



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-02131

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His bad conduct discharge (BCD) be upgraded to honorable.

APPLICANT'S CONTENTIONS

The absence of a thorough investigation and the denial of his rights led to an unfair and unjust process. He was subjected to coercion during questioning which compromised the integrity of the proceedings. Additionally, his attorney failed to fulfill their professional obligations, exhibiting limited effort in his defense. It took 17 years before his mental health allowed him to come forward and fight for justice as the discharge upgrade is necessary in order for him to seek medical attention for his PTSD stemming from his deployment to PSAB. He request a fair opportunity to be able to upgrade his discharge so that he can simply provide his family with a better life.

He has paid the price for and has learned from his wrongdoings.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman basic (E-1).

On 14 Aug 02, according to AF Form 3070, *Record of Nonjudicial Punishment*, the applicant received an Article 15 violation of UCMJ, Article 92; misuse of his government travel card for which he received a reduction to the grade of Airman (E-2), suspended through 13 Feb 03, forfeiture of pay in the amount of \$150.00 per month for two months, and 15 days extra duty.

On 9 Dec 05, according to AF Form 3070, the applicant received an Article 15 for 10 violations of UCMJ, Article 134; writing bad checks/insufficient funds for which he received a reduction to the grade of E-3, with a new date of rank of 9 Dec 05 and a reprimand.

On 20 Dec 05, according to General Court-Martial Order No. Wor... dated 8 Feb 06, the applicant was arraigned on the following charges at court-martial:

a. Charge 1: Article 121. Plea: Guilty. Finding: Guilty.

- Specification 1: Did, at or near Work-Product Air Force Base, TX, on or about 20 May 05 steal currency of a value of less than \$500, the property of RMH. Plea: G. Finding: G.

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- Specification 2: Did, at or near [Work-Product], TX, on or about 29 Mar 05, steal a ballistic vest, military property, of some value less than \$500, the property of the United States. Plea: G. Finding: G.
 - Specification 3: Did, at or near [Work-Product], TX, on divers occasions, between on or about 18 Nov 03 and on or about 1 Apr 05, wrongfully appropriate \$1881.18, the property of the Air Force Aid Society. Plea: G. Finding: G.
- b. Charge 2: Article 134. Plea: Guilty. Finding: Guilty.
- Specification 1: Did, in the State of Texas, on or about 19 Apr 04, wrongfully marry JLM, having at the same time of his said marriage to JLM a lawful wife then living, to wit: NAM. Plea: G. Finding: G.

The applicant's sentence was adjudged resulting in a bad conduct discharge, confinement for eight months, and reduction to the grade of E-1.

On 19 Apr 07, according to General Court-Martial Order No. [Wa...], the applicant's sentence to a bad conduct discharge, confinement for eight months, and reduction in grade to E-1, was finally affirmed and the bad conduct discharge will be executed.

On 2 May 07, the Department of the Air Force Office of the Judge Advocate General found inasmuch as no petition for a grant of review has been received within the appeal period, the sentence as approved in this case has become final. This order accurately reflects the final action taken pursuant to appellate review.

On 14 May 07, the applicant received a bad conduct discharge. His narrative reason for separation is "Court-Martial" and he was credited with 6 years, 7 months, and 19 days of total active service, to include 4 months and 8 days of foreign service credit.

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

POST-SERVICE INFORMATION

On 31 Oct 23, 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 or not 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 16 Nov 23 and provided an FBI report. According to the report, the applicant was arrested on 30 Jun 08 for theft of services greater than \$20 but less than \$500. On 27 Oct 08, the charge was dismissed.

The applicant's complete response 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 31 Oct 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.

AIR FORCE EVALUATION

The AFRBA Psychological Advisor finds insufficient evidence to support the applicant's request.

The available records find no evidence his mental health condition had a direct impact or was a contributing factor to his misconduct and subsequent BCD discharge. His service treatment records are not available or submitted by the applicant for review, but the available records, albeit limited, find no evidence he received any mental health evaluation, treatment, or mental disorder diagnosis, including PTSD, during service and thus, there are no records or evidence his mental health condition of PTSD had existed or occurred during his military service. His Enlisted Performance Report, for the rating period of 27 May 04 – 26 May 05, states he deployed to Work-Pr... Air Base, Kuwait in support of Work-Product (OIF), a combat zone, but there are no records he deployed to PSAB as he contended. It is possible he deployed to PSAB but the available limited records had no record of his activity. The applicant did not clearly identify his deployment experiences to Kuwait in support of OIF as a traumatic experience. The burden of proof is placed on the applicant to submit the necessary records to corroborate his claim. He reports developing PTSD from his deployment and military experiences but he did not identify his traumatic experience(s), when he began to experience symptoms of this condition, when he was diagnosed with PTSD, and/or how his condition of PTSD caused his misconduct and discharge. His documented misconduct included stealing and wrongfully appropriating currency/money on more than one occasion, stealing military property, and getting married to an individual when he was already married to someone else, which resulted in his court-martial conviction. These types of behaviors and misconduct also do not appear to be caused by his mental health condition and may be considered premeditated behaviors as these acts typically involved some thought and planning. There is no evidence or records he had any mental defect, cognitive impairments, a mental health condition, or was in emotional distress impairing his judgment at the time of any of his misconduct. His behavior was a significant departure from the standard of behavior expected of all service members, and again, there is no evidence his behavior was caused by having a mental health condition. To give the applicant the benefit of the doubt that even if he had a mental health condition or his mental health condition caused his misconduct, his mental health condition could not excuse or mitigate his discharge due to the severity of his offenses. He had been convicted at a general court-martial for his serious offenses and having a mental health condition does not exempt an individual from criminal or legal responsibility. After an exhaustive review of the available records, this psychological advisor finds no error or injustice with the applicant's discharge from service from a mental health perspective.

Liberal consideration is applied to the applicant's petition due to his contention of a mental health condition. It is reminded that liberal consideration does not mandate an upgrade per policy guidance. The following are answers to the four questions from the Kurta Memorandum from the available records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?

The applicant contends he developed PTSD from his military and deployment experiences and did not provide any other clarifying information about this condition such as the traumatic experience(s) he endured, when this condition was developed, and how this condition caused his misconduct and BCD. He did not discuss how his mental health condition may excuse or mitigate the discharge.

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

The applicant's treatment records were not available nor did the applicant submit them for review so there is no evidence or record of his mental health condition of PTSD or any other condition that existed or occurred during service. There are no records he deployed to PSAB, but there are records he deployed to **Work-Pr...** **Work-Pr...**, AB, Kuwait, in support of OIF, a combat zone. The applicant did not clearly identify this deployment experience as a traumatic experience.

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

There is no evidence the applicant's mental health condition, including PTSD, had a direct impact or was a contributing factor to his misconduct and discharge. His misconducts were serious offenses resulting in his conviction at a general court-martial and could not be excused or mitigated by this mental health condition. His mental health condition does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

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

The complete advisory opinion is at Exhibit E.

AF/JAJI, after careful review finds the court-martial sentence was appropriate, and clemency is not warranted.

The applicant's request for a discharge upgrade pertains to records resulting from a court-martial conviction and sentence. Pursuant to 10 U.S.C. § 1552(f), the Board is limited to two types of action: (1) correction of the record to reflect an action taken by review authorities under the UCMJ; or (2) action on the sentence of a court-martial for purposes of clemency. Hence, the Board's correction can merely reflect actions regarding a court-martial that were already taken by review authorities under the UCMJ (such as convening authority, clemency, or appellate corrections); or the Board can act only on the sentence, but only on the basis of clemency and not on the basis of alleged legal error or injustice. Thus, after careful review, AF/JAJI finds insufficient evidence or error regarding the first type of authorized correction, and insufficient grounds for clemency to support the second type of authorized correction. Aside from a brief personal statement in his application, he provided no evidence to support his allegations of errors or violations of his rights during the government's investigation.

As AF/JAJI does not opine on mental health claims, they do not opine regarding his mental health claim of PTSD. However, they note that the guidance for liberal consideration of mental health issues in the Kurta Memorandum cuts against his request for a discharge upgrade. According to Kurta Memorandum, paragraph 19, "Premeditated misconduct is not generally excused by mental

health conditions...Review Boards will exercise caution in assessing the causal relationships between asserted conditions or experiences and premeditated misconduct.”

The applicant pled guilty to stealing money, stealing military property, wrongfully appropriating funds belonging to the Air Force Aid Society, and marrying a woman while he was married to someone else. Such misconduct was willful in that it required deliberation on his part and was therefore “premeditated” as that term is used in the Kurta Memorandum. Accordingly, under the Kurta standards, any mental health condition, even if verified, would neither mitigate nor outweigh the discharge.

The complete advisory opinion is at Exhibit F.

APPLICANT’S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 10 Jan 24 for comment (Exhibit G), 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 AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant’s contentions. The applicant did not identify the traumatic experience that caused him to develop PTSD on his application. In fact, neither his records, nor his submission, contain any evidence that his PTSD had existed or occurred during his military service. The Board notes the burden of proof is placed on the applicant to submit the necessary records and/or evidence to corroborate his claim. Additionally, there was no indication or evidence a mental health disorder caused the applicant’s misconduct. It was not until years after his discharge for a court-martial conviction for misconduct, to include stealing, stealing military property, and marrying a woman while he was married to someone else, that the applicant alleges his PTSD condition. Liberal consideration was applied; however, the applicant’s mental health condition does not excuse or mitigate his discharge. Such misconduct was willful in that it required deliberation on his part and was therefore “premeditated” as that term is used in the Kurta Memorandum. Accordingly, under the Kurta standards, any mental health condition, even if verified, would neither mitigate nor outweigh the discharge. Further, the applicant provided no evidence in support of his allegations of unfairness and/or inequity regarding the investigation, court-martial and resulting discharge. It appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander’s discretion. The discharge was not unduly harsh or disproportionate to the offenses committed. Finally, in the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the evidence presented, and the 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.

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-2023-02131 in Executive Session on 17 Apr 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, dated 24 Jun 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 31 Oct 23.
- Exhibit D: FBI Report, dated, 16 Nov 23.
- Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 4 Dec 23.
- Exhibit F: Advisory Opinion, AF/JAJI, dated 5 Jan 24.
- Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 10 Jan 24.

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.

5/13/2024

X

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Board Operations Manager, AFBCMR
Signed by: USAF

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