



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-00178

Work-Product

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

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

APPLICANT'S CONTENTIONS

He believes his discharge classification does not accurately reflect the service he provided to his country. Throughout his military career, he demonstrated a strong work ethic and a commitment to upholding the armed forces' values and principles. He made every effort to carry out his responsibilities and believes his actions and conduct merited an honorable discharge. In support of his request for clemency, the applicant provides three personal letters of reference.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 4 Dec 89, the convening authority published General Court-Martial Order (GCMO) Number [Work-Product]. The Order stated the following: the applicant pled guilty and was found guilty of one charge and one specification of using cocaine on diverse occasions (Article 112a); one charge and three specifications of being absent from his place of duty at which he was required to be (Article 86); and one charge and one specification of wrongfully appropriating a vehicle of a value of approximately \$6,500.00 (Article 121). The applicant was sentenced to confinement for 14 months, reduction to the grade of airman basic, and discharge from the service with a BCD.

On 3 Jul 90, the convening authority published GCMO Number [Work-Product]. The Order stated the sentence promulgated in GCMO Number [Work-Product] was affirmed.

On 4 Jun 93, the applicant received a BCD. His narrative reason for separation is "Conviction by Court-Martial (Other than Desertion)" and he was credited with 4 years, 3 months, and 13 days of total active service.

AFBCMR Docket Number BC-2023-00178

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

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 11 May 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 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 11 May 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.

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 convicted at a general court-martial for engaging in a pattern of serious misconduct of being absent without leave (AWOL) at least three times including an AWOL where he was apprehended, wrongfully used cocaine on more than one occasion, and stole a vehicle. He offered no explanations for any of these behaviors and did not address them in his petition. The applicant marked "Other Mental Health" on his application to the AFBCMR; however, provided no clarifying information about how his mental health condition caused his discharge. He did not contend his mental health condition caused any of his behaviors. There is no evidence he had any mental health condition during service and thus, no evidence his mental health condition caused or had a direct impact on his numerous acts of misconduct leading to his BCD. There is no evidence he had a mental health condition or was in emotional distress impairing his judgment at the time of any of his misconduct.

He began to receive substance abuse treatment from the Department of Veterans Affairs (DVA) in Sep 13, which was 20 years after discharge, and had a long history of substance dependency problems occurring after service. There is evidence he used cocaine during service, however no evidence he used cocaine to cope with his mental health condition during service. Substance abuse/dependency problems are unsuiting conditions for military service and do not excuse one's drug-using behaviors. He did endorse having anxiety and insomnia decades after service, and these symptoms were reported to be related to his physical health issues and/or were induced by his substance abuse/dependency problems. Besides his substance abuse/dependency problems and anxiety and insomnia from his health issues, his psychiatric evaluation by a psychiatrist at the DVA reported he denied having any mental health conditions such as depression, PTSD, other trauma and stressor-related problems, mania, psychosis, etc.

His character statements from his family stated he received treatment for anxiety and depression, however they did not discuss the causes of these conditions or symptoms, whether they occurred in service, and how they were related to his reasons for discharge. There is no evidence he had anxiety or depression during service. Their statements were not corroborated by his DVA records as he did not receive treatment for anxiety and depression from the DVA. The applicant submitted no mental health treatment records to support the notion his mental health condition caused his maladaptive behaviors and misconduct during service.

The applicant's personal testimony and character statements were found to be insufficient and not compelling to support his request. Even if the applicant was to offer a compelling testimony or contend his mental health condition caused his misconduct, the Psychological Advisor opines his acts of misconduct were too egregious to be excused or mitigated by his mental health condition, especially since he was convicted at a general court-martial for serious offenses. His mental health condition does not exempt him from criminal responsibility.

Liberal consideration is applied to the applicant's petition due to his contention of a mental health condition. The following are answers 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 he believes his discharge classification does not accurately reflect the service he provided to his country. He marked "Other Mental Health" on his application to the AFBCMR, however provided no clarifying information about his mental health condition and its relation to his discharge. His submitted character statements from his family reporting he had a history of substance dependency problems, and he received treatment for anxiety and depression. However, they did not provide any other information about how his mental health condition affected his discharge. The applicant did not contend how his mental health condition may excuse or mitigate his discharge.

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

There is no evidence the applicant's mental health condition including anxiety or depression had existed or occurred during his military service. He began to receive substance abuse treatment from the DVA in Sep 13, which was 20 years after discharge, and was reported to have a long history of substance dependency problems after service. There is evidence he used cocaine during service but no evidence he used cocaine to cope with his mental health condition during service.

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

There is no evidence the applicant's mental health condition including anxiety or depression caused or had a direct impact on his misconduct and discharge. His misconduct was of a serious nature resulting in his conviction at a general court-martial and could not be excused or mitigated by his mental health condition. 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 D.

ADDITIONAL AIR FORCE EVALUATION

AF/JAJI finds insufficient evidence to support the applicant's request and recommends denying the applicant's request. The AFBCMR is limited to 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, the 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 only on the basis of clemency and not on the basis of alleged legal error or injustice.

AF/JAJI finds insufficient evidence of error regarding the first type of authorized correction, and insufficient grounds for clemency to support the second type of authorized correction. He contends he “consistently demonstrated a strong work ethic and commitment to holding the armed forces’ values and principals,” but the history of repeated misconduct as evidenced by his NJP and court-martial convictions, proves otherwise. With regard to his contention he suffered from PTSD, AF/JAJI does not opine on mental health claims. However, it is noted for the Board the Psychological Advisor to the AFBCMR provided a thorough analysis finding insufficient evidence to support applicant’s claim. Furthermore, the guidance for liberal consideration of mental health issues in the Kurta Memorandum cuts against his requested discharge upgrade. According to paragraph 19 of the Attachment to the Kurta Memorandum, premeditated misconduct is not generally excused by mental health conditions and review boards will exercise caution in assessing the causal relationship between asserted conditions or experiences and premeditated misconduct. In the present case, his court-martial convictions for three periods of unauthorized absence, wrongful cocaine use, and wrongful appropriation of a car are instances of premeditated misconduct. Accordingly, under the Kurta standards, any mental health condition, even if verified, would neither mitigate nor outweigh the discharge. After careful review, AF/JAJI finds the BCD is appropriate, and clemency is not warranted.

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 3 Oct 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. The Board concurs with the rationale and recommendation of AF/JAJI and AFRBA Psychological Advisor and finds insufficient evidence he had any mental health condition during service and thus, no evidence his mental health condition caused or had a direct impact on his numerous acts of misconduct leading to his BCD. The Board applied liberal consideration to the evidence submitted by the applicant; however, it is not sufficient to grant the applicant’s request. There is no evidence he had a mental health condition or was in emotional distress impairing his judgment at the time of any of his misconduct, thus his condition does not mitigate or excuse his discharge. He began to receive substance abuse treatment from DVA in Sep 13, which was 20 years after discharge, and had a long history of substance dependency problems occurring after service. Therefore, there is no evidence the applicant had a mental health condition during service, nor did a mental health condition cause his misconduct. 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.

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-2023-00178 in Executive Session on 18 Jan 24:

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Panel Chair

Panel Member

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Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 2 Jan 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 11 May 23.

Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 21 Sep 23.

Exhibit E: Advisory Opinion, AF/JAJI, dated 28 Sep 23

Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 3 Oct 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.

2/9/2024

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Board Operations Manager, AFBCMR
Signed by: USAF

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