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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-01476

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COUNSEL: Work-Product

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His type of separation "Dismissal" and character of service "uncharacterized" listed on his DD Form 214, *Certificate of Release or Discharge from Active Duty*, be upgraded to honorable.

APPLICANT'S CONTENTIONS

A rush judgement was made on him without consideration of progressive discipline. He was under mental distress to test due to only being able to use unclassified study materials and it cost him a career to serve his country.

In support of his request for clemency, the applicant provides a letter from his brother.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force captain (O-3).

On 5 Feb 86, the convening authority published General Court-Martial Order (GCMO) Number [REDACTED]. The Order stated the applicant pled not guilty and was found guilty to one charge and one specification of receiving unauthorized test materials with intent to use such materials to cheat on a written examination (Article 133), and one charge and two specifications of offering money with intent to influence an individual's action with respect to official matters and obtaining test materials (Article 134). The applicant also pled not guilty and was found guilty to one charge and two specifications of wrongfully having test materials for Squadron Officer School correspondence tests and cheating by studying said test materials prior to each exam (Article 133), however the first specification was dismissed after arraignment on the motion of multiplicity for findings. The applicant was sentenced to confinement for 105 days, forfeiture of all pay and allowances, and dismissal from the service.

On 26 Sep 86, the convening authority published GCMO Number [REDACTED]. The Order stated the sentence promulgated in GCMO Number [REDACTED] was affirmed.

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

On 10 Oct 86, the applicant received a dismissal from the service with a character of service as “uncharacterized.” He was credited with 7 years, 11 months, and 15 days of total active service.

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 17 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

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 Uniform Code of Military Justice (UCMJ) (for example, if a convening authority or appellate court took action but the 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 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 correction 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 17 Oct 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; however, character of discharge does not apply to officers dismissed by court-martial or dropped from the rolls of the Air Force.

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 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 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

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. Furthermore, the applicant has submitted no evidence to support his allegation other than his brief statement disagreeing with the court-martial results; therefore, finding insufficient evidence that would warrant clemency regarding the second type of authorized correction.

The complete advisory opinion is at Exhibit D.

The AFRB Psychological Advisor reviewed the available records and found no evidence the applicant's mental health condition had a direct impact or was a contributing factor to his misconduct and subsequent discharge. There are no records to confirm he had any mental health condition during service which may have impaired his judgment and caused him to engage in inappropriate acts of misconduct. The nature of his misconduct of cheating on his exams, bribing a sergeant, and wrongfully procuring test materials are not common behaviors produced by a mental health condition. These misconducts were rather intentional for his own gains. These acts were not impulsive and in fact, he cheated on his exams on more than one occasion and over an extended period of time. He had opportunities and time to disengage from these activities but chose not to do so.

There is no evidence he had any cognitive impairments or intellectual deficiencies causing him to engage in his poor behaviors and conduct. He may have been stressed with taking and passing exams, but his behaviors are not excused. There are many service members in similar situations of feeling stressed with having to take exams, but they do not engage in cheating and dishonest behaviors. His mental distress is not indicative of having a bona fide mental health condition or disorder. Furthermore, his acts of misconduct were serious resulting in his court-martial conviction and the Psychological Advisor opines his misconducts/offenses could not be excused or outweighed by his mental health condition even if there was a possibility there was a nexus between his mental health condition and misconducts. His behaviors were a significant departure from standard behaviors expected of all service members, and again, there is no evidence his behaviors were caused by having a mental health condition.

Liberal consideration is applied to the applicant's petition due to his contention of a mental health condition. It is reminded liberal consideration does not mandate an upgrade per policy guidance. 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 the mental health distress of using unclassified documents as a study guide cost him his career.

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

There is no evidence the applicant had any mental health condition during service. His service treatment records are not available or submitted by the applicant for review. He may have experienced mental distress during service but no evidence his mental distress was a mental health condition or disorder.

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

There is no evidence the applicant's mental health condition or mental distress had a direct impact or was a contributing factor to his misconduct and discharge. His misconducts were serious offenses 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 E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 15 Nov 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 recommendations of the AFRBA

Psychological Advisor and AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board finds no evidence the applicant had a mental health condition during service; the nature of his misconduct of cheating on his exams, bribing an enlisted airman, and wrongfully procuring test materials are not common behaviors produced by a mental health condition. Liberal consideration was applied to the applicant's request due to the contention of a mental health condition; however, since there is no evidence a mental health condition had a direct impact on his behaviors and serious misconduct resulting with his discharge, his condition or experience does not excuse, mitigate, or outweigh his discharge. 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-2023-01476 in Executive Session on 17 Apr 24:

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Panel Chair
Panel Member
Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 26 Apr 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 17 Oct 23.
- Exhibit D: Advisory Opinion, AF/JAJI, dated 25 Oct 23.
- Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 14 Nov 23.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 15 Nov 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.

10/2/2024

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Board Operations Manager, AFBCMR
Signed by: USAF

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