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

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-00703

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: YES

### APPLICANT'S REQUEST

1. His general (under honorable conditions) discharge be upgraded to honorable.
2. His narrative reason for separation and corresponding separation code be changed to reflect "Secretarial Authority."
3. His reentry (RE) code be changed to a "1."

### APPLICANT'S CONTENTIONS

His discharge was unfair at the time and remains so now as the discharge is both procedurally and substantively defective. He should receive liberal consideration; it would be unfair to not upgrade his discharge.

In support of his request, the applicant provides a copy of his Air Force Discharge Review Board (AFDRB) applications and decisional documents, copies of military kudos, his College Graduation Certificate, a character reference letter, and other military records related to his request for upgrade.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The applicant is a former Air Force Reserve (AFR) senior airman (E-4).

On 6 Dec 16, AF Form 3070, *Record of Nonjudicial Punishment Proceedings (AB thru SSgt)*, indicates the applicant received nonjudicial punishment (NJP), Article 15 for unwanted touching which caused bodily harm with intent to abuse. He received a reduction in grade to senior airman (E-4).

Dated 3 Apr 18, Reserve Order Work-Prod... indicates the applicant received a general (under honorable conditions) discharge from the AFR, effective 30 Mar 18, under the provisions of AFI 36-3209,

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Controlled by: SAF/MRB  
CUI Categories: Work-Product  
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*Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, paragraph 3.21.3, punitive.

On 17 May 20, the applicant submitted a request to the AFDRB for an upgrade to his discharge.

On 14 Jan 21, the majority of the AFDRB denied his request for a discharge upgrade and a change to his narrative reason and reenlistment code and found insufficient evidence of an inequity or impropriety to grant relief. The board found the negative aspects of the applicant's willful misconduct outweighed the positive aspects of his military service. Additionally, the board was not able to find any documentation regarding the discharge. The board relies on the presumption of regularity and therefore concluded the discharge received by the applicant was appropriate.

On 4 Feb 21, the applicant resubmitted a request to the AFDRB for an upgrade to his discharge.

On 24 May 22, the AFDRB denied the applicant's request and found no evidence of impropriety or inequity to warrant an upgrade of the discharge. The board concluded all steps taken to discharge the member were fair and proper and found the applicant, through counsel, did not provide sufficient evidence to overcome the facts presented through the investigation.

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

## **POST-SERVICE INFORMATION**

On 3 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 C). The applicant replied on 8 Aug 23 and provided an FBI report. According to the report, the applicant has had no arrests since discharge.

The applicant's complete response is at Exhibit D.

## **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 Post-Traumatic Stress Disorder (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 Memorandum.

On 3 Aug 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.

## **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. A review of the available records finds no evidence the applicant's mental health condition(s) had a direct impact on his misconduct of inappropriate sexual contact with intent to abuse which resulted in his punitive discharge from service. There were no records he had any mental health conditions or concerns during service. He was command referred to Alcohol and Drug Abuse and Prevention Treatment (ADAPT) following his alcohol-related incident, which occurred during or around the time of his misconduct, and the evaluation results yielded he did not have any alcohol or substance use disorders. His mental status exam (MSE) was determined to be unremarkable with no thought disorder, safety concerns, or other cognitive or emotional functioning impairment issues. Additionally, he was not given any other mental disorder diagnosis such as anxiety, depression, PTSD, etc. His ADAPT evaluation did mention he had increased his drinking after he returned from Iraq, but his drinking had decreased in the past three years. His reduction in alcohol consumption would coincide with the time of his misconduct. There was no evidence he was in emotional distress or had a mental health condition that would impair his judgment at the time of his misconduct. His military records at the time of service indicated he was possibly intoxicated at the time of the incident and his ADAPT evaluation had ruled out he had any alcohol abuse or dependency issues. His intoxication appeared to be an isolated incident of being drunk and disorderly from the records. The applicant and his legal counsel did not provide a contention or explanation for how his mental health condition to include PTSD or TBI had affected his functioning resulting with his discharge. They did not identify the actual mental health condition or diagnosis he had during service. There was no evidence in his objective military or service treatment records he had any of these conditions of PTSD or TBI at the time of service, no evidence any of these conditions had existed or occurred during service, and no nexus demonstrated between his mental health conditions and misconduct. Therefore, the Psychological Advisor finds no error or injustice identified with his discharge based on his mental health condition.

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 and/or his legal counsel marked "Other Mental Health" as issues or conditions related to his discharge on his application to the AFBCMR and referenced the Hagel Memorandum for PTSD and TBI in a previous petition to the AFDRB. The applicant and/or his legal counsel did not provide a contention, testimony, or explanation for how the applicant's mental health condition may excuse or mitigate his discharge.
2. Did the condition exist or experience occur during military service?

There was no evidence the applicant's mental health condition to include PTSD or TBI had existed or occurred during military service. He received a command referral to ADAPT following his alcohol-related incident during service and was determined to have no alcohol abuse or dependency problems. He was not given any alcohol or substance use disorders. He also was determined to have no thought disorder, emotional problems, or safety concerns and was not given any other mental disorder diagnosis such as anxiety, depression, PTSD, etc.

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

There was no evidence the applicant's mental health condition had a direct impact to his behaviors and discharge. There was no evidence he was in emotional distress or had a mental health condition that may impair his judgment at the time of his misconduct of inappropriate sexual contact with intent to abuse. 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 mental health condition also does not outweigh his original discharge.

The complete advisory opinion is at Exhibit E.

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

The Board sent a copy of the advisory opinion to the applicant on 17 Aug 23 for comment (Exhibit F), and the applicant replied on 10 Sep 23. In his response, the applicant contends, through counsel, there are significant inaccuracies present in the advisory opinion that deny recognition to the injuries he sustained during his military service. Even though the advisory opinion states there is no evidence of a mental health condition in his record, he reports having experienced behavioral health issues to include PTSD and other mental health concerns during his military service which affected the circumstances of his separation. He had four separate periods of active duty all of which ended in honorable service; however, he received a punitive discharge due to an incident when he touched someone's buttock without consent. His commander did not consider his personal statement nor the letter from his Area Defense Counsel before determining his discharge outcome. Furthermore, he is currently dealing with personal health issues and has been given a 70 percent disability rating for PTSD from the Department of Veterans Affairs (DVA). His current injuries are service-related and he should be given liberal consideration and granted a discharge upgrade.

The applicant's complete response is at Exhibit G.

#### **FINDINGS AND CONCLUSION**

1. The application was timely filed.
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 the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board notes his alcohol consumption may have contributed to his misconduct; however, finds no medical evidence he had a mental health issue while in service. A rating by the DVA, based on new and/or current exams conducted after discharge from service, does not warrant a change to a member's separation. The DVA under Title 38, U.S.C., is empowered to offer compensation for any medical condition with an established nexus with military service, without regard to its impact upon a member's fitness to serve, the narrative reason for release from service, or the length of time transpired since the date of discharge. The burden of proof is placed on the applicant to submit evidence to support his claim. The Board applied liberal consideration to the evidence submitted by the applicant; however, it is not sufficient to grant the applicant's request. The applicant did not provide any evidence or records to substantiate his claim that a mental health condition in service caused his misconduct of inappropriate sexual contact with intent to abuse, thus his condition does not mitigate or excuse his discharge. In the interest of justice, the Board considered upgrading the discharge based on fundamental fairness; however, given the evidence presented, the Board finds no basis to do so. The Board contemplated the many principles included in the Wilkie Memo to determine whether to grant relief based on an injustice or fundamental fairness; however, the evidence he provides lacks references that demonstrate his character, post-service rehabilitation, service to the community, or any degree of remorse pertaining to his in-service conduct. The Board 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. Therefore, the Board recommends against correcting the applicant's records. The applicant retains the right to request reconsideration of this decision, which could be in the form of a personal statement, 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.

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-2023-00703 in Executive Session on 20 Dec 23:

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Panel Chair

*Work-Product*

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 1 Aug 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 3 Aug 23.

Exhibit D: FBI Report, dated 8 Aug 23.

Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 14 Aug 23.

Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 17 Aug 23.

Exhibit G: Applicant's Response, w/atch, dated 10 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.

1/8/2024

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Board Operations Manager, AFBCMR  
Signed by: USAF

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