

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02066

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. The nonjudicial punishment (NJP) under Article 15, Uniform Code of Military Justice (UCMJ), dated 18 Jan 73, be removed from his record.
2. The rank/grade on his DD Form 214, *Report of Separation from Active Duty*, be changed from airman first class (E-3) to sergeant (E-4).

APPLICANT'S CONTENTIONS

He left his duty station without authorization during the month he would have earned authorized promotion from E-3 to E-4 due to time in service and acceptable job performance reviews. During his period of service, mental health issues were neither known nor recognized as a valid defense for absent without leave (AWOL). He currently has a mental health service-connected rating through the Department of Veterans Affairs (DVA) as a result of incidents on Grand Forks Air Force Base and Vietnam service during 1971-1972. He received NJP for being AWOL and reduction in rank/grade to airman basic (E-1). He ultimately separated from service on 29 Apr 74 at the E-3 grade.

During the NJP phase, the commander noted because he did not return voluntarily, the reduction to E-1 was justified. Mental health effects are now much better understood and considering his known and documented mental health conditions, it is his opinion this incident would currently be treated and adjudicated with no action taken against him. His request is to either revise his discharge grade to E-4, or preferably this whole incident be expunged from his record, along with the honorable discharge grade of E-4.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is an honorably discharged Air Force airman first class (E-3).

On 1 Oct 71, according to Special Order XXXX, dated 4 Oct 71, the applicant was promoted to the permanent grade of E-3, effective and with a date of rank of 1 Oct 71.

On 17 Oct 72, according to AF Form 2098, *Duty Status Change*, dated 19 Oct 72, the applicant's duty status changed from Present for Duty to AWOL.

On 16 Nov 72, according to AF Form 2098, dated 20 Nov 72, the applicant's duty status changed from AWOL to Deserter.

On 25 Nov 72, according to AF Form 2098, dated 7 Dec 72, the applicant's duty status changed from Deserter to Civil Confinement.

On 26 Nov 72, according to AF Form 2098, dated 21 Dec 72, the applicant's duty status changed from Civil Confinement to Military Control.

On 1 Dec 72, according to AF Form 2098, dated 7 Dec 72, the applicant's duty status changed from Military Confinement to Present for Duty.

On 18 Jan 73, according to squadron commander (SQ/CC) memorandum, the applicant was issued NJP under Article 15, UCMJ, for being AWOL from on or about 17 Oct 72 until on or about 25 Nov 72, in violation of Article 86, UCMJ. The applicant was reduced in grade to E-1, ordered to forfeit \$144 per month for two months, and serve 30 days correctional custody. The applicant appealed his NJP, and on 5 Feb 73, the group commander (GP/CC) denied his appeal.

On 16 May 73, according to SQ/CC memorandum, the applicant was issued NJP under Article 15, UCMJ, for wrongfully and falsely making, with intent to deceive, on or about 9 Apr 73, a certain document purporting to be a 24-hour duty excuse, well knowing the same to be false, in violation of Article 134, UCMJ. The applicant was ordered to forfeit \$50 per month for two months and was restricted to the limits of the base for a period of 60 days.

On 15 Jul 73, according to the applicant's *Uniform Military Personnel Record*, dated 18 Aug 73, he was [re]promoted to the grade of E-2.

On 15 Mar 74, according to Special Order XXXX, dated 27 Feb 74, the applicant was [re]promoted to the grade of E-3.

On 29 Apr 74, according to DD Form 214, the applicant was honorably discharged in the grade of E-3, with a 15 Mar 74 date of rank. He was credited with 3 years and 25 days of active service, with 40 days of lost time (17 Oct 72 to 25 Nov 72).

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

APPLICABLE AUTHORITY/GUIDANCE

In accordance with Air Force Regulation (AFR) 39-29, *Promotion of Airmen*, dated 19 Jan 68 (Incorporating Change 1, dated 18 Jul 68), Table 3 – *Requirements for Promotion to Grades Above E-2* (with associated notes), lists criteria for promotion to E-4 including requirements for Primary Air Force Specialty Code, time in grade, time in service, and commander's recommendation.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor has reviewed the available record and finds no error or injustice with his military records from a mental health perspective. The applicant presented insufficient evidence to support his request for the desired changes to his records. The applicant contends he left his duty station without authorization due to his mental health condition during the month when he would have earned an authorized promotion from E-3 to E-4 due to his time in service and acceptable job performance reviews. At this time, he claims mental health issues were neither known nor recognized as a valid defense for AWOL. He currently has a mental health service-connected rating through the DVA from the incidents at his duty station and Vietnam during 1971-1972. He received NJP for his AWOL with a reduction in grade to E-1. He was separated from service on 29 Apr 74 in the grade of E-3. He reports his commander justified his grade reduction because he did not return voluntarily. He believes mental health effects are now better understood, and his documented mental health conditions would be treated and adjudicated with no action taken against him in the present time. He is requesting a change

of his grade to E-4 and to expunge the incident, presumably his AWOL and its ensuing punishments, from his records. He also requested an honorable discharge grade of E-4. It is to be noted he already received and has an honorable character of service discharge.

A review of the objective military records does not support the applicant's contentions. His airman performance reports for the rating periods of 23 Feb 71 through 23 Dec 71 and 24 Dec 71 through 6 Jul 72 indicated he was stationed in Thailand during these time frames. While it is possible he may have been affected by his deployment experiences, there is no actual evidence he had any mental health conditions developed from his deployment experiences during service. His post-service mental health provider reported he denied having a history of mental disorders that was reported under the "Relevant Mental Health History" of the DVA questionnaire, and this information supports the impression that he did not have any mental health issues during service. There were no statements or reports from the applicant or his leadership of any observed mental health concerns he had at any time of his service that may have caused his AWOL. His grade was reduced because of his AWOL and his commander cited his AWOL for 41 days and his involuntary return as justifiable reasons for his grade reduction. The applicant appealed his NJP which was denied from his commander after legal consideration and advice. His appeal statement was not available for review but there was no evidence he had informed his commander that his mental health issues were mitigating circumstances to his AWOL as he claimed. There were no records the applicant had submitted any statements to explain his reason for AWOL during service. He reported to his post-service health provider he was AWOL in 1972 following an event where he had mistakenly found himself in a restricted area and had a gun pulled on him as a result. There were no records of this incident in his military records. To reiterate, there was no evidence the applicant had any mental health conditions that would cause him to be AWOL resulting in his grade reduction at any time of his military service.

Several months after the applicant's return from AWOL, he engaged in another serious misconduct of engaging in willful intent to deceive by submitting a forged document (he was discovered to have forged three signatures) from his medical provider to excuse him from duty for 24 hours for his physical condition, not mental health condition, of chronic bronchitis. He knew this document was false and received another Article 15 for this misconduct. This Article 15 did not result in a grade reduction but forfeiture of \$50 per month for two months and restriction to the limits of his duty station for 60 days. The applicant had another opportunity after this disciplinary action to submit a statement, other evidence, witnesses, or request a hearing but elected not to appeal. There is no evidence his mental health condition caused this misconduct and certainly could not be mitigated by his mental health condition should he have a mental health condition as his behaviors were intentional or premeditated.

The applicant's grade was reduced to E-1 from his NJP in Jan/Feb 73 for being AWOL, but he was discharged in the grade of E-3 in Apr 74. His grade was restored to E-3 with a date of rank listed as 15 Mar 74 on his DD Form 214. The applicant was discharged in the grade of E-3, with an honorable character of service despite receiving mediocre performance evaluations with reported appearance and conduct problems and at least two Article 15 actions for being AWOL for 41 days with an involuntary return and intentional deception by submitting a false medical report. His discharge characterization and grade appear to be more than fair to the applicant. Hypothetically, had the applicant been given a discharge that was other than an honorable and there was some evidence his mental health condition was a mitigating factor to his misconduct and discharge, liberal consideration would be applied to his situation and he most likely would have received a discharge upgrade. This situation did not occur as the applicant was fortunate to receive an honorable discharge despite his serious problematic behaviors and misconduct during service. Again, there is no evidence any of his misconduct or behaviors during service were caused by his mental health condition.

The applicant was diagnosed with somatic symptom disorder with depressive and anxious features and other specified trauma and stressor related disorder by his post-service mental health provider over 40 years post-service. His somatic, depressive and anxiety symptoms/features were derived from his chronic pain. There is no evidence he had any of these mental health symptoms secondary to his chronic pain during service. The applicant was given a diagnosis of other specified trauma and stressor related disorder from his in-service stressors causing him to experience nightmares, re-experience his trauma, depressed mood, anxiety, etc. Again, there is no evidence any of these trauma-related symptoms occurred or existed during his military service per his available military records. It appeared more likely than not he had a delayed onset of his trauma-related symptoms causing him to meet diagnostic criteria for other specified trauma and stressor related disorder over 40 years post-discharge. Delayed onset of trauma-related symptoms is not uncommon.

There is no evidence his mental health condition had a direct impact or was a mitigating factor to his behaviors and misconduct causing his reduction in rank during service. Finally, this psychological advisor opines liberal consideration is not appropriate for the applicant's request because this policy applies to discharge upgrades. The applicant is not requesting a discharge upgrade but a change to his rank and expunge his record of an incident (AWOL), which are not covered under liberal consideration.

The complete advisory opinion is at Exhibit C.

AF/JAJI (Clemency and Parole) recommends denying the application. After careful review, insufficient evidence of error or injustice was found, and the applicant has not submitted any new evidence that casts doubt on the legal sufficiency of the NJP. He does not challenge the 16 May 73 NJP, but similarly, no error or injustice was found in that disciplinary action.

On 17 Oct 72, the applicant failed to report for duty at the prescribed time and place. His duty status was listed as AWOL, then as Deserter, until 25 Nov 72 (41 days of unauthorized absence), when civilian authorities arrested him after a motor vehicle accident and returned him to military custody. Based on this misconduct, on 18 Jan 73, the applicant received NJP for violating Article 86, UCMJ. He was punished with a reduction in grade to E-1, a forfeiture of \$144 per month for two months, and confinement for 30 days.

On 9 Apr 73, less than three months after his NJP, the applicant wrongfully and falsely made, with intent to deceive, a certain document purporting to be a 24-hour duty excuse from a physician. Based on this misconduct, on 16 May 73, the applicant received NJP for violating Article 134, UCMJ. He was punished with a forfeiture of \$50 per month for two months and restriction for 60 days. He was in the grade of E-1 at the time of this NJP.

On 29 Apr 74, the applicant was discharged with an honorable service characterization in the grade of E-3. Due to the age of the service period, limited records were available.

The applicant alleges the grade reduction imposed at his 18 Jan 73 NJP was erroneous due to his then-undiagnosed mental health issues. This office does not opine on mental health matters; however, the Board's psychological advisor has provided a thorough analysis to the Board finding against the applicant's claim. As a result, this office finds no grounds for clemency based on mental health.

Furthermore, the guidance for liberal consideration of mental health issues in the Kurta Memorandum¹ 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 [. . .] Review Boards will exercise caution in assessing the causal relationship between asserted conditions or experiences and premeditated misconduct.” The underlying violations of the applicant’s two NJPs – a 41-day period of unauthorized absence terminated by apprehension, and a forged medical document – 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 D.

APPLICANT’S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant on 25 Sep 23 for comment (Exhibit E) but has received no response.

FINDINGS AND CONCLUSION

1. The application was not 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. The applicant claims his current service-connected mental health conditions caused his AWOL and were the reasons for his NJP. As such, the grade on his DD Form 214 should be amended from E-3 to E-4. However, the Board disagrees. The applicant provided no evidence to support his contention his AWOL was the result of mental health issues he experienced at the time of the incident. Additionally, there was no evidence in his official military records that shows he experienced mental health issues while serving. Furthermore, had the applicant experienced mental health issues during that time, the Kurta Memorandum detailing liberal consideration would not support relief due to the premeditated nature of the applicant’s misconduct. Accordingly, the Board concurs with the rationales and recommendations of AFRBA Psychological Advisor and AF/JAJI 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 also notes the applicant did not file the application within three years of discovering the alleged error or injustice, as required by Section 1552 of Title 10, United States Code, and Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*. While the applicant asserts a date of discovery within the three-year limit, the Board does not find the assertion supported by a preponderance of the evidence. The Board does not find it in the interest of justice to waive the three-year filing requirement and finds the application untimely.

RECOMMENDATION

The Board recommends informing the applicant the application was not timely filed; it would not be in the interest of justice to excuse the delay; and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

¹ *Memorandum for Secretaries of the Military Departments Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment* (A.M. Kurta, 25 Aug 17), also known as the Kurta Memorandum.

CERTIFICATION

The following quorum of the Board, as defined in DAFI 36-2603, paragraph 2.1, considered Docket Number BC-2022-02066 in Executive Session on 14 Dec 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/atchs, dated 21 Jul 22.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, AFRBA Psychological Advisor, dated 15 Mar 23.
Exhibit D: Advisory Opinion, AF/JAJI, dated 29 Aug 23.
Exhibit E: 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.

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Board Operations Manager, AFBCMR