



Work-Product

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

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-00259

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

### APPLICANT'S REQUEST

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

### APPLICANT'S CONTENTIONS

His character of service has been hindering his ability to provide a meaningful/comfortable life for his family. Also, information has come out that an incident he was involved in which severely impacted his career was taken out of context and has adversely affected his earning potential. Correcting his character of service would allow him to advance in a competitive society freely and positively and he would feel better about the choice he made to serve his country.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The applicant is a former Air Force airman (E-2).

On 12 Apr 99, 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 reasons for the action were:

- a. On 11 Jan 99, he received a Record of Individual Counseling for failing to report to work.
- b. On 6 Nov 98, he submitted a check to a car dealership that was returned for insufficient funds. For that, on 9 Mar 99, he was punished under Article 15, Uniform Code of Military Justice (UCMJ) for violating Article 134 and he received a reduction to the grade of E-2.
- c. On 5 Jul 97, he committed an indecent assault upon an airman. For that, on 2 Oct 97, he was punished under Article 15, UCMJ for violating Article 134 and he received a reduction to the grade of Airman and restriction to the base for 30 days.

On 22 Apr 99, the Staff Judge Advocate found the discharge action legally sufficient.

AFBCMR Docket Number BC-2023-00259

Work-Product

Work-Product

On 7 May 99, the discharge authority directed the applicant be discharged for Minor Disciplinary Infractions with a General (under honorable conditions) service characterization. Probation and rehabilitation were considered, but not offered.

On 10 May 99, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct" and he was credited with 2 years, 9 months, and 22 days of total active service.

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

## **POST-SERVICE INFORMATION**

On 6 Jul 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) (Exhibit C); however, he has not replied.

## **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 6 Jul 23, Board staff provided the applicant a copy of the liberal consideration and clemency 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 finds insufficient evidence to support the applicant's request for an upgrade of his discharge based on his mental health condition. The applicant did not make any contentions regarding his mental health condition and designated "Post Traumatic Stress Disorder (PTSD)" and "Other Mental Health" on his application without any elaboration for how he sustained or incurred these conditions, when they occurred, and how they may cause or impacted his misconduct resulting in his subsequent discharge from service. The applicant's objective and available military records find no records or evidence he received any mental health evaluation, treatment, or mental disorder diagnosis to include PTSD during service. Although there are no formal treatment records to confirm he had a mental health condition during service, he did discuss in his response to his first Article 15 that a terminated pregnancy had affected him emotionally and did not discuss his emotional distress further. However, his emotional distress from this situation had no nexus to his misconduct of indecent assault. This is because he

repeatedly denied holding down the airman and digitally penetrating her and said he accidentally grabbed her breast when he lost his balance while trying to get off the floor. Based on these explanations, it is not possible his mental health condition caused these behaviors. 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 reported misconducts or offenses. Even if it was possible that his mental health condition had somehow caused any of his misconduct, the AFRBA Psychological Advisor opines his mental health condition could not excuse or mitigate his misconduct of indecent assault. This misconduct was egregious and could not be disregarded or outweighed by his mental health condition. A review of the available records finds no error or injustice with his discharge from a mental health perspective and no evidence his mental health condition had a direct impact or was a contributing factor to his discharge.

Liberal consideration is applied to the applicant's petition due to the designation of a mental health condition of "PTSD" and "Other Mental Health" on his application to the BCMR. 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 did not make any contentions regarding his mental health condition and marked "PTSD" and "Other Mental Health" on his application to the BCMR without providing any clarifying information about how he sustained or incurred these conditions, when they occurred, and how they may cause 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 of PTSD or other mental health had existed or occurred during his military service. His service treatment records were not available or submitted for review and the available records find no evidence he received any mental health evaluation, treatment, or mental disorder diagnosis 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 PTSD or other mental health condition caused or had a direct impact on his acts of misconduct and subsequent discharge. His mental health condition does not excuse or mitigate his discharge especially his misconduct of indecent assault due to its egregious nature.
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.

## **APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 3 Oct 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 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 Title 10, United States Code § 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 of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. While the applicant marked "PTSD" and "Other Mental Health" on his application to this Board, he did not make any contentions regarding his mental health condition or provide any clarifying information about how he sustained or incurred these conditions, when they occurred, and how they may cause or mitigate his discharge. There is no evidence the applicant's mental health condition of PTSD or other mental health had existed or occurred during his military service. Liberal consideration was applied; however, the applicant's mental health condition does not excuse or mitigate his discharge, especially his misconduct of indecent assault due to its egregious nature.

Additionally, 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. In the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the evidence presented, and in the absence of post-service information/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 DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2023-00259 in Executive Session on 21 Feb 24:

Work-Product	Panel Chair
Work-Product	, Panel Member
Work-Product	Panel Member

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

- Exhibit A: Application, DD Form 149, dated 24 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 6 Jul 23.
- Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 28 Sep 23.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 3 Oct 23.

*Work-Product*

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.

2/3/2025

*Work-Product*

**AFBCMR Docket Number BC-2023-00259**

*Work-Product*