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

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-01651

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: NO

### APPLICANT'S REQUEST

His under other than honorable conditions (UOTHC) discharge be upgraded to honorable, or alternatively, general (under honorable conditions), with narrative reason for separation, separation authority, and separation code reflecting Secretarial Authority.

### APPLICANT'S CONTENTIONS

Counsel, on behalf of the applicant, contends he aspired to serve in the armed forces since childhood and was respected and relied upon by his fellow airmen. He received many positive performance reviews and was highly decorated until family and mental health issues contributed to uncharacteristic misconduct that led to his administrative separation from the Air Force in Aug 07 under other than honorable conditions. After separation, the applicant was determined to lead a productive life and better himself and his community, as well as serve the United States and veterans as a nurse for the Department of Veterans Affairs (DVA). He has continuously bettered the lives of his family, friends, and patients notwithstanding the significant challenges resulting from the characterization of and narrative reason for his separation. Since separation, he has remained steadily employed and active in his family and community.

Throughout his service, the applicant was praised by his commanding officers and was recognized as an excellent officer. He was assigned to Ramstein Air Base (AB), Germany, on 30 Jul 04, where he encountered many patients who had been injured as part of Operations IRAQI FREEDOM and ENDURING FREEDOM. He describes this time as traumatic due to the horrifying state of the patients he cared for who were suffering from injuries from blasts, severe burns, gunshot wounds, and he recalls when deceased troops were brought through his unit. He was greatly affected by his role in serving wounded soldiers to ensure survival of life, limb, or sight, as well as caring for psychologically unstable patients that suffered from early Post-Traumatic Stress Disorder (PTSD), depression, and suicidal ideations.

During this time, the applicant began suffering from mental health conditions. Seeing combat injuries was distressing, and he began experiencing symptoms of depression. Around this same time, he and his wife were having marital troubles due to his demanding schedule and frequent absence from his family. They sought help from the base Family Advocacy Office and unit chaplain. At the suggestion of the Family Advocacy Office counselor, the applicant's wife decided to move back to the United States with their four children. He was devastated and fell into a state of self-destruction. He drank heavily following his wife's departure, and on 19 Sep 05, received nonjudicial punishment (NJP) for a DUI [Driving Under the Influence]. He sought help through the Air Force Alcohol and Drug Abuse Prevention and Treatment (ADAPT) program but was

AFBCMR Docket Number BC-2023-01651

Work-Product

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instead referred to a counseling group. He received another NJP in Sep 06, for on or about 15 Mar 06 and 15 Apr 06, wrongfully having sexual intercourse with another woman, although he and his wife had formally separated. Despite his lack of judgment at the time, his peers still found him to display exemplary leadership and mentorship.

The applicant continued to struggle with alcohol abuse and was involved in a second DUI in Aug 06. He told the medical staff who treated him for injuries that he wanted to kill himself and was hospitalized for suicidal ideation. He was diagnosed with depression and alcohol dependency. He was again referred to ADAPT and began attending meetings at Alcoholics Anonymous (AA). On 5 Feb 07, he was charged for his Aug 06 misconduct and recommended to trial by general court-martial. Rather than face a court-martial and risk losing his medical license, on 15 Feb 07, the applicant requested he be allowed to resign as an officer. His request was granted, and he was separated on 14 Aug 07 with a UOTHC discharge characterization and the narrative reason for separation listed on his DD Form 214, *Certificate of Release or Discharge from Active Duty*, was "In Lieu of Trial by Court-Martial." He voluntarily accepted his discharge characterization believing it was the best choice at the time, because he continued to struggle with his mental health conditions that he did not feel were being properly addressed. Moreover, he believed seeking additional help for his mental health struggles would subject him to judgment and ridicule from his peers.

Immediately following his discharge, the applicant continued to struggle with alcohol abuse. While working in Washington state, his depression worsened when he felt isolated from his family and friends. He was involved in two DUIs in Washington, one in 2011 and one in 2012, which prompted him to seek help from a psychologist, resume attending AA meetings, and move back to his home state where he felt supported by friends and family. Since leaving Washington, his life has been overwhelmingly positive for over a decade. In addition to his treatment for depression, he sought medical help for PTSD related to his experience in Germany. He has dedicated his post-service life to bettering the lives of veterans while working at a Veterans Administration (VA) Medical Center. He is also active in his community and enjoys spending time with his family.

The applicant's diagnosed mental health conditions deserve consideration as a mitigating factor warranting discharge upgrade relief in light of the Department of Defense's and Air Force's increased recognition of the impact mental health disorders may have on an individual's service. Secretary of Defense, A.M. Kurta issued guidance (the Kurta Memo) to the various discharge review boards (DRB) noting they should provide liberal consideration to veterans petitioning for relief when based in whole or in part on matters relating to mental health conditions. Additionally, Under Secretary of Defense Robert L. Wilkie issued guidance to the various DRBs (the Wilkie Memo) further clarifying when determining whether to grant relief on the basis of equity and injustice, or clemency grounds, DRBs should consider requests for relief based in whole or in part on mental health conditions whenever there is insufficient evidence to warrant relief for an error or impropriety. The Kurta Memo sets out four questions the boards will consider in evaluating whether a mental health condition mitigates or excuses a veteran's behavior: (1) whether the veteran had a condition or experience that may excuse or mitigate the discharge; (2) whether that condition existed/experience occurred during military service; (3) whether that condition or experience actually excuses or mitigates the discharge; and (4) whether that condition or experience outweighs the discharge.

The applicant's military records clearly document his struggle with mental health issues concerning depression and alcohol dependency. Further, his records post-service demonstrate his on-going struggle with mental health issues, including treatment sought for potential PTSD related to his service in Germany. To date, he continues to seek treatment for mental health issues, including those that he was diagnosed with during his service. At the time of his discharge, he

was aware that the loss of his family impacted him greatly but did not know how much he was affected by the injuries he witnessed and the toll it took on his mental health. Although it was not identified at the time, he continues to struggle with depression and symptoms of PTSD as a result of his traumatic exposure in Germany. His record clearly demonstrates the existence of mental health conditions during his military service, satisfying the second prong for granting discharge relief. Although he fully accepts responsibility for the wrong decision he made, his records and testimony confirm he was suffering from mental health conditions and therefore, they must be liberally considered as excusing or mitigating the discharge. The circumstances surrounding his misconduct and administrative separation present a unique set of mitigating circumstances that contributed to his decisions that resulted in misconduct.

The applicant's misconduct resulted directly from a flare up of his diagnosed depression and alcohol dependency and should be considered a contributing factor in his discharge. Additionally, under current military procedures, he may have been diagnosed with PTSD and able to receive treatment. As a result, it is likely the misconduct that led to his UOTHC discharge would likely never have occurred. He was struggling with the loss of his familial environment while overseas and the legal separation from his wife. He regularly attended ADAPT and counseling sessions that he felt were not addressing the source of his depression, alcohol dependency, and binge drinking; therefore, the Air Force Board for Correction of Military Records (AFBCMR) should find the collective circumstances of his discharge sufficiently mitigate his misconduct. Further, his misconduct was precipitated by depression and suicidal ideation and was anything but pre-meditated.

Although the Air Force zero tolerance policy remains, the Wilkie Memo notes the severity of some misconduct can change over time, thereby changing the relative weight of the misconduct and discusses disparate treatment of service members for alcohol-related incidents. Further, it states relief is generally more appropriate for nonviolent offenses. It has been over a decade since the applicant's relatively minor, non-violent misconduct. He does not contend that his actions were acceptable or that he should have escaped punishment, but merely seeks to clear his name as he continues to serve our veterans. The applicant's mistakes were driving under the influence and an extramarital affair after his wife legally separated from him, which stemmed from the symptoms of his mental health conditions, both wholly non-violent offenses. His depression and suicidal ideations at the time of his discharge certainly outweigh his actions.

The applicant's UOTHC discharge is an injustice because it does not accurately characterize his overall service while in the Air Force and he has since rehabilitated his life and is a contributing member of his community. The misconduct that led to the UOTHC discharge was an aberration that does not truly reflect his quality of service or his overall character. On this basis, the AFBCMR has granted relief on multiple occasions in similarly situated cases. Though his mental health continued to deteriorate, and his depression worsened, the applicant performed his duties to the best of his abilities. Prior to the misconduct, he was a model Air Force officer. Since leaving the Air Force, he has worked hard to be a role model for his co-workers, family, and community. When the totality of his pre-separation and post-service conduct is fully analyzed and appreciated, it is clear that his misconduct following a decline of his mental health was an aberration in an otherwise honorable period of service and a subsequent productive, family-focused civilian life.

The applicant's complete submission is at Exhibit A.

## **STATEMENT OF FACTS**

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

On 19 Sep 05, according to AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, the applicant was issued nonjudicial punishment (NJP) under Article 15, Uniform Code of Military Justice (UCMJ), for:

- Violation of the UCMJ, Article 111; [he] did at or near Kaiserslautern, Germany, on or about 6 Aug 05, physically control a vehicle, to wit: a passenger car, while drunk.
- Violation of the UCMJ, Article 134; [he], was, at or near Kaiserslautern, Germany, on or about 6 Aug 05, drunk and disorderly which conduct was of a nature to bring discredit upon the armed forces.

The applicant received a reprimand and forfeiture of \$2,403.00 pay per month for two months.

On 21 Sep 06, according to AF Form 3070, the applicant was issued NJP under Article 15, UCMJ, for:

- Violation of the UCMJ, Article 134; [he] a married man, did, at or near Ramstein Air Base, Germany, between on or about 15 Mar 06 and on or about 15 Apr 06, wrongfully had sexual intercourse with [NAME], a married woman not [his] wife.

The applicant received a reprimand and forfeiture of \$2,364.00 pay per month for two months.

On 5 Feb 07, according to DD Form 458, *Charge Sheet*, the applicant was charged with:

- Violation of the UCMJ, Article 111, in that [he] did at or near Landstuhl, Germany, on or about 19 Aug 06, physically controlled a vehicle, to wit: a passenger car, while drunk.

On 15 Feb 07, according to applicant's memorandum, Subject: Resignation for the Good of the Service Under AFI 36-3207, he submitted a request to resign in lieu of court-martial.

On 5 Mar 07, the applicant's commander recommended his resignation be accepted and he be separated with an under honorable conditions (general) discharge.

On 14 May 07, according to AFLOA/JAJM memorandum, Subject: Tender of Resignation for the Good of the Service, [Applicant], the Chief, Military Justice Division recommended the applicant's request for resignation in lieu of court-martial be accepted.

On 25 Jul 07, according to Secretary of the Air Force Instrument, the applicant's resignation for the good of the service in lieu of court-martial, submitted 15 Feb 07, was accepted and his discharge from the Air Force with an under other than honorable conditions discharge was directed.

On 14 Aug 07, the applicant received an under other than honorable conditions discharge. His narrative reason for separation is "In Lieu of Trial by Court-Martial" and he was credited with 10 years, 6 months, and 17 days of total active service.

On 2 Aug 22, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge.

On 13 Dec 22, the AFDRB concluded 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 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 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, known as the Kurta Memo, 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 30 Nov 23, Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit E).

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 Psychiatric Advisor finds insufficient evidence to support the applicant's request for an upgrade to his discharge.

The applicant, through counsel, is petitioning the Board to change the characterization of his service from UOTHC discharge to honorable (or alternatively, general (under honorable conditions)) and a narrative reason and separation code to reflect Secretarial Authority. Counsel contends the [applicant's] UOTHC discharge is an injustice because his mental health conditions affected his capability to serve satisfactorily and mitigated the severity of his lapse in judgment. The applicant check-marked PTSD and Other Mental Health on his application for upgrade. On the applicant's previous submission for an upgrade on 2 Aug 22 [to the AFDRB], he only check-marked Other Mental Health, and not PTSD. Despite this, the previous board considered PTSD when reaching their decision to deny his upgrade. The decisional document indicated there was a licensed provider on the AFDRB and they reviewed his mental health record.

After reviewing the entire record, this psychological advisor agrees with the previous decision by the AFDRB to deny the applicant's request for an upgrade. There is insufficient evidence to suggest that his misconduct is mitigated by his mental health conditions.

There is insufficient evidence to support counsel's contention that the applicant sought treatment or was ever diagnosed with PTSD. Counsel supported this statement by including a subscript statement, "In 2021, [the applicant] sought support for PTSD related to his service at Ramstein Air Force Base. See Ex. L." Exhibit L is a Statement of Support of Claim for Service Connection for Post-Traumatic Stress Disorder (PTSD) submitted in 2015 that was completed by the applicant, not a mental health provider. As mentioned above, none of his post-service encounters are for mental health, nor was he diagnosed with any mental health condition post-service. There are no available medical records noted from 27 Jul 07 until 16 Mar 20. In 2021, the year counsel contends the applicant sought support for PTSD, there are two encounters, both relating to COVID screening. Counsel also contends that recent medical records indicate that his experiences at

Ramstein AB greatly affected him. Other than the applicant's self-completed Claim for Service Connection, there are no available 'recent' medical records related to mental health treatment.

The applicant was never diagnosed with PTSD. His treatment while he was in the military appears to stem from his depression, dependency on alcohol, and being the offender of spousal abuse. He was first started on antidepressant medication to cope with the death of a sibling, PCS [Permanent Change of Station], and stress. His treatment in ADAPT, Family Advocacy Program, and Life Skills Support appears to focus on alcohol dependence issues and the consequences resulting from his misconduct. While the applicant mentions difficulty with his work (treating wounded service members) when stationed at Ramstein AB, this was never the focus of his in-service treatment. A memorandum dated 12 Mar 07 noted there was no indication that at the time of the misconduct, the applicant suffered from mental disease or defect.

While being exposed to "horrifying combat injuries" can be disturbing, this exposure alone does not equate to having PTSD. His experiences may meet Criteria A of the Diagnostic and Statistical Manual (DSM) for PTSD which includes exposure to actual or threatened death, serious injury, or sexual violence (witnessing, in person, the event(s) as it occurred to others.). There is insufficient evidence, however, that he meets the other criteria listed in the DSM. While he is diagnosed with major depression, the encounter does not elaborate on the symptoms used to qualify for this diagnosis or the etiology of his symptoms.

The applicant was diagnosed with major depression and alcohol dependence during his military service. Even if the applicant had been diagnosed with PTSD, it would not have mitigated his misconduct which led to his discharge. While substance usage (drinking) may be related to PTSD or the applicant's mental health condition, the decision to drive (or other behaviors) following substance use (DUI) has no nexus with the applicant's mental health condition. These are rather conscious and deliberate decisions, following the actual substance usage. There is strong evidence that the applicant lied to police following this incident to evade arrest and conviction. The person who came forward and claimed he was the driver, later was convicted of lying about driving. The applicant in his emergency room encounter admitted that he was the driver of the vehicle at the time of the accident that injured local nationals. Lying to escape repercussions of his actions (DUI incident and adultery) is not part of the sequelae of symptoms associated with PTSD or the applicant's mental health condition. Lying and adultery are rather conscious, willful purposeful behaviors committed over time that do not have a nexus with his mental health conditions.

After considering the entire record and contentions, there is insufficient evidence to suggest the applicant had any mental health condition that would mitigate his misconduct. A review of the available records finds no error or injustice with the applicant's discharge and insufficient evidence has been presented to support the applicant's request. Liberal consideration is applied to the applicant's petition due to the contention of a mental health condition. The following are responses to the four questions from the Kurta Memorandum based on information presented in the records:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?  
The applicant, through counsel, checked the box for "PTSD" and "Other Mental Health" on his application. The applicant, through counsel, contended that his mental health conditions affected his capability to serve satisfactorily and mitigated the severity of his lapse in judgment.
2. Did the condition exist or experience occur during military service?  
The applicant was diagnosed with alcohol dependence and major depression during his military service.
3. Does the condition or experience excuse or mitigate the discharge?

The applicant was diagnosed with major depression and alcohol dependence during his military service. Even if the applicant had been diagnosed with PTSD it would not have mitigated his misconduct which led to his discharge. While substance usage (drinking) may be related to PTSD or the applicant's mental health condition, the decision to drive (or other behaviors) following substance use (DUI) has no nexus with the applicant's mental health condition. These are rather conscious and deliberate decisions, following the actual substance usage. There is strong evidence that the applicant lied to police following this incident to evade arrest and conviction. The person who came forward and claimed he was the driver, later was convicted of lying about driving. The applicant in his emergency room encounter admitted that he was the driver of the vehicle at the time of the accident that injured local nationals. Lying to escape repercussions of his actions (DUI incident and adultery) is not part of the sequelae of symptoms associated with PTSD or the applicant's mental health condition. Lying and adultery are rather conscious, willful purposeful behaviors committed over time that do not have a nexus with his mental health conditions. As mentioned in the AFDRB decision, the applicant's maladaptive alcohol use may explain the applicant's misconduct, but it does not mitigate it.

4. Does the condition or experience outweigh the discharge?

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

The complete advisory opinion is at Exhibit C.

AF/JAJI recommends denying the application as they found no evidence that would undermine the applicant's UOTHC characterization of service.

The applicant alleges his mental health conditions mitigate his underlying offense, and the UOTHC service characterization is unjust based on this overall service and post-service conduct.

On 19 Aug 06, while in Germany, the applicant was drunk, drove a personal sports utility vehicle at a high rate of speed, lost control while turning, struck two buildings, and flipped the vehicle on its side. German police responded to the accident and administered a field breathalyzer that resulted in the applicant's blood alcohol content of 0.16<sup>1</sup>, and the applicant was arrested. In a statement to police, the applicant claimed it was a friend, and not him, who was driving the vehicle. The friend also gave police a statement where he said he was driving, but later confessed he was not with the applicant during the 19 Aug 06 accident.

On 5 Dec 05, the applicant was offered NJP for driving while drunk, in violation of Article 111, UCMJ. On 11 Dec 06, he refused NJP and demanded trial by court-martial. On 5 Feb 07, the applicant's commander preferred to general court-martial one charge and one specification of violating Article 111, UCMJ. On 15 Feb 07, with advice from defense counsel, the applicant voluntarily requested to resign his commission in lieu of trial by court-martial, pursuant to Air Force Instruction (AFI) 36-3207, *Separating Commissioned Officers*, Chapter 2, Section 2C. The applicant stated his resignation was not conditioned upon receiving any particular service characterization.

The applicant received two NJPs prior to the 19 Aug 06 drunk driving incident. On 19 Sep 05, he received NJP for driving drunk, in violation of Article 111, UCMJ, and disorderly conduct, in violation of Article 134, UCMJ. He was punished with forfeitures and a reprimand. On 21 Sep

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<sup>1</sup> In the United States, the blood alcohol content at which all states make it unlawful to operate a motor vehicle is 0.08. We do not know the legal limit for the location of the accident in Germany at the time.



06, he received NJP for committing adultery, in violation of Article 134, UCMJ. He was punished with forfeitures and a reprimand.

After careful review, the advisor finds the applicant has provided no evidence to support his contention of mitigation due to mental health issues, or his contention of injustice based on overall good service. Regarding his contention that he suffered from mental health issues, the advisor cannot offer a medical determination but notes the mental health advisor found no evidence to support the applicant's mental health claims. Additionally, the guidance for liberal consideration of mental health issues in the Kurta Memorandum cuts against the applicant's requested discharge upgrade. According 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."

In the present case, the applicant drove drunk after a previous NJP for drunk driving. He then lied about driving drunk and even enlisted his friend to lie to the German police on his behalf. Such misconduct was willful in that it required deliberation on the part of the applicant, and was therefore, premeditated. Accordingly, under the Kurta standards, any mental health condition, even if verified, would neither mitigate nor outweigh the discharge.

With regard to the applicant's second contention, there is no evidence of injustice. After consulting with his defense counsel and with full knowledge that a UOTHC characterization was a possible outcome, he voluntarily requested to be administratively separated in lieu of trial. Furthermore, in light of the seriousness of his pending court-martial as well as his unfavorable service history that consisted of two previous NJPs, the UOTHC was a reasonable characterization of service.

The complete advisory opinion is at Exhibit D.

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

The Board sent copies of the advisory opinions to the applicant on 30 Nov 23 for comment (Exhibit F), and the applicant replied on 28 Dec 23. In his response, counsel contends the Board should discount the conclusions of the AO [legal advisory opinion] and MHO [mental health advisory opinion] and grant relief requested. The Board's mandate in reviewing the applicant's petition is to give liberal consideration to the claim that mental health conditions "contributed" to the circumstance resulting in discharge. The AO did not apply liberal consideration to the evidence submitted and further appears to have applied a standard requiring mental health conditions, specifically PTSD, to be the sole cause of the circumstances leading to the applicant's discharge and not merely a contributory factor.

The AO's reliance on the MHO statement that there is insufficient evidence to support counsel's contention that the applicant sought treatment or was ever diagnosed with PTSD because none of the applicant's post-service encounters were for mental health, nor was he diagnosed with any mental health conditions post-service is contrary to binding Department of Defense (DoD) guidance which states evidence of a mental health condition may come from sources other than a veteran's service record and the veteran's testimony alone may establish the existence of an experience, and the experience existed during or was aggravated by military service. The courts have routinely found board decisions arbitrary and capricious when they deny relief based on a lack of in-service mental health diagnoses or incomplete service records.

Nevertheless, the applicant submits the post-service medical records and mental health assessments. This new evidence confirms beyond a shadow of a doubt that the applicant has sought treatment and been diagnosed with PTSD as a result of traumatic events he experienced in-

service, and reiterates his position that his alcohol abuse was related to the stress and trauma he experienced. Notably, this evidence includes a 27 Aug 15 Mental Health Diagnostic Assessment referencing the applicant suffering from nightmares and issues from his time stationed in Germany and lists his past diagnoses including anxiety and PTSD. A 2 Nov 15 Mental Health Diagnostic Assessment references a follow-up for PTSD and Major Depressive DO. In light of this additional information, the Board should disregard the AO and MHO based on the applicant's submission of additional evidence to support his mental health claims. *Hensley v. United States*, 292 F. Supp. 3d 399, 410 (D.D.C. 2018) (“It is arbitrary and capricious for an agency to adopt an advisory opinion that addresses only the arguments and evidence contained in an applicant's prior submissions if the applicant has since presented new arguments or evidence.”).

The Board should disregard the AO's conclusions because they are arbitrary, capricious, and contrary to law. An advisory opinion must have a “rational connection between the facts found and the choice made.” See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). It is arbitrary and capricious for a board for correction of military records to rely on a “fundamentally flawed advisory opinion,” because the advisory opinion must itself “satisfy the arbitrary and capricious standard.” See *McDonough v. Stackley*, 245 F. Supp. 3d 1, 2, 5 (D.D.C. 2017). It is also arbitrary and capricious for the Board to rely on an advisory opinion that fails to offer an explanation for its conclusions or offers conclusions that “run[] counter to the evidence before the agency.” *Gilbert v. Wilson*, 292 F. Supp. 3d 426, 434 (D.D.C. 2018). When a veteran has been diagnosed with a mental health condition — as is the case here — binding DoD guidance requires review boards to consider that diagnosis “persuasive evidence that the condition existed or experience occurred during military service” and to “liberally consider” the fact that the mental health condition “excus[es] or mitigate[es] the discharge.” Here, the AO's conclusions fail to satisfy that standard.

The AO's conclusion that there is no evidence to support the applicant's mental health claims fail to liberally construe his own statements per the Kurta Memo. The petition included the applicant's affidavit which detailed several traumatic experiences that he contended contributed to his mental health conditions at the time. The MHO barely mentions his affidavit and the AO fails to mention it at all. It is evident the AO failed to consider his testimony in contravention of the Kurta Memo.

The AO's conclusion that there is insufficient evidence of the applicant's mental health claims is further undermined because the MHO, which the AO relies upon, cites numerous mental health symptoms in his active duty service record, to include examples of substance abuse, depression, relationship issues, and the inability to conform behavior to the expectations of a military environment. The AO either fails to grant proper weight to the evidence it cites or there is no rational connection between the facts found and the choice made. Despite being provided with ample evidence, the AO fails to give any reasoned explanation as to why it concludes the applicant's mental health conditions cannot cause substance abuse and misconduct. The AO appears to set a higher bar, suggesting the mental health conditions or PTSD had to be the sole cause of his misconduct and had to fully excuse that misconduct. Further, the AO incorrectly applies the Kurta Memo's guidance related to substance abuse and mental health conditions and conveniently fails to include the Kurta Memos guidance that “substance-seeking behavior and efforts to self-medicate symptoms of a mental health condition may warrant consideration.” His misconduct fits into an overall picture of substance abuse, which impacted his decisions at the time and cut against any finding of premeditation and stemmed directly from his substance abuse, which occurred at a time during which he was under a great deal of stress, both physically and emotionally, as evidenced by his documented struggles with depression and suicidal ideations.

Putting the mental health considerations aside, the applicant should still be granted relief based on his service record and exemplary post-discharge conduct. The Wilkie Memo recognizes an

honorable discharge characterization does not require flawless military service. The AO appears to completely ignore years of service. Prior to 2005, he was a model Air Force officer. His post-service rehabilitation and continuing commitment to a life of public service support an equitable upgrade. In addition to his role serving veterans at the VA Medical Center, he is active in his community and is a devoted husband, father, and friend.

The applicant's complete response is at Exhibit G.

## **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, to include the applicant's rebuttal, 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. The applicant was diagnosed with major depression and alcohol dependence during his military service. Even if he had been diagnosed with PTSD while serving, it would not have mitigated the misconduct that led to his discharge. While substance usage may be related to PTSD, or the applicant's mental health condition, the decision to drive (or other behaviors) following substance use has no nexus with his mental health condition. These are rather conscious and deliberate decisions. Further, there is strong evidence the applicant lied to police following the incident to evade arrest and conviction. Lying to escape repercussions of his actions (DUI incident and adultery) is not part of the sequelae of symptoms associated with PTSD or the applicant's mental health condition. Lying and adultery are conscious, willful, purposeful behaviors committed over time, and again, have no nexus with his mental health condition. Liberal consideration has been appropriately applied by the AFRBA Psychological Advisor and the Board agrees with their finding that the applicant's mental health conditions do not excuse or mitigate his discharge.

Additionally, the applicant voluntarily submitted his request for resignation in lieu of court-martial, after consulting with his defense counsel and with full knowledge that a UOTHC discharge was possible. In fact, he specifically acknowledged the UOTHC service characterization in his written request. The discharge was consistent with the substantive requirements of the discharge regulation and was within the Secretary of the Air Force'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, to include post-service criminal history provided by the applicant which reflected his misconduct continued after his discharge, 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-2023-01651 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, w/atchs, dated 27 Apr 23.

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

Exhibit C: Advisory Opinion, AFRBA Psychological Advisor, dated 13 Oct 23.

Exhibit D: Advisory Opinion, AF/JAJI, dated 28 Nov 23.

Exhibit E: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 30 Nov 23.

Exhibit F: Notification of Advisory, SAF/MRBC to Counsel, dated 30 Nov 23.

Exhibit G: Counsel's Response, w/atchs, dated 28 Dec 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.

3/11/2024

Work-Product