



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2022-02785

COUNSEL: Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUESTS

1. His general (under honorable conditions) discharge be upgraded to honorable.
2. His reentry (RE) code be changed to "1."
3. His narrative reason for separation be changed to "Secretarial Authority" with a corresponding separation code.

APPLICANT'S CONTENTIONS

He should be given liberal consideration for the review of his discharge because it was unfair at the time and remains so now. The discharge is both procedurally and substantively defective.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 24 Aug 09, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFI 36-3208, *Administrative Separation of Airmen*. The specific reason for the action was on or about 26 Dec 08, the applicant conspired to set up a meeting with another airman and a known drug dealer for the purchase of Oxycodone, a controlled substance. For the misconduct, the applicant was punished under the provisions of Article 15, Uniform Code of Military Justice (UCMJ), dated 23 Jun 09, and received a reduction to the grade of airman basic.

On 26 Aug 09, the Staff Judge Advocate found the discharge action legally sufficient.

On 3 Sep 09, the discharge authority directed the applicant be discharged for drug abuse, with a general (under honorable conditions) service characterization. Probation and rehabilitation were considered, but not offered.

AFBCMR Docket Number BC-2022-02785

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

On 10 Sep 09, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct (Drug Abuse)" and he was credited with 1 year and 29 days of total active service.

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

POST-SERVICE INFORMATION

On 22 Jun 23, the Board sent the applicant a request for post-service information and advised the applicant he was required to provide a Federal Bureau of Investigation (FBI) Identity History Summary Check, which would indicate whether or not he had an arrest record. In the alternative, the applicant could provide proof of employment in which background checks are part of the hiring process (Exhibit C). The applicant replied on 7 Aug 23 and provided an FBI report. According to the report, the applicant was arrested and charged on 17 Dec 12 for one count of "Poss/Etc Firearm, Univ/Etc" and was convicted on 19 Dec 12.

The applicant's complete response is at Exhibit D.

APPLICABLE AUTHORITY/GUIDANCE

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?

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 22 Jun 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.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor reviewed the available records and finds insufficient evidence to support the applicant's request for an upgrade to honorable, change in his narrative reason, and change in his RE and separation codes based on his mental health condition. The applicant did not identify the mental health condition he had and did not discuss how his mental health condition may excuse or mitigate his discharge. His service treatment records find no evidence or records his mental health condition caused his misconduct and subsequent discharge. He did voluntarily seek mental health treatment for work and family stress, but this occurred after his misconduct occurred and after he received an Article 15. He was notified of discharge a few days after he initiated mental health treatment. It appeared his emotional distress was in response to his work and personal stressors. There was no evidence he had work or personal stressors preceding his misconduct and no evidence he was in emotional distress or had a mental health condition

impairing his judgment at the time of his misconduct. Moreover, the applicant provided two personal statements in response to his Article 15 and discharge action at the time of service. In these two statements the applicant made no mention of any mental health condition and in fact, he denied knowing his friend was a drug dealer, denied he introduced the two airmen to his friend, a known drug dealer, for drug transactions, and denied he used drugs or being involved in drugs. Based on these statements, it is not possible his mental health condition caused or was a contributing factor to his misconduct.

The applicant sought mental health treatment from the Department of Veterans Affairs (DVA) about one year after discharge. He claimed he experienced trauma during service when he was working undercover and had a gun held to his head during a drug bust. There is no evidence whatsoever to substantiate his claims to the DVA. He was given a diagnosis of post-traumatic stress disorder (PTSD) from this experience and no evidence of PTSD or a similar condition during service. He also displayed obsessive-compulsive disorder (OCD) traits and psychotic symptoms after service; however, there is no evidence he had any of these traits or symptoms during service. His more recent visits to the DVA mental health clinic were related to his work stress causing him to feel depressed. His work stressors had no nexus to his military service. It is also noted the applicant's contentions have changed with time. During service, he was steadfast in his assertion he did not engage in misconduct involving drugs. Several years later, he contended to the Discharge Review Board (DRB) through his counsel at two different times he was not allowed to overcome his deficiency, the events that took place were no longer relevant in his life, and he was only 17 or 18 years old at the time of the incident implying he was young and naïve at the time. For his application to the AFBCMR, he is requesting liberal consideration be given to him and liberal consideration involves a mental health condition possibly excusing or mitigating a discharge. His reports to the DVA about his traumatic experience allegedly occurring during service were not corroborated by his objective military records. His reports have been inconsistent, so it is difficult to discern which reports were more accurate or genuine. Despite the inconsistent reporting, there is no evidence his mental health condition had a direct impact on his misconduct resulting in his discharge from service. There is no evidence of an error or injustice with his discharge from a mental health perspective.

Although the applicant provided no explanations for how his mental health condition caused his discharge, liberal consideration is applied to the applicant's request because he designated "Other Mental Health" on his application to the AFBCMR. The following are responses to the four questions from the Kurta Memorandum from the available records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
The applicant marked "Other Mental Health" on his application to the AFBCMR and provided no clarifying information such as the mental health condition he had during service, when he incurred the condition, and how his mental health condition may excuse or mitigate his discharge.
2. Did the condition exist or experience occur during military service?
The applicant briefly sought mental health treatment during service for work and family problems after his misconduct occurred and after he received an Article for his misconduct for conspiring with an airman to commit an offense of purchasing and using a controlled substance and setting

up a meeting with a known drug dealer. It appeared his emotional distress or mental health condition was developed in response to his work and family problems caused by his own misconduct. He was diagnosed with PTSD by the DVA one year after discharge for allegedly being undercover and having a gun held to his head. There is no evidence to corroborate his experience. He was also reported by the DVA to experience OCD traits and psychotic symptoms one year after discharge. There is no evidence that any of these traits or symptoms had existed or occurred during his military service.

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

There is no evidence the applicant was in emotional distress or had a mental health condition at the time of his misconduct especially since the applicant denied engaging in his misconduct at the time of service. There is also no evidence his mental health condition was a contributing factor to his misconduct and subsequent discharge. His mental health condition does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

Since there was no evidence his mental health condition may excuse or mitigate his discharge, his condition also does not outweigh his discharge.

The complete advisory opinion is at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 26 Sep 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 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. Section 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 finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board notes the applicant's contention his petition should be considered under liberal consideration due to his mental health condition and the Board applied liberal consideration to the evidence submitted by the applicant; however, it is not sufficient to grant his request. The preponderance of evidence does not support his mental health condition in service caused his misconduct, which the Board notes was before he obtained

treatment for work and family stress, thus his condition does not mitigate or excuse his discharge. The burden of proof is placed on the applicant to submit evidence to support his claim. 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 showing an arrest and conviction in 2012, 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-2022-02785 in Executive Session on 18 Jan 24:

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Panel Chair
, Panel Member
Panel Member

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

- Exhibit A: Application, DD Form 149, dated 25 Oct 22 and 18 Apr 23.
- 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 22 Jun 23.
- Exhibit D: FBI Report, dated 7 Aug 23.
- Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 25 Sep 23.
- Exhibit F: 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.

12/5/2024

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Board Operations Manager, AFBCMR
Signed by: USAF

AFBCMR Docket Number BC-2022-02785

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