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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02992

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COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT’S REQUEST

His general (under honorable conditions) discharge be upgraded to honorable.

APPLICANT’S CONTENTIONS

He served honorably and wanted to leave the military because he was mentally unstable. Additionally, the Department of Veterans Affairs (DVA) Summary of Benefits has evidence showing his depression was incurred during his military service.

The applicant’s complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman basic (E-1) who entered the regular Air Force on 3 Jan 96.

On 21 Nov 97, the convening authority published Special Court-Martial (SPCM) Order Number [redacted]. The Order stated the applicant pled guilty to one charge and four specifications of intent to defraud by passing bad checks with insufficient funds to cover the charges (Article 123a). The applicant was sentenced to confinement for three months, forfeiture of \$200.00 pay per month for 3 months, and reduction to the grade of airman basic. In addition, the applicant pled not guilty and was found not guilty to 1 charge and 10 specifications in violation of Article 123a. In terms of actions executed, confinement for 53 days, forfeiture of \$200.00 pay per month for 3 months, and reduction to the grade of airman basic was approved.

On 22 Dec 97, according to DD Form 214, *Certificate of Release or Discharge from Active Duty*, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is “Misconduct” and he was credited with 1 year, 10 months, and 5 days of total active service. The applicant’s DD Form 214 reflects he had lost time during the period of 5 Nov 97 through 20 Dec 97.

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

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POST-SERVICE INFORMATION

On 13 Feb 23, 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 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 Post-Traumatic Stress Disorder (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 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 13 Feb 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 completed a review of all available records and finds insufficient evidence to support the applicant's request for an upgrade of his discharge. The applicant did not submit his discharge paperwork and service treatment records for review and without these vital records, it could not be determined with a degree of certainty his mental health condition could excuse or mitigate his discharge. Therefore, the presumption of regularity is applied for his situation. The applicant's DVA records revealed he had screened positive for depression and PTSD in May 10, 13 years after discharge, when he initiated medical care with the DVA. He screened positive for depression and PTSD during this initial visit and in subsequent visits, but starting on 6 Aug 15 to present, he screened negative for both depression and PTSD. The onset and causes for his depression and PTSD were not reported in his records and no explanation was provided for his eventual negative screenings for these conditions. He never received any regular mental health treatment from the DVA. He was given service connection for unspecified depressive disorder and the rationale for their decision was also not provided. Nevertheless, service connection from the DVA does not automatically demonstrate causation or mitigation to his discharge. The DVA had determined that at least as likely as not, he had

experienced depression sometime during his military service but did not determine this condition caused his discharge. It may be possible his depression and misconduct were two mutually exclusive events, he may have developed depression due to his disciplinary, SPCM proceeding, and/or discharge action, his depression could cause his behavioral problems, or he developed depression prior to his misconduct. There are many potential scenarios but his available records and evidence presented were deficient to demonstrate a nexus had existed between his mental health condition and misconduct/discharge. The available objective military records found no evidence he had any mental health condition to include depression during service, no evidence he was in emotional distress at the time of any of his misconduct, and no evidence his mental health condition had a direct impact to his discharge or was a mitigating factor to his discharge. Therefore, the Psychological Advisor finds no error or injustice with his discharge. Liberal consideration is applied to the applicant's petition due to his contention of a mental health condition. 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 contends there is evidence showing his depression as a disability was incurred during his military service.

2. Did the condition exist or experience occur during military service?

There is no evidence the applicant's mental health condition to include depression had existed or occurred during service. His service treatment records were not available for review. He initiated medical care at the DVA starting in May 10, 13 years after discharge, and screened positive for depression and PTSD. The onset and causes of these conditions were not clarified nor did the applicant provide any additional information about his condition(s). He was briefly treated for depression with Zoloft by his PCP and was given a provisional diagnosis of depression. He never received any regular mental health treatment from the DVA and subsequent periodic screenings with primary care revealed he would screen negative for depression and PTSD starting in 2015 and beyond. He was given service connection for depression effective on 10 Feb 19 with no additional information provided for how this condition was connected to his service or may cause his discharge.

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

There is no evidence the applicant's mental health condition to include depression had a direct impact to his misconduct and subsequent discharge from service. His mental health condition does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

Since his mental health condition does not excuse or mitigate his discharge, his condition also does not outweigh his original discharge.

The AFRBA Psychological Advisor provided a supplemental advisory to correct the facts surrounding the applicant's Special Court-Martial conviction.

The complete advisory opinion and supplementary advisory opinion are at Exhibits D and F.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinions to the applicant on 9 May 23 and 15 Sep 23 for comment (Exhibit E and 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. The Board concurs with the rationale and recommendation of the AFRBA Psychological Advisor and finds insufficient evidence to demonstrate a nexus between his mental health condition and misconduct discharge. The Board applied liberal consideration to the evidence submitted by the applicant; however, it is not sufficient to grant the applicant's request. The applicant did not provide any evidence or records to substantiate his claim a mental health condition in service caused his misconduct, 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, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's records.

The applicant retains the right to request reconsideration of this decision. The applicant may provide post-service evidence depicting his current moral character, occupational, and social advances, in the consideration for an upgrade of discharge characterization due to clemency based on fundamental fairness.

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.

