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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-02186

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COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

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

APPLICANT'S CONTENTIONS

She had no proof that she suffered discrimination and manipulation because of her sexual orientation. She was later awarded 70 percent disability for events that occurred while in service. Correction should be made because now there is proof that she was a victim of discrimination because of her sexual orientation.

In support of her request for clemency, the applicant provided a letter from the Department of Veterans Affairs (DVA), dated 21 Nov 23, reflecting a 70 percent combined service-connected evaluation, and character reference letters.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 25 Aug 05, 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 reasons for the action were:

a. On 11 May 05 and 13 May 05, [the applicant] showed a blatant disregard for authority by using a motor vehicle during duty hours in violation of training regulations. This conduct violated Article 91 and Article 92 of the Uniform Code of Military Justice. As a result, [the applicant] received Letters of Counseling (LOC), dated 11 May 05 and 13 May 05, respectively.

b. On 12 May 05, a Military Training Leader (MTL) observed [the applicant] wearing her uniform, specifically her Battle Dress Uniform, without a rank insignia in violation of AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel*. The MTL instructed [the applicant] to change into the correct uniform before departing from the dormitory for work. [The applicant] failed to obey instructions and proceeded to work without a rank insignia on her uniform. As a result, [the applicant] received an LOC, dated 12 May 05.

c. On or about 30 May 05, [the applicant] brought a young child into her dormitory room and kept the child there overnight. [The applicant's] conduct violated a lawful order prohibiting

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children in the dormitory. As a result, [the applicant] received a Letter of Reprimand, dated 2 Jun 05.

d. On or about 23 Jun 05, [the applicant] remained absent without authority from her unit until 27 Jun 05. As a result, [the applicant] received an Article 15, dated 3 Aug 05.

On 7 Sep 05, the Staff Judge Advocate found the discharge action legally sufficient.

On 12 Sep 05, the discharge authority directed the applicant be discharged for minor disciplinary infractions, with a general (under honorable conditions) service characterization. Probation and rehabilitation were considered, but not offered.

On 16 Sep 05, the applicant received a general (under honorable conditions) discharge. Her narrative reason for separation is "Misconduct" and she was credited with 11 months and 5 days of total active service.

On 20 Jun 13, the applicant submitted a request to the Air Force Discharge Review Board (AFDRB) for an upgrade to her discharge.

On 5 Sep 13, 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 21 Nov 23, according to a DVA letter, provided by the applicant, she received a combined service-connected evaluation of 70 percent.

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

POST-SERVICE INFORMATION

On 24 Oct 23, the Board sent the applicant a standard request for post-service information. This letter informed the applicant that a Federal Bureau of Investigation (FBI) background check would assist the Board in evaluating her case. Although the applicant did reply to the request for post-service information (Exhibit D), her response did not include an FBI background check or other criminal history data.

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 Post-Traumatic Stress Disorder (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 24 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.

On 20 Sep 11, with the repeal of the law commonly known as “Don’t Ask, Don’t Tell” (DADT), 10 U.S.C. § 654, the Department of Defense (DoD) issued supplemental policy guidance on correcting military records of former service members who had been discharged under that law or a precursor. The guidance applied to the following types of requests: changing the narrative reason for a discharge; re-characterizing service as honorable; changing a reentry code to one allowing immediate eligibility to reenter service. The guidance directed that such requests should normally be granted when both of the following conditions are true: (1) the original discharge was based solely on DADT or a similar policy in place prior to enactment of DADT; and (2) there were no aggravating factors in the record, such as misconduct. For meritorious cases, the guidance further directed the use of “Secretarial Authority” as the new narrative reason for separation, with Separation Program Designator (SPD) code “JFF” and reentry code “1J.” In addition, the guidance noted that while each request must be evaluated individually, an honorable or under honorable conditions (general) discharge should normally be considered to indicate the absence of aggravating factors. Finally, the issuance of a discharge under DADT or the taking of an action pursuant to DoD regulations related to a discharge under DADT should not by itself be considered to constitute an error or injustice that would invalidate an otherwise proper action taken pursuant to DADT and applicable DoD policy. Thus, remedies such as correcting a record to reflect continued service with no discharge, restoration to a previous grade or position, credit for time lost, or an increase from no separation pay to half or full separation pay or from half separation to full separation pay, would not normally be appropriate.

AIR FORCE EVALUATION

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

This Psychological Advisor has reviewed the available records and finds there was no evidence or records the applicant’s mental health condition, including PTSD, had a direct impact or was a contributing factor to her discharge. The applicant was discharged from service for engaging in a pattern of minor disciplinary infractions consisting of violating training regulations by driving during duty hours, wearing her uniform without her rank and failing to obey instructions to correct her uniform, bringing a young child and having the child stay overnight in her dormitory room which was prohibited in the dormitory, and she was absent without authority for approximately four days. There were no explanations provided for these infractions at the time of service nor from the applicant in her petition to the Air Force Board for Correction of Military Records (AFBCMR). She did not address these behavioral or misconduct problems. These acts of misconduct do not appear to be caused by her mental health condition. Her service treatment records are not available or submitted by the applicant for review, but the remaining available records find no records or evidence she had any mental health condition, including PTSD, caused by her military duties during service. There are no records she was in emotional distress or had a mental health condition impairing her judgment at the time of any of her documented misconduct. The applicant claims she was discriminated against because of her sexual orientation and there are no records or evidence to substantiate this claim. She did not clearly describe the alleged discrimination she experienced, how it caused her misconduct, and how it was related to her reason for discharge. She also reported having PTSD and did not provide any records to reflect how and

when she met diagnostic criteria for this condition, how and why this condition was service-connected by the DVA, and how this condition caused her misconduct and subsequent discharge from service. Service-connection does not equate to causation or mitigation of her discharge. Her DVA treatment records reported she had a history of PTSD and identified she was physically and sexually abused prior to her military service. There is no evidence her prior-service traumatic experiences or mental health condition were aggravated by her military duties or service. She did report she was discriminated against due to her sexual orientation but was not clear if this experience was a traumatic experience and again, how this experience caused her pattern of misconduct and discharge. It is alluded that this experience was the traumatic experience causing her PTSD based on her contention for this petition. It is plausible she experienced discrimination as she contended, to give her the benefit of the doubt, despite no records; however, her personal testimony was found to be insufficient and not compelling to support her request. This Psychological Advisor finds insufficient evidence has been presented to demonstrate a nexus between the applicant's mental health condition, including PTSD, and her reason for discharge for misconduct. There is no evidence her mental health condition was a mitigating factor to her discharge, and there is no error or injustice identified with her discharge from a mental health perspective.

Liberal consideration is applied to the applicant's request due to the contention of a mental health condition. It is reminded that liberal consideration does not mandate an upgrade per policy guidance. The following are responses 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 is requesting an upgrade of her discharge to honorable because she suffered from discrimination due to her sexual orientation and alluded to developing PTSD from this experience.

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

There is no evidence or record the applicant's mental health condition of PTSD was caused by her experience of discrimination due to her sexual orientation or had existed or occurred during her military service. Her service treatment records are not available for review, and the available records find no evidence she had PTSD during service. Her DVA records, which were 18 years after discharge, reported she had a history of PTSD from her prior-service physical and sexual abuse experiences and presumably from her discrimination experience due to her sexual orientation during service.

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

The applicant did not adequately or compellingly explain how her mental health condition, including PTSD, had caused her pattern of minor disciplinary infractions/misconduct leading to her discharge from service. There is no evidence or records that her mental health condition, including PTSD, had a direct impact or was a mitigating factor to her discharge based on the available records for review. Thus, her mental health condition does not excuse or mitigate her discharge.

4. Does the condition or experience outweigh the discharge?

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

The complete advisory opinion is at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 5 Dec 23 for comment (Exhibit F) 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 Title 10, United States Code, Section 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 PTSD on her application, the applicant provided no supporting documentation or explanation how this condition related to her misconduct or her request for relief. Additionally, while the applicant contended discrimination based on her sexual orientation, she provided no evidence of discrimination or a nexus between this allegation and her discharge for misconduct. Further, 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 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-2023-02186 in Executive Session on 17 Apr 24:

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Panel Chair
Panel Member
Panel Member

All members voted against correcting the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, dated 29 Jun 23.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.

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Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 24 Oct 23.

Exhibit D: Applicant's Response, w/atchs, dated 21 Nov 23.

Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 28 Nov 23.

Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 5 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.

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