



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-03206

Work-Product

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His bad conduct discharge (BCD) discharge be upgraded.

APPLICANT'S CONTENTIONS

It has been 44 years since his discharge; he has not been in trouble since and has been a good citizen. He has three children who graduated college. He was 19 when his dad died, one year after he enlisted. He took a stereo from his roommate and sold it to a police friend and told him it was stolen. The death of his father left his mother homeless to which he had to go home to support. He marked Post-Traumatic Stress Disorder (PTSD) on his application.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

Dated 30 Apr 79, AF Form 3070, *Notification of Intent to Impose Nonjudicial Punishment*, indicates the applicant received nonjudicial punishment (NJP), Article 15 for disorderly conduct. He received a reduction in grade to airman (E-2), suspended until 29 Oct 79, and forfeiture of \$50.00 in pay per month for 2 months.

Dated 7 Jun 79, the applicant received a Vacation of Suspension notification in violation Article 86 by leaving his place of duty without authorization. The applicant was reduced to the grade of airman with a new date of rank (DOR) of 2 May 79.

On 4 Oct 79, the convening authority published Special Court-Martial Order Number Work... The Order stated the applicant pled guilty to one charge and one specification of theft of a stereo and amplifier/receiver (Article 121). The applicant was sentenced to confinement at hard labor for four months, forfeiture of \$200.00 in pay per month for 4 months, reduction to the grade of airman basic, and discharged from the service with a BCD.

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On 25 Apr 80, the applicant received a BCD. His narrative reason for separation is “Conviction by Court-Martial (Other Than Desertion)” and he was credited with 3 years, 1 month, and 13 days of total active service.

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

POST-SERVICE INFORMATION

On 29 Aug 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 F). The applicant replied on 19 Sep 23 and provided an FBI report. According to the report, the applicant has had no arrests since discharge. Additionally, the applicant submitted post-service information to include a personal statement and a character reference statement. In his personal statement he states he suffered fear and anxiety a year after he entered the Air Force with the sudden death of his father leaving his mother and younger brother without financial support. The fear for his family’s future led to decisions which he regrets resulting in his BCD. Since his discharge, he has excelled in his professional life and volunteers with youth groups at his church.

The applicant’s complete response is at Exhibit G.

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 (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 29 Aug 23, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit F).

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 completed a review of all available records and finds insufficient evidence to support the applicant's request for the desired changes to his record. The applicant was seen at the Mental Health Clinic (MHC) starting on 23 Feb 79 initially for psychological testing for unspecified reasons. His subsequent mental health treatment notes reported he had possible auditory hallucinations and was admitted for observation for this problem sometime in Mar 79. This problem appeared to have been resolved as there was no continuous complaint about this issue after his hospital admission and there were no records he had psychosis or was given any psychotic disorder diagnosis. His other treatment notes reported he had stomach pains that were secondary to his stress reaction related to his problems in the Air Force, he had acute situational reaction after being interviewed by Security Police (SP) and was requested and received a clemency evaluation as part of his court-martial proceeding by his Area Defense Counsel. His treatment notes consistently reported his mental status as stable and responsible for his behaviors. All of his mental health treatment and related encounters had occurred after his documented misconduct of stealing a stereo and amplifier/receiver occurring on or about 17 Nov 78. His mental health condition or emotional distress was in response to his occupational and legal problems caused by his own misconduct according to his treatment records.

The applicant contends his father passed away one year after he entered the Air Force and alluded to this experience affecting him. While this situation is possible, there is no actual evidence his mental health condition or grief and loss from his father's death caused him to have any behavioral changes or caused his misconduct. His mental health treatment notes had no documentation of his father's death and no records of any difficulties he had relating to his father's death or adjustment problems after his father's death. He also contends his mother was left homeless after his father died and he needed to go home to support her. He was reported to have been absent without leave (AWOL) (not showing up to work) for at least four days in Apr 79 but his AWOL was not listed as a misconduct or offense convicted at special court-martial contributing to his BCD. There was no evidence his mental health condition caused his AWOL. His mental health provider reported

he was stable and responsible when he was seen at the MHC the previous day, the same day/time period he was reported to be AWOL. The applicant admitted in his application, he took the stereo from his roommate and sold it to a friend, to whom he had disclosed, the item was stolen. It appeared the applicant knew what he was doing at the time when he stole the stereo and sold it. There was no evidence he had any cognitive impairments or mental health condition which may have impaired his judgment at the time of his misconduct. His service treatment records confirmed there was no evidence he had any thought disorder. Furthermore, he received formal evaluations in the form of psychological testing in Feb 79 and a competency evaluation in Sep 79 in addition to his mental health treatment. Although the results of his test and evaluation were not available for review, his mental health provider and/or Primary Care Manager (PCM) did not document any significant cognitive or intellectual problems in his records especially since they had met and assessed him on numerous occasions. Moreover, his regular mental health provider's notes, the same provider who had performed his psychological testing and competency evaluation, were absent for any detected or observed cognitive impairment issues. The applicant marked "PTSD" on his application to the AFBCMR; however, he provided no additional information about this diagnosis or condition. There is no evidence he had or was diagnosed with PTSD during service. He was assessed to have acute situational reaction and was somewhat anxious in response to being upset after he was interviewed by SP, presumably related to being under investigation for his misconduct of stealing his roommate's stereo. This condition, however, was noted to be "partially resolved" at that time and he no longer had this issue when he was seen for follow-up the next day. There is no evidence the applicant was ever diagnosed with PTSD by a duly qualified mental health provider during or post-service. He submitted no treatment records to corroborate this diagnosis and condition and again, no explanation was provided for how this condition caused his misconduct.

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 in the policy 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 contends his father passed away one year after he had enlisted in the Air Force. He acknowledged he took his roommate's stereo, sold it to a police officer friend, and informed his friend it was stolen. He marked "PTSD" on his application to the AFBCMR as the issue/condition related to his request for a discharge upgrade but provided no information for how this condition may cause, excuse, or mitigate his discharge.

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

There is no evidence his condition of PTSD had existed or was experienced during his military service. His service treatment records revealed he received mental health treatment after his misconduct of stealing a stereo and amplifier which resulting in his special court-martial conviction and discharge. He received psychological testing, regular mental health counseling/therapy, and a clemency evaluation by his mental health provider during service. He had possible auditory hallucinations and was admitted to the hospital for this problem but no records indicated this problem persisted, he had psychosis or was diagnosed with a psychotic

disorder. He was assessed to have acute situational reaction due to being interviewed by SP. The same note specified this condition was “partially resolved” and his succeeding notes dated the following day stated he was doing okay, was stable and in control. His service treatment notes consistently reported he was stable and responsible for his behaviors. His mental health condition or emotional distress appeared to have been the result of or in response to his occupational and legal problems caused by his own misconduct. There were no records reporting his father’s death and/or he had grief and loss or adjustment problems following his father’s death which may cause his behavioral changes, misconduct, or BCD.

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

There is no evidence the applicant’s mental health condition to include PTSD, grief and loss/adjustment problems from his father’s death, caused or had a direct impact to his misconduct resulting with his special court-martial conviction and BCD. 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 complete advisory opinion is at Exhibit C.

AF/JAJI recommends denying the application finding insufficient evidence of error regarding the first type of authorized correction, and insufficient evidence warranting clemency regarding the second type of authorized correction.

The applicant’s request for a discharge upgrade pertains to records resulting from a court-martial conviction and sentence. Consequently, pursuant to 10 U.S.C. § 1552(f), the AFBCMR can take only two types of action: (1) correction of a record to reflect an action taken by review authorities under the UCMJ; or (2) action on the sentence of a court-martial for purposes of clemency. Hence, AFBCMR 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 take action only on the sentence, but even then only on the basis of clemency and not on the basis of alleged legal error or injustice.

AF/JAJI does not opine on the applicant’s mental health matters except to note any mental health issue occurred after the theft of the stereo equipment. The Psychological Advisor has already provided a thorough analysis to the Board. As a result, AF/JAJI finds no grounds for clemency based on mental health. Furthermore, the guidance for liberal consideration of mental health issues in the Kurta Memorandum cuts against the requested corrections. 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. The applicant’s special court-martial conviction for larceny reflects premeditated misconduct. Accordingly, under the

Kurta standards, any mental health condition, even if verified, would neither mitigate nor outweigh the discharge.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 29 Aug 23 for comment (Exhibit E), 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 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. Based on the available evidence of record, it appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. The applicant has provided no evidence which would lead the Board to believe his service characterization was contrary to the provisions of the governing regulation, unduly harsh, or disproportionate to the offenses committed. Furthermore, the Board concurs with the rationale and recommendation of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. Liberal consideration was applied to the applicant's request due to the contention of a mental health condition; however, since there is no evidence his mental health condition or experience with grief and loss from his father's death had a direct impact on his behaviors and misconduct resulting with his discharge, his condition or experience does not excuse, mitigate, or outweigh his discharge.

In the interest of justice, the Board considered upgrading the applicant's discharge. In support of his request for an upgrade, the applicant provided an FBI report, a personal statement, and a character reference statement from his spouse. In his personal statement, he contends the sudden death of his father caused fear for his family's future which led to decisions which he regrets resulting in his BCD. Since his discharge, he has excelled in his professional life and volunteers with youth groups at his church. The Board contemplated the many principles included in the Wilke Memorandum to determine whether to grant relief based on an injustice or fundamental fairness. However, the Board does not find the evidence presented is sufficient to conclude the applicant's post-service activities overcame the misconduct for which he was discharged. 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 a supporting statement from his spouse 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.

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 fundamental fairness. Therefore, the Board recommends against correcting the applicant’s record.

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-2022-03206 in Executive Session on 27 Sep 23 and 4 Dec 23:

-  Panel Chair
-  Panel Member
-  Panel Member
-  Panel Member

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

- Exhibit A: Application, DD Form 149, dated 15 Nov 22.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFRBA Psychological Advisor, dated 14 May 23.
- Exhibit D: Advisory Opinion, AF/JAJI, dated 21 Aug 23.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 29 Aug 23.
- Exhibit F: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 29 Aug 23.
- Exhibit G: Applicant’s Response, w/atchs to include FBI Report, dated 19 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.

3/11/2024

Work-Product

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