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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-2022-02463

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His bad conduct discharge (BCD) be upgraded to honorable.

APPLICANT'S CONTENTIONS

He served in the military during the 11 Sep 01 attacks. He began having dreams and nightmares of death and getting deployed to *Work...* Due to not being diagnosed with post-traumatic stress disorder (PTSD), he suffered, acted out and made bad decisions while serving his country. He would like to become a better man and receive the help he needs.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 26 Jul 05, the convening authority published Special Court-Martial Order Number *Wo...* The order stated the applicant pled guilty to one charge and four specifications for failing to go at the time prescribed to his appointed place of duty (Article 86). He pled guilty to one charge and four specifications for making false official statements (Article 107). He also pled guilty to one charge and one specification for wrongful use of marijuana (Article 112a). Additionally, he pled guilty to one charge and one specification for breaking a said restriction (Article 134). The applicant was sentenced to confinement for six months and discharged from the service with a BCD.

On 14 Aug 07, according to Special Court-Martial Order Number *Wo...* the sentence to confinement for six months and discharge from the service with a BCD was affirmed.

On 29 Aug 07, the applicant received a BCD. His narrative reason for separation is "Court-Martial." He was credited with 7 years, 2 months, and 16 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 E.

POST-SERVICE INFORMATION

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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

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On 19 Sep 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); however, he has not replied.

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, United States Code, Section 1552(f), actions by this Board are limited to corrections reflecting actions taken by the reviewing officials and action on the sentence of the court-martial 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 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

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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 19 Sep 22, 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 finds insufficient evidence to support the applicant's request for an upgrade to his discharge based on his mental health contention. There are no records available to corroborate the applicant's condition of PTSD or that similar conditions existed or occurred during his military service. In addition, no records were submitted by the applicant to confirm he was evaluated and diagnosed with this condition by a duly qualified mental health care professional during or post- service. The applicant did not adequately demonstrate there was a nexus between his mental health condition and discharge. He did not clearly discuss or explain

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how his mental health condition caused his numerous and repeated misconducts of failing to go at the time prescribed at his appointed place of duty, wrongful use of marijuana, financial irresponsibility, and intentionally making false official statements. These misconducts and offenses were serious resulting with his special court-martial conviction and BCD. The burden of proof is placed on the applicant to submit the necessary records or evidence to support his request. Therefore, the Psychological Advisor finds no error or injustice with his discharge.

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 has PTSD from being in the military during September 11, 2001, and started having dreams and nightmares of dying or getting sent to Iraq. He began acting out and messing up his career. He reported he was not diagnosed, made bad decisions, was suffering at the time, and acted out.

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 were no objective service records to substantiate he had any mental health conditions to include PTSD that had existed or was experienced during military service. There were no post-service treatment records submitted as well and no evaluation report or statement from a duly qualified mental health care professional to confirm he was ever diagnosed with PTSD.

3. Does the condition or experience actually excuse or mitigate the discharge?
The applicant did not adequately or compellingly explain how his mental health condition had caused his misconducts resulting with his special court-martial conviction and BCD. There was no evidence his mental health condition had a direct impact or was a mitigating factor to his discharge based on the available records for review. Thus, 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 D.

DAF/JA finds no error or injustice in the Special Court-Martial findings or sentence. The applicant voluntarily pled guilty to the charges. The applicant gave the court no reason to believe he was not competent to plead guilty, including any mental health or substance abuse issues. Therefore, any mental health condition neither excuses/mitigates nor outweighs the BCD. DAF/JA finds no grounds for clemency in the BCD adjudged by the Special Court-Martial and the applicant's other acts of misconduct.

The complete advisory opinion is at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

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The Board sent a copy of the advisory opinion to the applicant on 7 Mar 23 for comment (Exhibit F) 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 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/or recommendation of DAF/JA and the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant’s contentions. 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 finds no evidence the sentence of the military court was improper or that it exceeded the limitations set forth in the Uniform Code of Military Justice. The Board also considered the passage of time, the overall quality of the applicant’s service, the seriousness of the offense(s) committed, and the applicant’s post-service conduct. In the interest of justice and fundamental fairness, the Board considered upgrading the discharge based on clemency; 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. The Board is satisfied that the application of liberal consideration does not warrant relief. 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-2022-02463 in Executive Session on 24 May 23:

Work-Product [redacted] Panel Chair
[redacted], Panel Member
Work-Product [redacted] Panel Member

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

- Exhibit A: Application, DD Form 149, dated 18 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 19 Sep 22.
- Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 4 Jan 23.
- Exhibit E: Advisory Opinion, DAF/JA, dated 3 Mar 23.
- Exhibit F: 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.

1/2/2024

Work-Product

Board Operations Manager, AFBCMR
Signed by: *Work-Product*