

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-03008

XXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

Her bad conduct discharge be upgraded to honorable.

APPLICANT'S CONTENTIONS

She believes her bad conduct discharge was an injustice done to her at the time of her service. She went undiagnosed with Bipolar with mania over the course of her life, roughly 30 years. At the time of her charges, she was 19 years old and a single mother with a two-year old daughter. She was assigned in personnel and was known for her ability and getting things organized and executed. She first started noticing changes when she had mood swings. She tried to alleviate her symptoms of depression throughout her time in service. That same year she was involved in a major car accident that left her hospitalized for a week with heavy injuries to her face and head. She was told at this time she was expecting a child for the second time and her mood spiked as she was struggling with an abusive marriage, started showing signs of Post-Traumatic Stress Disorder (PTSD), and tried to handle her family by herself, but it took its toll.

In the days leading up to her misconduct, her spouse was released from custody and showed up at her home in base family housing. She had met her limit, was tired, feeling like it was never going to get better, and tried to end her life in dramatic style. Through therapy and understanding of mental health and mental disabilities, and getting proper medication was a game changer. She had been misdiagnosed and left untreated for many years. She believes if she was able to acquire proper medication treatment, maybe even intervention, those events would not have transpired. She fully accepts her responsibility and her actions.

At 19 years old she was left the mother of her two-year old and a newborn baby. She eventually left her spouse and became homeless, unable to request an appointment due to the nature of her discharge and did not qualify for government assistance. She had fallen very far at this time and eventually lost her two daughters. Not understanding her disability, and not seeing her trauma and undiagnosed PTSD, she went on struggling throughout her life, but did not give up.

She was determined to get a handle on her disabilities and went back to school. She realized what she wants to do in life is help people like her. She wishes she could have finished her enlistment, but at the time they did not know what they know now about disabilities. The biggest impact that hinders her is the nature of her discharge. She is requesting clemency in the interest of (in)justice. She is a dedicated government employee who is passionate about her work, and she has suffered enough in her life. This was 21 years ago, and if she had a chance to go back into military service, she would in a heartbeat. Her service was short-lived and would ask to see if she could rejoin the Air Force. Her children are thriving, and she gets to see them daily as she repairs her life.

In support of her request for clemency, the applicant provides a personal statement and copies of her medical records to support her request for upgrade.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 3 Apr 03, according to AF Form 910, *Enlisted Performance Report (AB thru TSgt)*, the applicant received a referral report for the period 21 Jun 01 through 20 Feb 03. She acknowledged receipt on 15 Apr 03.

On 6 Jun 03, according to Special Court-Martial Order Number XX, dated 7 Aug 03, the applicant was arraigned on the following offenses:

- Charge: Article 112a; Plea: Guilty; Finding: Guilty
- Specification 1: Did, within the continental United States, between on or about 7 Nov 02 and on or about 17 Nov 02, use methamphetamine, a schedule II controlled substance. Plea: Guilty; Finding: Guilty
- Specification 2: Did, at or near Seaside, California, on or about 4 Dec 02, wrongfully possess .35 grams of methamphetamine, a schedule II controlled substance. Plea: Not Guilty; Finding: Not Guilty

The applicant was sentenced to a bad conduct discharge and reduction to the grade of airman basic (E-1), pending appellate review.

On 15 Nov 05, according to Special Court-Martial Order Number XX, the applicant's sentence to a bad conduct discharge and reduction to the grade of E-1 was affirmed.

On 7 Dec 05, the applicant received a bad conduct discharge. Her narrative reason for separation is "Court Martial (Drug Related Offense)" and she was credited with 4 years, 5 months, and 17 days of total active service.

On 14 Aug 12, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to her discharge.

On 13 May 15, the AFDRB concluded the discharge was consistent with the procedural and substantive requirements of the discharge regulation and was within the discretion of the discharge authority and the applicant was provided full administrative due process.

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

POST-SERVICE INFORMATION

On 29 Mar 23, the Board sent the applicant a standard request for post-service information (Exhibit C). This letter informed the applicant that a Federal Bureau of Investigation (FBI) background check would assist the Board in evaluating her case. Although the applicant did reply to the request for post-service information, her response did not include an FBI background check or other criminal history data.

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 29 Mar 23, 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 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

AFRBA Psychological Advisor, after review of the available records, finds insufficient evidence to support the applicant's request for an upgrade of her discharge from a mental health perspective.

This psychological advisor has reviewed the available records and finds the applicant's contentions plausible; however, her service treatment records were not available or submitted by the applicant for review to corroborate her contentions or the reports she made to her post-service mental health provider/evaluator. The available albeit limited records found no reports or observations she had any mental health conditions or issues during service. The available and submitted records/documents also reflected apparent inconsistent reporting by the applicant. She claimed to the mental health provider she was diagnosed and treated for Bipolar Disorder during service and found the medication she was prescribed to be ineffective at the time. To the contrary, on her application to the BCMR she wrote she had undiagnosed Bipolar with mania prior to her incident and was taking medication, but in a different part of the same application, she reported her condition was left untreated. In her handwritten testimony, she reported being diagnosed as depressed or with depression and this was left untreated. She also likened herself to others all over the world who had suffered from untreated Bipolar Disorder and PTSD during her military service. In her typewritten testimony, she reported trying to make an appointment or attended sick call when she had mood swings, depressed mood, and started showing early symptoms of PTSD but to no avail. Moreover, she claimed to her provider she suffered from head trauma from a serious car accident rendering her being in a coma for three days and had not been the same since her accident. She alleged coping with her stressors with alcohol and drugs and was sent to a recovery program for alcohol abuse during service to the provider. She did not directly or explicitly address her alcohol or drug use in any of her personal testimonies. There is no evidence any of the incidents or mental health conditions she reported experiencing to her provider post-service and in her personal testimonies had occurred during her military service. Her reports to her provider contrasted her personal testimonies and this psychological advisor finds her reporting and contentions as confusing. She was diagnosed with Bipolar I Disorder, current episode depressed, severe without psychotic features, PTSD, chronic, and Alcohol Use Disorder, In sustained remission by her post-service provider 17 years post-discharge and no evidence she had any of these conditions during service based on the available records. Without her service treatment record, this psychological advisor is unable to determine whether or not she was diagnosed with any mental health condition(s) and/or received mental health treatment during service as she inconsistently claimed.

The applicant vaguely addressed the reason for her discharge in her personal testimonies. Her military records showed she was discharged from service for illicit use of methamphetamine between on or about 7 Nov 02 and 17 Nov 02 and possessed the same substance on or about 4 Dec 02; she was also convicted at special court-martial for these offenses. She contended having marital problems and struggled with an abusive marriage and implied her stressful situations affected her mental health leading up to her discharge. She did not report she coped with her stressors with methamphetamine in her personal testimonies but informed her provider she coped with her stressors with alcohol and drugs. The benefit of the doubt is given to the applicant that she may have coped with her mental health condition with substances as co-occurring conditions, i.e., depression and substance use, are not uncommon. However, due to the serious offenses of her misconduct resulting with her special court-martial conviction and bad conduct discharge (BCD), more definitive and substantive information such as her service treatment records are necessary to determine whether her mental health condition was a mitigating factor to her misconduct and discharge. Moreover, her inconsistent reporting was not found credible or compelling enough to demonstrate her mental health condition could excuse or outweigh her BCD. More information is needed, and the burden of proof is placed on the applicant to submit the necessary records to adequately support her request. Therefore, there is no error or injustice identified with her discharge from a mental health perspective.

Liberal consideration is applied to the applicant's request due to the 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 made numerous and various contentions. She contended she had undiagnosed Bipolar with mania prior to her incident, was left untreated but was also taking medication on her application. In her personal testimonies, she contended being diagnosed as depressed or with depression, had mood swings, and sustained head trauma from a serious car accident causing her to have early signs of PTSD during service. She tried seeking treatment but to no avail during service. She reported having marital problems and was in an abusive marriage and implied her stressors preceded her misconduct and discharge. She did not directly or clearly address her drug use and possession and/or how her mental health condition may excuse or mitigate her discharge.

2. Did the condition exist or experience occur during military service? The applicant's service treatment records were not available or submitted by the applicant for review. She claimed to her post-service mental health provider/evaluator she was diagnosed and treated for Bipolar Disorder and sustained head trauma causing her to develop PTSD during service. She was given diagnoses of Bipolar I Disorder, current episode depressed, severe without psychotic features, PTSD, chronic, and Alcohol Use Disorder, In sustained remission by her provider 17 years post-discharge. There is no evidence any of these conditions or experiences had existed or occurred during her military service based on her available military records.

3. Does the condition or experience actually excuse or mitigate the discharge? The applicant did not directly or clearly address her drug use and possession, which were the reasons for her special court-martial conviction and discharge. She reported having marital problems that preceded her misconduct and discharge. She informed her mental health provider she coped with her stressors with alcohol and drugs. Her various reports are confusing but benefit of the doubt is given to the applicant that she may have coped with her mental health condition with substances. However, due to the serious offenses of her misconduct resulting with her special court-martial conviction and BCD, more substantive information such as her service treatment records are necessary to determine whether her mental health condition or experience may actually excuse or mitigate her discharge. Her inconsistent reporting is determined to not be compelling or sufficient enough to support her contentions. As a result, her mental health condition or experience does not excuse or mitigate her discharge.

4. Does the condition or experience outweigh the discharge? Since the applicant's mental health condition or experience does not excuse or mitigate her discharge, her mental health condition or experience also does not outweigh her original discharge.

The complete advisory opinion is at Exhibit D.

AF/JAJI recommends denying the application. Based on review of the total record available, no grounds were found to grant clemency in the form of a discharge upgrade. The applicant acknowledged her guilt of the offense for which she was charged by the government and sentenced by a panel of members. No additional information has been provided to suggest clemency in the form of a discharge upgrade is warranted.

In 2003, the applicant pled guilty and was convicted at a special court-martial of wrongful use of methamphetamine and wrongful possession of methamphetamine, in violation of Article 112a, Uniform Code of Military Justice. She was sentenced to a reduction to the grade of airman basic (E-1) and a bad conduct discharge. On 1 Aug 23, a psychological advisor provided a report based on the applicant's contentions regarding bipolar disorder, and determined there was insufficient evidence to support the applicant's request for upgrade based on her mental health.

We note that the guidance for liberal consideration of mental health issues – *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 – cuts against the requested correction to the applicant's discharge characterization as that would not be appropriate for her crimes according to the memorandum's standards. 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 misconduct was premeditated misconduct. Therefore, even if she has the asserted diagnoses, a discharge upgrade is not warranted.

The applicant is required to submit a Federal Bureau of Investigation Identity History Summary Check to the Board. That document does not appear to have been included with her submission. However, during her interview with her post-service counselor, she reported a post-service criminal history involving arrests, probation, and DUIs [Driving Under the Influence].

The complete advisory opinion is at Exhibit E.

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 F) 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. 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. Further, the Board concurs with the rationale of the AFRBA Psychological Advisor and the recommendation of AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant's contentions. Liberal consideration was applied; however, the applicant's mental health condition does not excuse or mitigate her discharge. In the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the evidence presented, and in the absence of criminal history provided by the applicant, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's record.

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 Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2022-03008 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 9 Nov 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 29 Mar 23.
- Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 1 Aug 23.
- Exhibit E: Advisory Opinion, AF/JAJI, dated 25 Sep 23.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 25 Sep 25.

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.

X

Board Operations Manager, AFBCMR