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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2022-02231

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

This bad conduct discharge (BCD) be upgraded.

APPLICANT'S CONTENTIONS

He is seeking medical attention for service-related injuries, post-traumatic stress disorder (PTSD), and disability benefits. Since his discharge, he has tried to turn his life around and be a positive influence. He moved back to *Work-Product* to care for his grandfather. He was fortunate enough to get a job where he was actively helping in the community. He now has a fiancé and two children and has worked about ten different jobs to provide a better life for his family. Every day is a constant struggle whether it be dealing with chronic pain from injuries sustained while on active duty or a decline in his mental health.

In support of his request for a discharge upgrade, the applicant submitted character reference letters, a personal statement, and a denial of employment letter.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman basic (E-1).

On 19 Apr 16, General Court-Martial (GCM) Order Number *Atto...* was published. The Order stated the sentence to a BCD, confinement for 19 months, and forfeiture of all pay and allowances, as promulgated in GCM Order Number 16, dated 19 Aug 14 was affirmed and the BCD would be executed.

On 22 Apr 16, DD Form 214, *Certificate of Release or Discharge from Active Duty*, indicates the applicant was discharged with a BCD with a narrative reason for separation of "Court Martial (Other)."

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

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

POST-SERVICE INFORMATION

On 25 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) (Exhibit C), which the applicant provided on 27 Sep 22 (Exhibit D). According to the report, the applicant has had no arrests since discharge.

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 Uniform Code of Military Justice (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 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?

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On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness issued supplemental guidance, known as the Wilkie 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 Wilkie Memo.

On 25 Aug 22, Board staff provided the applicant a copy of the liberal consideration and clemency 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 reviewed the available records and finds insufficient evidence has been presented to support the applicant's request for an upgrade of his discharge. His contentions were not able to be corroborated due to the absence of vital records or could not be substantiated by the available records. His court-martial records and/or discharge paperwork detailing his misconduct, charges and specifications for his court-martial conviction and BCD were not available for review. Without this crucial record, the Psychological Advisor was unable to assess whether his mental health condition may have caused, excused, or mitigated his discharge. There were sporadic reports of his misconduct and offenses reported in his service treatment records such as assault/strangulation of his girlfriend; however, caution must be taken because these were his self-reports to his mental health care providers and may not include the complete and accurate depictions of the actual events and his offenses. This was even noted by his treating psychiatrist. He also denied he stole any military property in his personal statement and there were no records of this incident in his limited available records and would again, demonstrate the need for his actual court-martial and discharge records as there may be other offenses that were not reported in his medical records or disclosed by the applicant that contributed to his court-martial conviction and BCD. The applicant denied to his mental health care providers he had abused/strangled his ex-girlfriend and claimed he had memory loss of the incident. He claimed in his personal testimony he blacked out. This reporting was found to be inconsistent. When he first presented to the mental health clinic on 13 Aug 12, he acknowledged he engaged in a verbal argument with his ex-girlfriend but denied any attempts to strangle or physically harm her. A few days later when he completed an intake/psychiatric evaluation on 16 Aug 12, he again denied the accusations against him and reported he was holding her wrist to prevent her from hitting him. On 10 Jul 13, he reported to his new psychiatrist his girlfriend was intoxicated at the time causing his psychiatrist to question the validity of his reporting. These three versions differ from one another and is possible may have occurred simultaneously or in tandem but contradicts his reports of memory loss and "having a blackout episode" during the incident. If he truly had memory loss or blacked out, he would not be able to recall his actions during the incident. A previous psychiatrist stated periods of dissociation have been observed in PTSD patients during period of distress, and the Psychological Advisor concurs with this statement; however, according to the applicant's reports albeit varying, it was highly unlikely he was dissociating at the time because of the explanations he provided. He appeared to be fully aware of the situation to be able to recall the incident. Despite the absence of the applicant's court-martial and discharge paperwork, his behavior alone of assaulting or strangling his girlfriend is egregious and could not be excused, mitigated, or be disregarded by his mental health condition. The applicant claimed he chose to plead guilty to get help for his mental health condition because he had suicidal thoughts and made numerous failed suicidal attempts prior to his court-martial; however, his objective service treatment records do not substantiate his claims. The applicant received regular mental health treatment from Aug 12 to Mar 14, about 18 months or a year and a half, for his mental health conditions/diagnoses of PTSD, Anxiety Disorder NOS, Adjustment Disorder with Mixed Anxiety and Depressed Mood, and Alcohol Abuse caused by his deployment experiences and legal issues. He attended and received treatment services of psychiatry/medication management, supportive therapy, Cognitive Processing Therapy (CPT)/PTSD group, alcohol and drug education course from Alcohol and Drug Abuse Prevention and Treatment (ADAPT), and Level I outpatient

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substance abuse treatment from ADAPT. His last treatment notes from his psychiatrist dated 6 Mar 14 reported his mood and anxiety symptoms had significantly improved with his current psychotropic medication regimen and due to these improvements, he no longer met diagnostic criteria for PTSD and his diagnosis was changed to Anxiety Disorder NOS. There were no reports from any of his mental health care providers the applicant had endorsed having any suicidal ideation or made numerous suicidal attempts. If he did, he most likely would require a higher level of care and there was no evidence in his records he needed this level of care. Since the applicant's court-martial records and discharge paperwork are not available for review, presumption of regularity is maintained that there is no error or injustice with his discharge. The burden of proof is placed on the applicant to demonstrate his mental health condition may have caused, excused, or mitigated his discharge to support his request. The available records do not support this impression and his request for an upgrade of his discharge could not be supported.

Liberal consideration is applied to the applicant's request. The following are responses to the four questions from the Kurta Memorandum 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 contended he developed PTSD from his deployment experiences to Afghanistan and was depressed, constantly on edge and anxious, and he increased his drinking following his return from deployment. He claimed he blacked out during an incident with his ex-girlfriend and denied he stole any military property. He claimed he had suicidal thoughts and attempted suicide multiple times before his court-martial and pled guilty so he could get the help he needed for his mental health condition.

2. Did the condition exist or experience occur during military service?
There is evidence the applicant was diagnosed with PTSD that was later changed to Anxiety Disorder NOS due to his deployment experiences, Adjustment Disorder with Mixed Anxiety and Depressed Mood caused by his legal problems, and Alcohol Abuse during his military service. He received psychiatry/medication management services, supportive therapy, PTSD group, and alcohol abuse treatment for his conditions and issues during service. There was no evidence he had any suicidal thoughts or made numerous suicide attempts as alleged during service.

3. Does the condition or experience actually excuse or mitigate the discharge?
Since the applicant's court-martial records and discharge paperwork were not available or submitted for review, it could not be determined definitively his mental health condition could excuse or mitigate his discharge since it is unknown at this time of the actual reasons for his court-martial conviction and BCD. Additionally, his contentions could not be corroborated by his objective military and treatment records. Presumption of regularity is applied that there is no error or injustice with his discharge and 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 mental health condition also does not outweigh his original discharge.

The complete advisory opinion is at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION

AF/JA finds no error or injustice in the GCM findings or sentence and find no grounds for clemency after a careful review of the records. As a preliminary matter, we inform the AFBCMR that any Board action on the present application can only be based on clemency, not the alleged errors or injustices. The AFBCMR's authority stems from U.S.C., Title 10, Section 1552, *Correction of Military Records*. Section 1552 (f) is clear that the AFBCMR cannot correct court-martial records unless the correction is one of two types of action: 1) correction of a record to reflect an action taken by review authorities under "chapter 47 of this title" (i.e., the UCMJ); or 2) action on the sentence of a court-martial for purposes of clemency. That means AFBMCR corrections can merely reflect actions regarding a court-martial that were already taken by review authorities under the UCMJ (such as convening authority clemency, or appellate corrections); or the AFBCMR can act only on the sentence (not the guilty finding), but even then, only on the basis of clemency (not any alleged error or injustice). After all, the UCMJ already contains avenues to evaluate possible errors or injustice, including corrective actions by the convening authority and appellate courts. Nevertheless, AF/JA addressed the alleged errors and injustices in case the AFBCMR considers issues of error/injustice to be relevant to the question of clemency. First, we find no legal error in the GCM findings or sentence. Notably, the applicant voluntarily pled guilty. Second, the applicant's contention about PTSD or any other mental health issue lacks legal merit. As part of any guilty plea, a military judge conducts a providency hearing to make certain the military accused understands the crimes to which they are pleading guilty, the nature of the guilty plea, and the consequences of the guilty plea. The applicant gave the court no reason to believe he was not competent to plead guilty, including PTSD or any mental health issues. Even the guidance for liberal consideration of mental health conditions, the Kurta Memorandum, cuts against any correction. The guidance is clear that the court-martial's punishment, including the BCD, was appropriately administered. 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 assault consummated by a battery against his girlfriend, and his larceny and wrongful disposition of military property, which crimes were especially egregious because of his position as a Security Forces member, were premeditated acts. Therefore, any mental health condition, even if true, neither excuses/mitigates nor outweighs the BCD. Finally, AF/JA find no grounds for clemency. A clemency analysis necessarily includes a review of the applicant's total record. Here, the BCD adjudged by the GCM is viewed together with his Referral EPRs and his previous non-judicial punishment. Based on the totality of the circumstances, they find no basis for clemency.

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF EVALUATIONS

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

FINDINGS AND CONCLUSION

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1. The application was timely filed. Given the requirement for passage of time, all discharge upgrade requests under fundamental fairness or clemency are technically untimely. However, it would be illogical to deny a discharge upgrade 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 recommendations of the AFRBA Psychological Advisor and AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant's contentions. Specifically, the Board finds the applicant's misconduct was especially egregious and were premeditated acts. Liberal consideration was applied to the applicant's request due to the contention of a mental health condition; however, the Board finds his premeditated misconduct was not excused or mitigated by his mental health conditions, and therefore does not outweigh his discharge. 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. The 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. While the applicant has presented some supporting statements indicating he has apparently made a successful post-service transition, the Board does not find the documentation sufficient to conclude they should upgrade the applicant's discharge at this time. In this respect, the supporting statements from the applicant's co-workers and friends indicate their admiration for the applicant and the way he has lived his life since his separation; however, these statements do not provide his impact in the community and if the impact is so admirable the Board could conclude an upgrade of his discharge would not constitute an injustice to those who have earned this characterization of service. Therefore, the Board recommends against correcting the applicant's records. The applicant retains the right to request reconsideration of this decision, which could be in the form of additional character statements or testimonials from community leaders/members specifically describing how his efforts in the community have impacted others. Should the applicant provide documentation pertaining to his post-service accomplishments and activities, this Board would be willing to review the materials for possible reconsideration of his request based on clemency.

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-2022-02231 in Executive Session on 18 Jan 24:

 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 17 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 25 Aug 22.
- Exhibit D: FBI Report, dated, 27 Sep 22.
- Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 26 Jan 23.
- Exhibit F: Advisory Opinion, AF/JAJI, dated 7 Mar 23.
- Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 7 Mar 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.

10/9/2024

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Board Operations Manager, AFBCMR
Signed by: USAF