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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-01660

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COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His general (under honorable conditions) discharge be upgraded to honorable.

APPLICANT'S CONTENTIONS

He contends his discharge is an injustice to the progression and future of his life, career, and access to benefits.

In support of his request for clemency, the applicant provides his resume, college transcripts, letters of recommendation, and a personal letter to the Board.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman first class (E-3).

On 25 Oct 05, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFI 36-3208, *Administrative Separation of Airmen*, paragraph 5.50.2 for misconduct; specifically, conduct prejudicial to good order and discipline. The specific reasons for the action are the following:

- a. On 20 Nov 02, the convening authority published Special Court-Martial Order Number **Work-Product** The Order stated the applicant pled guilty and was found guilty to one charge and two specifications of underage drinking and failing to refrain from consuming alcoholic beverages within the 12 hours prior to duty (Article 91); pled not guilty and was found not guilty to one charge and two specifications of operating a motor vehicle by driving above the posted speed limit and operating a motor vehicle without a valid insurance coverage (Article 134); and pled not guilty but was found guilty to one charge and one specification of operating a motor vehicle while under the influence of alcohol (Article 111). The applicant was sentenced to confinement for 15 days, hard labor without confinement for 60 days, forfeiture of two-thirds pay per month for 3 months, base restriction for 30 days, and reduction in grade to airman basic (E-1).

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- b. On or about 13 Jun 05, he failed to go to his appointed place of duty and received a Letter of Reprimand (LOR), dated 14 Jun 05.
- c. On or about 8 May 05 and 25 Aug 05, he wrongfully and without authority, wore the rank of senior airman while in the rank of airman first class and received a LOR, dated 6 Sep 05.
- d. On 9 Sep 05, AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, indicates the applicant received nonjudicial punishment (NJP) and forfeiture of pay in the amount of \$323.00 for the following offenses: (1) on or about 27 Mar 05 to on or about 29 Jul 05, failed to refrain from carrying a concealed weapon while on a military base, (2) on or about 8 Aug 05 possessed an open alcoholic beverage, and (3) failed to refrain from parking in a handicap parking zone.

On 30 Nov 05, the Staff Judge Advocate found the discharge action legally sufficient.

On 2 Dec 05, the discharge authority directed the applicant be discharged for a pattern of misconduct with a general (under honorable conditions) service characterization. Probation and rehabilitation were not offered.

On 16 Dec 05, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct" and he was credited with 5 years, 4 months, and 10 days of total active service.

On 22 Nov 07, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to his discharge.

On 29 Oct 08, the AFDRB concluded neither the evidence of record nor the documentation provided by the applicant substantiated an inequity or impropriety warranting justification for a change to his discharge.

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

POST-SERVICE INFORMATION

On 11 Jan 24, the Board sent the applicant a request for post-service information, including a standard criminal history report from the Federal Bureau of Investigation (FBI) (Exhibit E). The applicant replied on 16 Jan 24 and provided an FBI report. According to the report, the applicant has had no further arrests since discharge.

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 (USD P&R) issued clarifying guidance to Discharge Review Boards and Boards for Correction of Military/Naval Records considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions [PTSD, Traumatic Brain Injury (TBI), sexual assault, or sexual harassment]. Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on the aforementioned conditions.

Under Consideration of Mitigating Factors, it is noted that PTSD is not a likely cause of premeditated misconduct. Correction Boards will exercise caution in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with the aforementioned mental health conditions and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

Boards are directed to consider the following main questions when assessing requests due to mental health conditions including PTSD, TBI, sexual assault, or sexual harassment:

- a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
- b. Did that condition exist/experience occur during military service?
- c. Does that condition or experience actually excuse or mitigate the discharge?
- d. Does that condition or experience outweigh the discharge?

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness (USD P&R) issued supplemental guidance 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 11 Jan 24, the 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.

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 an upgrade to his discharge characterization. There is insufficient evidence to suggest the applicant had any mental health condition that would mitigate his misconduct. The applicant was not diagnosed with any mental health conditions while he was in the military. His first mental health condition was diagnosed seven years (2012) after his military service (anxiety disorder not otherwise specified (NOS); depressive disorder and personality disorders/traits). He was later additionally diagnosed with adjustment reaction with mixed emotions, major depressive disorder with psychotic features, and personality disorder. None of these mental health diagnoses are service-connected or appear to be related to any experience from the military.

While PTSD is found in the applicant's military record in Joint Legacy Viewer (JLV) he was never diagnosed with PTSD. PTSD is found in the applicant's problem list, but a review of each of these six records, shows he was never diagnosed with PTSD. Rather it appears he was possibly checked in with the diagnosis code of PTSD. The notes do not pertain to a mental health encounter. Two are from his primary care physician which references a referral to mental health for evaluation, one is a phone call in an attempt to contact him, one is for tobacco cessation, one is for chronic pain, and the last encounter specifically rules out PTSD as a diagnosis. Again, none of these notes diagnosed the applicant with PTSD or any mental health condition. His compensation and pension (C&P) evaluation dated 2 Jul 18, noted he did not meet the criteria for any mental health condition and specifically commented "There is no evidence of a chronically experienced mental disorder or symptoms beginning during the military and persisting after the military." He does not have a service connection for any mental health condition. Since there is insufficient evidence the applicant had a mental health condition during his military service or had a mental health condition caused or exacerbated by his military experience, his misconduct is not mitigated by any mental health condition.

After considering the entire record and contentions, there is insufficient evidence to suggest the applicant had any mental health condition mitigating 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 checked box #14 with PTSD and other mental on his application for an upgrade.

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

The applicant was not diagnosed with a mental health condition during his military service or at discharge. The applicant was not diagnosed with any mental health condition until seven years after his military service. He was diagnosed post-service with anxiety disorder NOS, depressive disorder, personality disorders/traits, adjustment reaction with mixed emotions, major depressive disorder with psychotic features, and rule-out personality disorder. None of these mental health diagnoses are service-connected or appear to be related to any experience from the military.

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

His C&P evaluation dated 2 Jul 18, noted he did not meet the criteria for any mental health condition and specifically commented "There is no evidence of a chronically experienced mental disorder or symptoms beginning during the military and persisting after the military. He does not have a service connection for any mental health condition. Since there is insufficient evidence the applicant had a mental health condition during his military service or that he has a mental health condition that was caused or exacerbated by his military experience, his misconduct is not mitigated by any mental health condition.

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.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 10 Oct 23 for comment (Exhibit D), 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 recommendation of the AFRBA Psychological Advisor and finds no evidence the applicant was diagnosed with any mental health disorder during service. The applicant was diagnosed post-service with anxiety disorder NOS, depressive disorder, personality disorders/traits, adjustment reaction with mixed emotions, major depressive disorder with psychotic features, and rule-out personality disorder; none of which are service-connected or appear to be related to any experience from the military. Liberal consideration was applied to the applicant's request due to the contention of a mental health condition; however, since there is no evidence he had a mental health condition with a direct impact on his behaviors and misconduct resulting with his discharge, it 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, 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.

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-2023-01660 in Executive Session on 21 Feb 24:

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Panel Chair

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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 16 May 23.

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

Exhibit C: Advisory Opinion, AFRBA Psychological Advisor, dated 10 Oct 23.

Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 10 Oct 23.

Exhibit E: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 21 Feb 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.

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	<div>Work-Product</div> <div>Board Operations Manager, AFBCMR</div> <div>Signed by: USAF</div>	