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

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-01859

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COUNSEL: NONE

HEARING REQUESTED: NOT INDICATED

### APPLICANT'S REQUEST

Her official military personnel records be amended to:

- Upgrade her general (under honorable conditions) discharge to honorable.
- Change her DD Form 214, *Certificate of Release or Discharge from Active Duty*, Narrative Reason for Separation, Separation Code, and Reentry Code.
- Entitle her to the GI Bill.
- Promote her to the grade of senior airman (E-4).

### APPLICANT'S CONTENTIONS

She had applied for the reshaping program and thought she was being honorably discharged and keeping her GI Bill under that program, but apparently not. She had been pulled and questioned over a guy she had been seeing previously who was in trouble for drugs. He told them she was not in it. She took a drug test as well as let them search her home and vehicles. Nothing was found. Every supervisor and all high-ranking officers from her flight wrote letters on her outstanding performance. She was told they could not do anything to her without a court-martial. She guesses she was wrong because they did this to her. They lied on her DD Form 214 and took her GI Bill. They held her promotion.

This correction should be made because it is simply not true. Not to mention, they tricked her. The day they pulled her claiming her force shaping had gone through, she read this paperwork and became upset. She questioned it and did not want to sign it. They told her she had no choice, and there was no one for her to speak to as everyone had left for Christmas break. They threatened her with being arrested if she did not sign the paperwork and leave of her own will. She was so young and scared. She looks at her kids now and it makes her angry. She would do anything to go back and be arrested and demand a trial or a court-martial. She did nothing wrong. She was an upstanding airman. She actually put up with a lot of garbage she should not have but always did her job and went above and beyond. This has affected her life in drastic ways, and she just wants it fixed so she can move on and heal.

She never knew she could do anything about it. Honestly, she went into such a deep, dark depression for so long over it. Her ex-husband can vouch for that. He, as well as old supervisors, recently encouraged her to get this corrected and get her GI Bill, go back to school, and set an example for her kids. They all know she was a great airman and never did anything wrong.

The applicant's complete submission is at Exhibit A.

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## STATEMENT OF FACTS

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

On 13 May 02, according to DD Form 2366, *Montgomery GI Bill Act of 1984 (MGIB)*, the applicant acknowledged by signature, "I must receive an HONORABLE discharge for service establishing entitlement to the MGIB."

On 9 Dec 04, the applicant was issued a Letter of Reprimand (LOR) from her commander for on or about Dec 03, wrongfully using and possessing cocaine and wrongfully failing to report another military member's use of cocaine. On 16 Dec 04, the applicant's Area Defense Counsel provided a written response to the LOR, with supporting documentation, to include the applicant's written response to the LOR, dated 15 Dec 04.

According to the applicant's Record Review RIP, dated 13 Dec 04, her Promotion Eligibility Status was "Ineligible – not recommended by commander."

On 16 Dec 04, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of Air Force Instruction (AFI) 36-3208, *Administrative Separation of Airmen*. The specific reason for the action was: In or around the month of Dec 03, [the applicant] did, wrongfully use and possess cocaine and wrongfully failed to report another military member's use of cocaine, as documented by the Report of Investigation, dated 4 Feb 04, and the LOR, dated 9 Dec 04. On this same date, the applicant's Area Defense Counsel provided a written response to the discharge notification, with supporting documentation.

On 21 Dec 04, the Staff Judge Advocate found the discharge action legally sufficient.

The discharge authority directed the applicant be discharged for drug use, with a general (under honorable conditions) service characterization, and without probation and rehabilitation in accordance with AFI 36-3208.

On 22 Dec 04, the applicant received a general (under honorable conditions) discharge. Her narrative reason for separation is "Misconduct", separation code is "JKK" [Misconduct – Drug Abuse], reentry code is "2B" [Separated with a general or under-other-than-honorable-conditions discharge], and she was credited with 2 years, 7 months, and 24 days of total active service.

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

## POST-SERVICE INFORMATION

On 21 Nov 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, she has not replied.

## APPLICABLE AUTHORITY/GUIDANCE

On 3 Sep 14, the Secretary of Defense issued a memorandum providing guidance to the Military Department Boards for Correction of Military/Naval Records as they carefully consider each petition regarding discharge upgrade requests by veterans claiming PTSD. In addition, time limits to reconsider decisions will be liberally waived for applications covered by this guidance.

On 25 Aug 17, the Under Secretary of Defense for Personnel and Readiness issued clarifying guidance to Discharge Review Boards and Boards for Correction of Military/Naval Records considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions [PTSD, Traumatic Brain Injury (TBI), sexual assault, or sexual harassment]. Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on the aforementioned conditions.

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

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

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

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness issued supplemental guidance, known as the Wilkie Memo, to military corrections boards in determining whether relief is warranted based on equity, injustice, or clemency. These standards authorize the board to grant relief in order to ensure fundamental fairness. Clemency refers to relief specifically granted from a criminal sentence and is a part of the broad authority Boards have to ensure fundamental fairness. This guidance applies to more than clemency from sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. Each case will be assessed on its own merits. The relative weight of each principle and whether the principle supports relief in a particular case, are within the sound discretion of each Board. In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, the Board should refer to paragraphs 6 and 7 of the Wilkie Memo.

On 21 Nov 23, 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.

**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.

In accordance with AFI 36-2502, *Airman Promotion Program*, dated 6 Aug 02:

2.2. *SrA Promotions* (see Table 1.3.):

2.2.1. Airmen are promoted (fully qualified) to SrA upon meeting minimum requirements in Table 2.1., recommended by the commander in writing, and have:

- 2.2.1.1. 36 months TIS [time in service] and 20 months TIG [time in grade], or
- 2.2.1.2. 28 months TIG, whichever occurs first.

Table 1.2. *Withholding Promotion.*

- Withhold an airman's promotion when his or her name is not removed from a select or eligibility list and the airman is under investigation (military/civil.) PES code B (See note 4.)

Note 4. A commander may withhold an airman's promotion if he or she is under investigation or the subject of an inquiry (formal or informal) military or civil law that may result in action under UCMJ or prosecution by civil authorities. The commander may withhold the promotion when the investigation or inquiry is complete, but no determination is made as to the action the military or civil authorities will take.

## AIR FORCE EVALUATION

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

This advisory is limited to the applicant's mental health condition. Matters pertaining to personnel or legal issues should be addressed by subject matter experts in these respective fields. A review of the applicant's available records finds no evidence the applicant's mental health condition had a direct impact or was a contributing factor to her discharge. The applicant was discharged for wrongful use and possession of cocaine and for not reporting another service member's cocaine use. She consistently denied using drugs during and after service; therefore, based on her report, it is not possible her mental health condition caused her documented misconduct and subsequent discharge for the aforementioned reasons. She discussed being in a deep depression because of, and following, her discharge, and there is no evidence her depression preceded or caused her discharge. She did not discuss how her mental health condition may excuse or mitigate her discharge, and there is no evidence she was in emotional distress or had any mental health condition impairing her judgment causing her misconduct during service. Therefore, her request for an upgrade of her discharge and change of her narrative reason for separation, separation code,

and reentry code based on her mental health condition could not be supported. There is no error or injustice with her discharge from a mental health perspective.

Liberal consideration is applied to the applicant's petition because she marked "Other Mental Health" on her application and stated she was in a deep depression because of her discharge. 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 reports she was in a deep depression because of her discharge but did not discuss how her mental health condition, including depression, may excuse or mitigate her discharge.

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

The applicant's service treatment records are not available or submitted by the applicant for review. From the available records, there is no evidence she had any mental health condition, including depression, during service. Her depression did not exist or occur during her military service. She reports experiencing a deep depression because of her discharge indicating her depression occurred after her military service.

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

There is no evidence the applicant's mental health condition, including depression, had a direct impact or was a contributing factor to her documented misconduct of using and possessing cocaine and not reporting another service member's drug use. She repeatedly and consistently denied engaging in these acts; therefore, it is not possible her mental health condition caused her reported acts of misconduct and discharge for these reasons. There is no evidence she was in emotional distress or had a mental health condition impairing her judgment and causing her misconduct. Her mental health condition does not excuse or mitigate her discharge.

4. Does the condition or experience outweigh the discharge?

Since her mental health condition does not excuse or mitigate her discharge, her condition also does not outweigh her original discharge.

The complete advisory opinion is at Exhibit D.

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

The Board sent a copy of the advisory opinion to the applicant on 21 Nov 23 for comment (Exhibit E) but has received no response.

## **FINDINGS AND CONCLUSION**

1. The application was timely filed. Given the requirement for passage of time, all clemency requests are technically untimely. However, it would be illogical to deny a clemency application as untimely, since the Board typically looks for over 15 years of good conduct post-service. Therefore, the Board declines to assert the three-year limitation period established by 10 U.S.C. § 1552(b).

2. The applicant exhausted all available non-judicial relief before applying to the Board.

3. After reviewing all Exhibits, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale of the AFRBA Psychological Advisor and finds a

preponderance of the evidence does not substantiate the applicant's contentions. Despite her contention of "other mental health" conditions on her application, the applicant provided no supporting documentation or explanation how this condition related to her misconduct or her request for relief. Furthermore, the applicant states she experienced depression due to her discharge, suggesting her mental health condition did not cause the misconduct that resulted in her discharge.

While the applicant contended she believed she was being discharged via a force shaping program, with an honorable service characterization, there is no documented evidence supporting her participation in any restructuring program, and she signed acknowledgement of her commander's recommendation for discharge for misconduct with a general (under honorable conditions) service characterization. Additionally, the applicant was aware an honorable service characterization was required to be eligible for the GI Bill. Further, her contention that her promotion was unjustly withheld is without merit as her promotion eligibility status was in accordance with AFI 36-2502.

Finally, 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, and in the absence of post-service information/criminal history provided by the applicant, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's records.

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-2023-01859 in Executive Session on 17 Apr 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, dated 22 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 21 Nov 23.

Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 20 Nov 23.

Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 21 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.

5/10/2024

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**AFBCMR Docket Number BC-2023-01859**

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