court-martial conviction, and his AWOL reflect premeditated misconduct. Accordingly, under the Kurta standards, any mental health condition, even if verified, would neither mitigate nor outweigh the discharge.

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 25 Sep 23 for comment (Exhibit G), 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. 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. Additionally, the Board concurs with the rationale of the AFRBA Psychological Advisor and AF/JAJI 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 experience 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. 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.
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-2022-02055 in Executive Session on 30 Nov 23:

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Work-Product	Panel Chair
Work-Product	Panel Member
Work-Product	Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 4 Aug 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 1 Mar 23.
- Exhibit D: Applicant’s Response, w/atchs, dated 27 Mar 23.
- Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 13 Jul 23.
- Exhibit F: Advisory Opinion, AF/JAJI, dated 25 Aug 23.
- Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 25 Sep 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.

12/21/2023
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<div style="background-color: black; color: white; padding: 2px 10px; display: inline-block;">Work-Product</div> Board Operations Manager, AFBCMR Signed by: USAF