



Work-Product

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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2023-00391

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT’S REQUEST

His bad conduct discharge (BCD) be upgraded.

APPLICANT’S CONTENTIONS

He served under the “Don’t Ask, Don’t Tell” (DADT) policy as transgender. This created an atmosphere where he could not confide in his team to cope with the stress of flying in combat missions. He became depressed and self-medicated with drugs, which ruined his previously unmarred service record. Since his time in the service, he has taken responsibility for his depression, which has improved since transitioning from female to male. He has been an active, positive contributor to society, earning his nursing degree and is an American Academy Nurse Practitioner Certified Board (AANPCB) Family Nurse Practitioner. He seeks to serve and produce positive impacts to the country, even if he can no longer serve in the military.

In support of his application, he submitted transcripts from nursing classes, an AANPCB certification card, name change documentation, master’s degree, a License Verification Report, excerpts from his military personnel records and medical documentation.

The applicant’s complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 15 Mar 05, General Court Martial Order (GCMO) Number [redacted] dated 13 Jun 05, indicates a military judge adjudged a sentence to the applicant to a BCD, confinement for 12 months, reduction to the grade of airman basic (E-1), and forfeiture of all pay and allowances. The applicant was found guilty and was convicted of three Articles of the Uniform Code of Military Justice (UCMJ), specifically:

1. Article 112a – Did, on divers’ occasions, within the continental United States, between on or about 1 Dec 03 and on or about 10 Mar 05, wrongfully used crystal methamphetamine.

2. Article 121 – Did, on or about 30 Sep 04, steal a waiver of motor vehicle tax, of a value less than \$500.00, the property of the [REDACTED] Work-Product
3. Article 107 – Did, on or about 27 Oct 04, with intent to deceive, make an official statement to wit: “It was my first time using any drug” and “This was the only time I used it” or words to that effect which was totally false and was then known by the applicant to be false.

On 20 Oct 08, the applicant received a BCD. His narrative reason for separation is “Court-Martial (Other)” and he was credited with three years, seven months, and one day of total active service.

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

POST-SERVICE INFORMATION

On 9 Mar 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). On 11 Jun 23, the applicant responded stating he is an actively licensed Registered Nurse and Advance Practice Registered Nurse in [REDACTED] Work-Product This requires a Level 2 background check with fingerprinting each time he is licensed and upon hiring. This supporting documentation was provided with the original application. The applicant’s complete response is at Exhibit D.

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 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 20 Sep 11, with the repeal of the law commonly known as “Don’t Ask, Don’t Tell” (DADT), 10 U.S.C. Section 654, the Department of Defense (DoD) issued supplemental policy guidance on correcting military records of former service members who had been discharged under that law or a precursor. The guidance applied to the following types of requests: changing the narrative reason for a discharge; re-characterizing service as honorable; changing a reentry code to one allowing immediate eligibility to reenter service. The guidance directed that such requests should normally be granted when both of the following conditions are true: (1) the original discharge was based solely on DADT or a similar policy in place prior to enactment of DADT; and (2) there were no aggravating factors in the record, such as misconduct. For meritorious cases, the guidance further directed the use of “Secretarial Authority” as the new narrative reason for separation, with Separation Program Designator (SPD) code “JFF” and reentry code “1J.” Finally, the guidance noted, while each request must be evaluated individually, an honorable or under honorable conditions (general) discharge should normally be considered to indicate the absence of aggravating factors.

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 (USDN P&R) 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 9 Mar 23, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit C).

AIR FORCE EVALUATION

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The AFRBA Psychological Advisor finds insufficient evidence to support the applicant's request for an upgrade of his discharge from a mental health perspective. The applicant contends he self-medicated with drugs due to depression because of his personal struggles and this explanation is plausible and compelling. However, his mental health condition could not explain or excuse his other serious offense of stealing a waiver of motor vehicle tax for which he was also convicted at a general court-martial. The nature of this offense was not clarified in his records nor did the applicant address this misconduct in his application. It could not be determined if his mental health condition was a mitigating factor to this misconduct and based on the language of the offense, could be considered as a premeditated behavior, which would not be excused by his mental health condition due to the element of planning. Moreover, his service treatment records were limited, and he only submitted one page for review. This record/page was vague and was absent of pertinent information such as the onset and cause for his mental disorder diagnoses of Amphetamine Dependence and Adjustment Disorder with Mixed Emotional Features given to him during his military service. This record could not fully confirm or substantiate the applicant's contention. Inferences could be made, but more definitive information is necessary. Thus, and at this time, the applicant's mental health condition could not fully mitigate or excuse his discharge, especially since the serious offenses of his misconduct had consisted of the use of an illicit/hard drug on numerous occasions over a year's period and wrongfully appropriating a motor vehicle tax waiver, had resulted in his general court-martial conviction and his BCD. The Psychological Advisor is sympathetic to the applicant's plight but finds his misconducts and offenses are too serious to be outweighed by a one-page service treatment record that is lacking substantive information. More information is needed, and the burden of proof is placed on the applicant to submit the necessary records to adequately support his request. The applicant may consider submitting his complete service treatment records for a reconsideration of his request in the future and/or the Board may consider applying clemency to his request for his post-service accomplishments. However, there is no error or injustice identified with his 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 contends he served under the Don't Ask, Don't Tell policy as a transgender and this created an atmosphere where he could not confide with his team to cope with the stress of flying in combat missions. He developed depression and self-medicated with drugs resulting with his BCD and incarceration.

2. Did the condition exist or experience occur during military service?
The applicant submitted a page from his service treatment records reporting he was being transferred to W----- Treatment Center for reasons unknown and was given diagnoses of Amphetamine Dependence and Adjustment Disorder with Mixed Emotional Features on Axis I and a diagnosis was deferred on Axis II. The onset and rationale for these diagnoses were not provided in the record.

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

While it is compelling the applicant had coped with his depression from his personal struggles with drugs, his mental health condition could not fully or adequately excuse or mitigate his BCD, especially with a vague and limited-service treatment record. He was also convicted at a general court-martial for stealing a waiver motor vehicle tax and based on the description of this offense coupled with limited information about this offense, his mental health condition was not a mitigating factor to this offense. His mental health condition does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

Since the applicant's mental health condition does not excuse or mitigate his discharge, his mental health condition also does not outweigh his discharge.

The complete advisory opinion is at Exhibit E.

APPLICANT'S REVIEW OF EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 11 Aug 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 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 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 notes the applicant believes relief is warranted based on the repeal of DADT; however, the DoD issued guidance regarding DADT, advises discharge upgrades should be granted when the original discharge was based solely on DADT and there were no aggravating factors in the record, such as misconduct. Based on the Board's review of the evidence of record, the applicant's discharge does not meet either requirement as there are aggravating factors in the record. Furthermore, 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. The Board applied liberal consideration to the evidence submitted by the applicant; however, it is not sufficient to grant the applicant's request. The Board notes the applicant may have coped with his depression from his personal struggles with drugs; however, he provides very little evidence 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 clemency. In support of his request for an upgrade, the applicant provided transcripts from nursing classes and his degree diploma, a copy of his nursing license, and a

License Verification Report which he contends is proof of employer security background checks. However, the evidence he provides lacks references that demonstrate his character, service to the community, or any degree of remorse pertaining to his in-service conduct. The Board contemplated the many principles included in the Wilke Memo to determine whether to grant relief based on an injustice or fundamental fairness and considered the applicant’s post-service conduct and achievements, length of time since the misconduct, his character and reputation, service to the community, job history and degree of contrition. However, given the evidence presented, the Board determined relief is not warranted. The applicant retains the right to request reconsideration of this decision, which could be in the form of personal or 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 clemency.

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-2023-00391 in Executive Session on 25 Oct 23:

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, w/atchs, dated 19 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 9 Mar 23.
- Exhibit D: Applicant’s Response, dated 14 Jun 23.
- Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 5 Jul 23.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 11 Aug 23.

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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.

12/11/2024

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Board Operations Manager, AFBCMR

Signed by: *Work-Product*