



Work-Product

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

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-00949

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COUNSEL: NONE

HEARING REQUESTED: NO

### APPLICANT'S REQUEST

He official military personnel record amended to reflect:

- His general (under honorable conditions) discharge be upgraded to honorable.
- His rank of airman first class/grade of E-3 be restored.

### APPLICANT'S CONTENTIONS

He wrote to his congressman to report discriminatory practices. His reporting officials gave him 8 and 9 airman performance reports (APR). After they had a permanent change of station, his reports were changed to give him a lower rating, which led to him being given an Article 15 and losing pay and rank. He suffered from anxiety, depression, and at the time of discharge, suicidal thoughts. He felt like he failed in his obligation to his country and himself. No one who joins the military, takes an oath to protect and serve their country, should be discriminated against. Nor should a person be treated in a negative way for utilizing the rights to which they are entitled. He did not know how to make this request until shown by members of the Department of Veterans Affairs (DVA).

In support of his request, the applicant provides a DVA Decision Rating Letter, dated 4 Nov 22, and DVA Primary Care Mental Health flyer.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

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

On 12 Jul 85, according to AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, the applicant was issued nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ) for:

- [He] did, at Work-Prod... Air Base (AB), Italy, on or about 30 Jun 85, without authority, go from [his] appointed place of duty, to wit: the "Y" hangar road adjacent to Sierra 1, in violation of Article 86, UCMJ.

The applicant was given a reduction in grade to airman (E-2); ordered to perform extra duties for two days, and restricted to the limits of Work-Prod... AB, Italy, for 12 days, with reduction to airman (E-2) suspended until 10 Jan 86, at which time, unless sooner vacated, would be remitted without further action.

AFBCMR Docket Number BC-2023-00949

Work-Product

Work-Product

On 21 Oct 85, according to AF Form 366, *Record of Proceedings of Vacation of Suspended Nonjudicial Punishment*, the applicant's suspended reduction to airman (E-2) was vacated for:

- [He], having received a lawful order from a noncommissioned officer, then known to [him] to be a noncommissioned officer, to report to the Orderly Room, Building 920, an order which it was [his] duty to obey, did at [Work-Prod...] AB, Italy, on or about 17 Oct 85, willfully disobey the same.

The applicant was reduced to the grade of airman (E-2) with a new date of rank of 12 Jul 85.

On 20 Feb 86, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of Air Force Regulation (AFR) 39-10, *Administrative Separation of Airmen*, Chapter 5, Section H, paragraph 5-46, minor disciplinary infractions. The specific reasons for the action were:

a. [The applicant] did, at [Work-Prod...] AB, Italy, on or about 17 Oct 85, fail to obey a lawful order, for which [he] received a vacation action, dated 21 Oct 85, for a suspended punishment given to [him] on 12 Jul 85 for leaving [his] place of duty.

b. [He] did, at [Work-Prod...] AB, Italy, on or about 27 Aug 85, fail to go to a mandatory appointment, for which [he] received a Letter of Reprimand (LOR) on 28 Aug 85.

c. [He] did, at [Work-Prod...] AB, Italy, on or about 30 Jun 85, leave [his] appointed place of duty without authority, for which [he] received an Article 15 on 12 Jul 85.

d. [He] did, at [Work-Prod...] AB, Italy, on or about 13 Dec 84, make five unauthorized phone calls, for which [he] received an LOR on 20 Dec 84.

e. [He] was, at [Work-Prod...] AB, Italy, on or about 17 Nov 84, derelict in the performance of [his] duties, for which [he] received an LOR on 6 Dec 84.

f. [He] did, at [Work-Prod...] AB, Italy, on or about 6 Oct 84, fail to go to [his] appointed place of duty, for which [he] received an LOR on 14 Oct 84.

g. [He] was, at [Work-Prod...] AB, Italy, on or about 17 Aug 84, absent from [his] place of duty, for which [he] received a Letter of Admonishment (LOA) on 18 Aug 84.

On 26 Feb 86, the Staff Judge Advocate found the discharge action legally sufficient.

On 12 Mar 86, the discharge authority directed the applicant be discharged under the provisions of AFR 39-10, Chapter 5, Section H, paragraph 5-46, minor disciplinary infractions, with a general service characterization. Probation and rehabilitation were considered, but not offered.

On 1 Apr 86, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct – Pattern of Minor Disciplinary Infractions" and he was credited with 3 years, 1 month, and 6 days of total active service.

On 19 Oct 98, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge.

On 22 Mar 99, the AFDRB denied the request, concluding the discharge was consistent with the procedural and substantive requirements of the discharge regulation and was within the discretion of the discharge authority and the applicant was provided full administrative due process.

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

## POST-SERVICE INFORMATION

On 18 Oct 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

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 18 Oct 23, Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit D).

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

AFRBA Psychological Advisor finds insufficient evidence to support the applicant's request for the desired changes to his records based on his mental health condition.

A review of the available records finds the applicant's contentions were not corroborated by his objective military records. The applicant's Article 15 resulting in his loss of pay and rank was not caused by his reduced APR rating as claimed but because he left his appointed place of duty without authority. Furthermore, his Article 15 was induced after receiving several LORs and an LOA for various acts of misconduct or infractions from the period of Aug 84 to Dec 84 and not being able to adhere to conduct standards when he had been counseled and reprimanded about his behaviors. The applicant had submitted a response to his discharge action at the time of service and explained he left his post because there was a transmission relieving him of his post and had a witness provide a statement to substantiate his report. He did know why his Article 15 was not withdrawn. This psychological advisor is not a personnel or legal subject matter expert and could not comment or provide an opinion on this matter, so the Board may consider receiving an advisory from these experts to review his Article 15. The applicant also provided explanations for his other misconduct in his personal statement. He stated some of his misconduct or disciplinary action was not his fault but admitted to having no excuses for being outside of the Alert Team Facility without a portable radio and not attending his mandatory dental appointment, reported he did not see a weapons violation and could not report it, believed it was alright for him to make his unauthorized phone calls as others had done so, and claimed he was never given a direct order to report to the Orderly Room. He believed he was directed to go there to set up appointments with the mental health officer and the chaplain and, since this was already completed the previous day, he assumed he did not need to report there the following day. These explanations provided find no evidence

his mental health condition caused any of these behaviors. He appeared to be aware of his actions and, sometimes, believed his actions were not wrongful or not his fault. There is no evidence he was in emotional distress or had a mental health condition impairing his judgment at the time of any of his documented misconduct.

The applicant was command-referred to a mental health evaluation by his squadron commander during service. The reason for the evaluation was not documented in his records, but the results of the evaluation found he had mild occupational stress, which is not a mental disorder, and was probably the reason for his evaluation. His mental health evaluation had occurred after all of his documented misconduct had occurred, including receiving his Article 15 and vacation action. He attended a follow-up appointment with the mental health provider the day after his evaluation was completed, and he reported not being interested in his Air Force Specialty Code. He was again not given any mental disorder diagnosis; there were no records he was given any mental disorder diagnosis during service. There were no reports he had anxiety, depression, suicidal ideation, or Post-Traumatic Stress Disorder (PTSD) during his evaluation. He was returned to duty after each encounter with the mental health provider and was advised to return to the clinic or receive support counseling as needed, indicating his problems were not so severe that they would warrant regular counseling services. There are no records he received any regular mental health treatment during service. The applicant did report during his separation physical examination with his Primary Care Manager (PCM) he had frequent trouble sleeping, depression or excessive worry, and nervous trouble of any sort. His PCM clarified his depression began in Oct 85 due to his personal and work problems, he had insomnia beginning in 1985, also due to personal and work stress, and he gained 20 pounds from Sep 85 to Feb 86 due to personal problems. His anxiety/worries were not explicitly addressed but could be related to any of these problems. The onset of his problems and symptoms developed after all or most of his misconduct and ensuing disciplinary actions, according to the timeline provided. Again, he did not report any of these symptoms during both encounters with the mental health provider. He may have developed anxiety and depressive symptoms including sleep problems after his mental health evaluation or he did not report them at that time. It appeared more likely than not that his problems and symptoms were in response to his occupational problems as implied in his records. There is no evidence he had mental health problems or symptoms preceding his pattern of misconduct.

The applicant began to receive mental health treatment at the DVA about 37 years after discharge starting on 23 Mar 23. He was given a diagnosis of Anxiety Disorder, Unspecified, by his DVA providers. There is evidence he had anxiety symptoms during service but no evidence he met the diagnostic criteria for this condition or was given this diagnosis during service. During his initial evaluation, he endorsed severe PTSD symptoms of irritability, avoidance, and hypervigilance and stated he experienced trauma during service from a peer dying by drowning. There are no reports of this experience in his available records and no evidence he experienced any of these symptoms during service. He was not given a diagnosis of PTSD by his DVA provider, although it is acknowledged he recently began treatment at the DVA, and not enough time or encounters had occurred to assess him fully for this condition yet. Regardless of a confirmed diagnosis of PTSD, there is no evidence his condition of PTSD had impacted his functioning and caused his discharge from service. He also did not receive a diagnosis for depression by the DVA and could be for the same reason as discussed.

The applicant contended he suffered from anxiety and depression, which was confirmed by his separation physical examination during service. However, to reiterate, these conditions had occurred after his misconduct and more likely than not in response to his occupational stressors as indicated by his military records. He also reported at the time of discharge he had suicidal thoughts. This may have occurred since he reported to his DVA provider “that right when he was discharged from service, he experienced thoughts of SI [suicidal ideation]”; however, there is no

evidence he had suicidal thoughts prior to this time, and no evidence of his suicidal thoughts, which is a symptom of depression, causing his discharge but was a reaction to his discharge. As a result of an extensive review of his available records, this psychological advisor 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 misconduct and subsequent discharge.

Liberal consideration is applied to the applicant's petition due to his contention of a mental health condition. Liberal consideration, however, is not appropriate to be applied to his request for restoration of his rank as this request is not covered under this policy. It is reminded that liberal consideration does not mandate an upgrade. 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 suffered from anxiety and depression and, at the time of discharge, suicidal thoughts. He marked "PTSD" on his application and did not provide an explanation for this condition. He did not discuss how his mental health condition may excuse or mitigate his discharge.

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

There is evidence from his separation physical examination with his PCM he endorsed having frequent trouble sleeping, depression or excessive worry, and nervous trouble of any sort. His PCM clarified his depression began in Oct 85 from his work and personal problems, his sleep problems began in 1985 due to work and personal problems, and he gained 20 pounds from Sep 85 to Feb 86 from personal problems. He was command-referred to a mental health evaluation and met with a mental health provider on 21-22 Oct 85 and was noted to have mild occupational stress and was not given any mental disorder diagnosis. There were no reports he had anxiety, depression, or sleep problems during his evaluation. These problems appeared to have occurred after his mental health evaluation. He was never given any anxiety or depressive disorder during service. There is no evidence he had PTSD during service. He reported to the DVA provider his traumatic experience was a peer drowning during service and he developed symptoms of irritability, avoidance, and hypervigilance. There is no record of this incident and no evidence he had any of these symptoms during service. He was diagnosed with Anxiety Disorder, Unspecified, by his DVA providers almost 37 years after service. There is no evidence he had this condition during service. He reported having suicidal ideation at the time of his discharge, which may have occurred because he reported to his DVA provider he had suicidal thoughts as soon as he was discharged, but his thoughts were in reaction to his discharge. There is no evidence he had suicidal thoughts preceding his discharge.

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

There is no evidence the applicant's mental health condition including anxiety, depression, suicidal ideation, and PTSD had caused or had a direct impact on his numerous acts of misconduct leading to his subsequent discharge from service. His records indicated his symptoms began after all or most of his misconduct and disciplinary action had already occurred and they were in response to his occupational problems and discharge. 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. 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.

## APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 18 Oct 23 for comment (Exhibit E) but has received no response.

### AIR FORCE EVALUATION

AF/JAJI recommends denying the application. There is insufficient evidence to demonstrate a material error or injustice has occurred.

During the relevant timeframe, the applicant was an enlisted airman on active duty assigned as a security specialist. He entered active duty on 25 Feb 83 and was discharged from the Air Force on 1 Apr 86. His DD Form 214, *Certificate of Release or Discharge from Active Duty*, lists the characterization of service as "general (under honorable conditions)" and the narrative reason for separation is "misconduct-pattern of minor disciplinary infractions." He was an airman (E-2) at the time of discharge. The applicant previously submitted a request for upgrade with the AFDRB which was denied in 1999.

According to his military personnel records, he was discharged for numerous minor disciplinary infractions, including leaving his place of duty without authority on more than one occasion, failure to go, making unauthorized phone calls, dereliction of duty, and being absent from his place of duty. His records indicate he received an LOA, four LORs, nonjudicial punishment under Article 15, UCMJ, and a vacation of suspended punishment. On 1 Apr 86, he was discharged with a general service characterization.

On 17 Oct 23, a psychological advisor provided a report based on the applicant's assertion that he had anxiety, depression and thoughts of suicide. The psychological advisor determined there was insufficient evidence to support his request for a discharge upgrade based on his mental health condition. The psychological advisor determined the applicant's mental health conditions occurred after his misconduct and more likely than not in response to his occupational stressors as indicated by his military records. After an extensive review of his available records, the psychological advisor found 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 misconduct and subsequent discharge.

This advisor noted the guidance for liberal consideration of mental health issues – *Memorandum for Secretaries of the Military Departments Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment*, (A.M. Kurta, 25 Aug 17), also known as the Kurta Memorandum – cuts against the requested correction to the applicant's discharge characterization as that would not be appropriate for his misconduct according to the memorandum's standards. 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 limited information provided in the available documents indicates the applicant's mental health condition did not contribute in any significant way, if it contributed at all, to the misconduct. Furthermore, the misconduct was willful in that it required deliberation on the part of the applicant and was therefore, "premeditated" as that term is used in the Kurta Memorandum. Therefore, a discharge upgrade is not warranted.

The applicant provided supplemental matters to be considered by the Air Force Board for Correction to Military Records (AFBCMR). Applicants may apply to the AFBCMR to correct an alleged error or injustice to their military records. His request does not involve an error in his military records. DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 3.4.4, provides “[t]he applicant has the burden of providing evidence in support of their allegation(s) of an error or injustice.” As this is not a de novo review, the advisor’s scope is limited to determining whether there was an error to the detriment of the applicant. This advisor finds no error.

The complete advisory opinion is at Exhibit F.

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

The Board sent a copy of the advisory opinion to the applicant on 17 Jan 24 for comment (Exhibit G) 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 of the AFRBA Psychological Advisor and recommendation of AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant’s contentions. Despite his contention of PTSD on his application, the applicant provided no supporting documentation or explanation how this condition related to his request for relief. Additionally, there was no indication or evidence a mental health disorder caused the applicant’s misconduct. It was not until after all or most of his misconduct and ensuing disciplinary actions that he developed mental health symptoms, and he did not report these symptoms during both encounters with the military mental health provider. Liberal consideration was applied; however, the applicant’s mental health condition does not excuse or mitigate his discharge. Further, it appears the disciplinary actions were consistent with the substantive requirements of the relevant regulations and were within the commander’s discretion. Nor were the disciplinary actions 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.

## **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-2023-00949 in Executive Session on 20 Mar 24:

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Panel Chair

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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 14 Apr 23.

Exhibit B: Documentary Evidence, including relevant excerpts from official records.

Exhibit C: Advisory Opinion, AFRBA Psychological Advisor, dated 17 Oct 23.

Exhibit D: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 18 Oct 23.

Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 18 Oct 23.

Exhibit F: Advisory Opinion, AF/JAJI, dated 21 Dec 23.

Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 17 Jan 24.

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.

5/10/2024

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