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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-01702

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His general (under honorable conditions) discharge be upgraded to honorable.
2. His narrative reason for separation be changed to "Medical Discharge" or "Medical Retirement."
3. His re-enlistment eligibility (RE) code be changed to "2Q."

APPLICANT'S CONTENTIONS

He was accused of pointing his weapon at a fellow airman; however, the airman provided a written affidavit stating the allegations were entirely false and he never pointed his weapon at him. The false allegations led to him receiving non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ), resulting in an unjustified General (Under Honorable Conditions) discharge. Prior to the incident, he was seen by mental health services when his toddler daughter was diagnosed with Stage 4 Childhood Acute Lymphoblastic Leukemia; he was formally diagnosed with Major Depressive Disorder (MDD) with Suicidal Ideation, Panic Disorder, and Post-Traumatic Stress Disorder (PTSD) by the Department of Veterans Affairs (DVA). His mental health records omitted these conditions or disorders from his medical records; however, there was proof of his mental health treatment history in his Personnel Reliability Program (PRP) medical records to validate his treatment. The omission of these conditions or disorders from his records hindered the proper evaluation of his case by the Medical Evaluation Board (MEB), the Physical Evaluation Board (PEB), and initially by the DVA.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 18 May 2004, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFI 36-3208, *Administrative Separation of Airmen*. The specific reasons for the action was on or about 22 February 2004, the applicant failed to obey a lawful general regulation, to wit: Air Force Instruction 31-207, *Arming and Use of Force By Air Force Personnel*, paragraph 2.12, by wrongfully aiming a loaded firearm at another airman, in violation of Article 92 of the UCMJ. The applicant received an Article 15, dated 15 March 2004, and a reduction to the grade of airman and 30 days extra duty.

On 25 May 2004, the Staff Judge Advocate found the discharge action legally sufficient.

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On 18 June 2004, the discharge authority directed the applicant be discharged for Commission of a Serious Offense, with a general (under honorable conditions) service characterization. Probation and rehabilitation were considered, but not offered.

On 23 June 2004, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct" and he was credited with 2 years, 2 months, and 28 days of total active service.

On 5 October 2016, 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.

On 24 November 2020, DVA Benefits Decision Letter, dated 27 January 2022, provided by the applicant, indicates he was granted service connection disability for major depressive disorder (also claimed as post-traumatic stress disorder) with an evaluation of 100 percent.

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

POST-SERVICE INFORMATION

On 29 August 2023, the Board sent the applicant a request for post-service information and advised the applicant he was required to provide a Federal Bureau of Investigation (FBI) Identity History Summary Check, which would indicate whether he had an arrest record. In the alternative, the applicant could provide proof of employment in which background checks are part of the hiring process (Exhibit C). The applicant replied on 28 September 2023 and provided an FBI report. According to the report, the applicant has had no arrests since discharge.

The applicant's FBI Report is at Exhibit D.

APPLICABLE AUTHORITY/GUIDANCE

On 3 Sep 14, the Secretary of Defense issued a memorandum providing guidance to the Military Department Boards for Correction of Military/Naval Records as they carefully consider each petition regarding discharge upgrade requests by veterans claiming 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 29 August 2023, Board staff provided the applicant a copy of the liberal consideration and clemency guidance (Exhibit C).

Department of the Air Force Instruction (DAFI) 36-3211, *Military Separations*, describes the authorized service characterizations.

Honorable. The quality of the airman's service generally has met Department of the Air Force standards of acceptable conduct and performance of duty or when a member's service is otherwise so meritorious that any other characterization would be inappropriate.

General (Under Honorable Conditions). If an airman's service has been honest and faithful, this characterization is warranted when significant negative aspects of the airman's conduct or performance of duty outweigh positive aspects of the member's military record.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor finds insufficient evidence to support the applicant's request for the desired changes to his records based on his mental health condition. The applicant was discharged from service for committing a serious offense of pointing his firearm at another airman. The applicant had repeatedly and consistently denied he committed this offense in his personal statements provided at the time of service, to his DVA provider after service, to the AFDRB in a previous petition, and in his current application to the BCMR. Since he denied committing this offense, it is not possible his mental health condition caused his misconduct and subsequent discharge for his serious offense. The narrative that he provided in his response to his Article 15 to explain his behaviors was that he pointed his radio that was located in his right hand towards the airman in a joking manner. The Psychological Advisor acknowledges the airman provided a signed affidavit reporting the applicant did not point his weapon at him. The Psychological Advisor is not a personnel or legal subject matter expert and could not comment or provide an opinion about the discrepant reporting from the airman. Nevertheless, and from the information presented in his objective military records, there is no evidence the applicant was in emotional

distress or had a mental health condition impairing his judgment at the time of the incident. The applicant reported he suffered trauma during service from the tragic loss of his child occurring while he was on active duty. The applicant did not mention his daughter's illness or death in any of his personal statements during service causing him to brandish his weapon nor did his commander and medical providers document his grief and loss as factors influencing his behavior. His child's illness and death and his behavior of pointing a weapon at an airman appeared to be mutually exclusive events. Hypothetically if he was in emotional distress or had a mental health condition at the time of the incident, the Psychological Advisor concurs with his commander's opinion that his offense was egregious and could cause serious harm or be fatal to another airman and could not be excused or mitigated by his mental health condition. The applicant is requesting a medical discharge/retirement and believes he should have been referred to the Medical Evaluation Board (MEB) and Physical Evaluation Board (PEB). There is evidence the applicant sought mental health treatment during service from February 2003 to July 2003 for parent-child relationship problem. His parent-child relationship problem was not specified in the available records, and the Psychological Advisor accepts his personal testimony and his reports to the DVA that his mental health treatment was related to his daughter's illness from which she passed away in April 2004. Although his mental health treatment records were unavailable for review, his available records indicated that he was returned to duty on 22 July 2003 presumably after he completed treatment signifying, he no had duty limitations based on his mental health condition. It appeared from his records his stressor or issue was resolved or was no longer a concern to him to be returned to duty. He claimed he did not receive adequate mental health treatment during service and his records do not support his allegation. He would receive several examinations/evaluations including a separation physical examination with his Primary Care Manager (PCM) following the termination of his mental health treatment and all records stated he denied having any mental health condition or concerns including feeling down, helpless, panicky, or anxious (he also completed some of the questionnaires himself), he was deemed worldwide qualified, and he had no permanent duty limiting condition profile because of his mental health condition. The applicant was diagnosed with MDD with Suicidal Ideation, Panic Disorder, and PTSD by his DVA providers over 15 years after his discharge from service. There is no evidence he had or was diagnosed with any of these conditions during service. It appeared more likely than not he had delayed onsets of MDD and PTSD and/or these conditions were exacerbated and aggravated by his post-service stressors as reflected in his DVA treatment records. Also, the mere presence of a mental health condition, diagnosis, or treatment during service does not automatically render a condition unfitting. There is no evidence the applicant's mental health condition had elevated to potentially unfitting meeting the criteria for a referral to the MEB and PEB for a possible medical discharge or retirement. As such, his request for a medical discharge or retirement could not be supported.

For awareness since the applicant has received service-connected disability rating for his mental health condition from the DVA, the military's DES, established to maintain a fit and vital fighting force, can by law, under Title 10, U.S.C., only offer compensation for those service incurred diseases or injuries which specifically rendered a member unfit for continued active service and were the cause for career termination; and then only for the degree of impairment present at the time of separation and not based on post-service progression of disease or injury. To the contrary, the DVA, operating under a different set of laws, Title 38, U.S.C., is empowered to offer compensation for any medical condition with an established nexus with military service, without regard to its impact upon a member's fitness to serve, the narrative reason for release from service, or the length of time transpired since the date of discharge. The DVA may also conduct periodic reevaluations for the purpose of adjusting the disability rating awards as the level of impairment from a given medical condition may vary (improve or worsen) over the lifetime of the veteran.

Liberal consideration is applied to the applicant's petition due to the request for an upgrade of his discharge and his contention of a mental health condition. Liberal consideration is not appropriate to be applied to the applicant's petition for medical discharge/retirement because this policy does not apply to this request. 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 contended he was accused of pointing his weapon at a fellow airman while he was on guard duty and denied engaging in this behavior. He stated he sought mental health treatment services during service when his toddler daughter was diagnosed with Stage 4 Childhood Acute Lymphoblastic Leukemia and later died from this illness also occurring during service. He was formally diagnosed with MDD with Suicidal Ideation, Panic Disorder, and PTSD by the DVA based on these experiences.

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

There is no evidence the applicant's mental health condition of MDD with Suicidal Ideation, Panic Disorder, or PTSD existed or occurred during his military service. He was diagnosed with these conditions over 15 years after service and was denied service connection for Panic Disorder by the DVA because this condition did not occur or was caused by his service. There is evidence he sought brief mental health treatment services from February to July 2003 for parent-child relationship problem, which may have been related to his child's illness. After his mental health treatment concluded, he denied in subsequent examinations with his PCM of having any mental health concerns including feeling down, helpless, panicky, or anxious. There were no reports of his child's death in his military records. He informed the DVA after service his child passed away in April 2004, which would have occurred during service.

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

There is no evidence the applicant's mental health condition including MDD with Suicidal Ideation, Panic Disorder, or PTSD from his daughter's illness and death had a direct impact or was a contributing factor to his misconduct of a serious offense of pointing his weapon at another airman. The applicant repeatedly and consistently denied engaging in this act and so it is not possible his mental health condition caused his misconduct. There is no evidence he was in emotional distress or had a mental health condition impairing his judgment and causing his misconduct. His mental health condition(s) developed from his daughter's illness and death and his act of misconduct or serious offense appeared to be mutually exclusive events. Even if his misconduct was caused or related to his mental health condition despite no evidence, his misconduct was egregious and could potentially cause serious injury or be fatal to another airman 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 is at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 26 October 2023 for comment (Exhibit F), and counsel replied on 7 December 2023. In the response, counsel contends the Board must find that diagnoses made by the DVA are persuasive in these matters. Further, based on the

dates of the application to the AFDRB, the Board must grant the applicant a *de novo* review under the Carson memorandum as the Hagel memo was not applied to his original request for relief, which was decided in late 2016. In applying that *de novo* review, the Board should find the applicant was not a violent individual seeking to cause harm to another airman or even to threaten him. Rather, he was a young man dealing with unimaginable family stress who overreacted to a prank played on him by another airman and whose actions were taken out of context by observers. The applicant has paid the price of being overreactive for nearly two decades. In reviewing his application with liberal consideration and acknowledging the connection between his mental health and his otherwise erratic behavior, the Board should grant the requested relief.

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 discharge upgrade requests under fundamental fairness or clemency are technically untimely. However, it would be illogical to deny a discharge upgrade 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 Title 10, United States Code § 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 finds a preponderance of the evidence does not substantiate the applicant's contentions. There is no evidence the applicant's mental health condition of MDD with Suicidal Ideation, Panic Disorder, or PTSD existed or occurred during his military service. He was diagnosed with these conditions over 15 years after service. While there is evidence the applicant sought brief mental health treatment services from Feb 03 to Jul 03 for a parent-child relationship problem, which may have been related to his child's illness, after the applicant's mental health treatment concluded, he denied in subsequent examinations with his PCM of having any mental health concerns. The applicant was deemed worldwide qualified, and he had no permanent duty limiting condition profile because of his mental health condition. Further, there is no evidence the applicant was in emotional distress or had a mental health condition impairing his judgment and causing his misconduct. Liberal consideration was applied; however, the applicant's mental health condition does not excuse or mitigate his discharge. Liberal consideration was not applied to the applicant's request for a fitness determination as it is not applicable in accordance with current Department of Defense guidance.

The Air Force and the DVA disability systems operate under separate laws. Under 10 USC, the PEB must determine if the service member's condition renders them unfit for continued military service. To be unfitting, the condition must be such that it alone precludes the member from fulfilling their military duties. The PEB then applies the rating best associated with the level of disability at the time of disability processing and that rating determines the final disposition. The mere presence of a mental health condition, diagnosis, or treatment during service does not automatically render a condition unfitting. There is no evidence the applicant's mental health condition had elevated to potentially unfitting meeting the criteria for a referral to the MEB and PEB for a possible medical discharge or retirement. The DVA, under 38 USC, is empowered to offer compensation for any medical condition with an established nexus with military service, without regard to its impact upon a member's fitness to serve, the narrative reason for release from service, or the length of time transpired since the date of discharge. The DVA may also conduct periodic reevaluations for the purpose of adjusting the disability rating awards as the level of

impairment from a given medical condition may vary (improve or worsen) over the lifetime of the veteran.

Additionally, it appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander'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, the serious nature of the misconduct, and in the absence of post-service information provided by the applicant, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's record.

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-2023-01702 in Executive Session on 21 Feb 24:

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el 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 19 May 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 29 Aug 23.
- Exhibit D: FBI Report, dated, 28 Sep 23.
- Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 16 Oct 23.
- Exhibit F: Notification of Advisory, SAF/MRBC to Counsel, dated 26 Oct 23.
- Exhibit G: Counsel's Response, w/atchs, dated 7 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.

2/4/2025

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