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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-02291

Work-Product

COUNSEL: NAME

Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board grant relief from his court-martial sentence and upgrade his bad conduct discharge (BCD) to an unspecified character of service.

APPLICANT'S CONTENTIONS

Prior to his court-martial conviction, he was found unfit by the Informal Physical Evaluation Board (IPEB) with 30 percent disability for mood disorders associated with military service. An upgrade to his discharge would enable him to receive medical care from the Department of Veterans Affairs (DVA). While he was stationed in Italy, he was in an automobile accident that took the life of at least one person. His life changed after this incident and then he was medically transferred to another base where his condition got progressively worse. He committed crimes at this base in which he pled guilty, and the plea deal agreement took away his medical retirement. Looking back, he wished he took another path. He did not know he would not be able to get help for any of his medical conditions that were service-connected due to his discharge type. He has been struggling with his mental health problems and is requesting mercy so he can get medical care through the DVA. He has not been in trouble with the law except for speeding tickets which were related to his most recent episode and he has been able to put back into remission and rebuild his life once again.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force senior airman (E-4).

On 13 Feb 07, according to documentation provided by the applicant, an IPEB found the applicant's Mood Disorder associated with Anxiety Disorder and Undifferentiated Somatoform Disorder unfitting with 30 percent disability and recommended permanent retirement. His Personality Disorder was determined not separately unfitting and not compensable or ratable.

On 31 Oct 07, the convening authority published General Court-Martial Order Work-P.... The Order stated the applicant pled guilty to three charges and nine specifications. The applicant was sentenced to confinement for 18 months, reduction to the grade of airman basic, and discharge from the service with a BCD. The specific charges and specifications were as follows:

Charge I: Article 92:

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Specification 1: He knew of his duties, on or about (o/a) 20 Nov 06, was derelict in the performance of his duties in that he negligently failed to turn in his additional Common Access Cards.

Charge II: Article 107:

Specification 1: He did, o/a 20 Nov 06, with intent to deceive, make to Special Agent [Wor...], an official statement, that he purchased a Toshiba laptop computer at Best Buy or words to that effect, which statement was false and then known to him as false.

Specification 2: He did, o/a 22 Nov 06, with intent to deceive, make to Special Agent [Wor...], an official statement, that the Toshiba laptop was given to him by [Wor...], or words to that effect, which statement was false and then known to him as false.

Specification 3: He did, o/a 20 Nov 06, with intent to deceive, make to Special Agent [Wor...], an official statement, that he did not take the Pentax camera, the camera was at the Base Exchange (BX) as a display model, and he only took the manual from the display model for the computer cord, or words to that effect, which statement was false and then known to him as false.

Charge III: Article 121:

Specification 1: He did, between o/a 1 Aug 06 and o/a 30 Sep 06, steal a 42-inch Phillips plasma television set, remote control, and power cord, a value of about \$1,757.97, the property of the Army and Air Force Exchange Service (AAFES).

Specification 2: He did, between o/a 1 Sep 06 and o/a 31 Oct 06, steal two rings of combined value of about \$1,798.00, the property of AAFES.

Specification 3: He did, between o/a 1 Aug 06 and o/a 20 Nov 06, steal a Pentax Optio digital camera, a JVC Everio camcorder, three DVD movies, four X-Box Live 12-month gold subscription cards, two music compact discs, and a compact disk cleaning kit, each of a value under \$500.00, the property of AAFES.

Specification 4: He did, between o/a 1 Aug 06 and o/a 20 Nov 06, wrongfully appropriate a Toshiba Satellite Notebook computer, a value of about \$1,098.00, the property of AAFES.

Specification 5: He did, between o/a 1 Jan 06 and o/a 20 Nov 06, steal two desktop computers, military property, each of a value greater than \$500.00, the property of the United States Air Force (USAF).

On 26 May 10, the applicant received a BCD with narrative reason of "Court Martial (Other)". He was credited with 4 years, 10 months, and 24 days of total active service and time lost from 29 Aug 07 thru 2 May 08.

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

POST-SERVICE INFORMATION

On 2 Aug 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 5 Aug 23 and provided an FBI report. According

to the report, on 4 Jan 22, the applicant was arrested and pled not guilty to obstruction of investigation and the case was dismissed. The applicant also provided LinkedIn recommendations and a resume.

The applicant's complete response is at Exhibit D.

APPLICABLE AUTHORITY/GUIDANCE

This Board is without authority to reverse, set aside, or otherwise expunge a court-martial conviction. Rather, in accordance with Title 10, United States Code, Section 1552(f), actions by this Board are limited to corrections reflecting actions taken by the reviewing officials and action on the sentence of the court-martial for the purpose of clemency.

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, 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 2 Aug 23, the 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 completed a review of all available records and finds insufficient evidence to support the applicant's request for an upgrade to his discharge from a mental health perspective. A review of the applicant's available military personnel and service treatment records finds no evidence his unfitting mental health condition of Mood Disorder associated with Anxiety Disorder and Undifferentiated Somatoform Disorder was a mitigating factor to his numerous misconduct infractions and subsequent discharge from service. The bulk of his documented misconducts did occur within the time frame coinciding with his mental health treatment for anxiety and depression and the applicant had made complaints of mood and cognitive difficulties to his psychiatrist. His psychiatrist had referred him to receive neuropsychological testing to rule out any cognitive issues and the results found he most likely embellished his symptoms for secondary gains and there was no evidence he had a bona fide cognitive disorder or related impairment issues. His neuropsychological testing was performed after he was caught stealing merchandise from the BX. His psychiatrist was incredulous of his reports of dissociative episodes or psychotic symptoms that the applicant alluded to being responsible or had a nexus to his criminal behaviors because his described symptoms were not consistent to acute psychosis. His neuropsychological testing results confirmed he had no cognitive or psychotic disorders. His psychiatrist opined his behaviors or misconducts are likely manifestations of his personality disorder. This opinion was also supported and reflective of his test results and of the

neuropsychologist's recommendation. His test results found his clinical presentation strongly suggested a chronic personality disorder that interfered with his day-to-day functioning and the neuropsychologist had recommended consideration for administrative discharge action in accordance with AFI 36-3208, *Administrative Separation of Airmen*, paragraph 5.11 (Personality Disorders).

It appeared from this recommendation and from his psychiatrist's treatment record his personality disorder influenced his behaviors especially misconducts. The AFRBA Psychological Advisor concurs with their clinical assessments. His maladaptive behavioral problems and misconducts involving multiple incidents of stealing properties over a prolonged period of time and being dishonest with the Special Agent during his OSI investigation are consistent to behavioral traits of a personality disorder and not to depression, mood disorder, anxiety disorder, somatoform disorder, cognitive disorder, etc. Personality disorders are considered to be unsuited mental health conditions and unsuited for military service. His personality disorder may explain his behaviors, but his condition does not excuse his criminal behaviors or exempt him from criminal responsibility.

The applicant was convicted at general court-martial for stealing or wrongfully appropriating numerous merchandises from the BX, AAFES, and the USAF between the period of 1 Jan 06 to 22 Nov 06, made several false official statements to a Special Agent during his investigation, and was derelict in the performance of his duties. He was reported to have stolen large and small merchandises to include a TV, laptop, camera, camcorder, and jewelry over time. These items are typically highly valued and highly secured and monitored items in a store. His behaviors of taking these items do not appear to be impulsive acts and was likely premeditated. There is no evidence he was in emotional distress at the time of any of his misconducts/offenses and again, no evidence he had any cognitive disorder or impairment issues that may affect his judgment and decision making skills. He knew the difference between right and wrong and to adhere to the right and refrain from the wrong.

The applicant claimed he was in a car accident in Italy in which there was at least one fatality and his life had not been the same afterwards. He claimed his condition worsen after he transferred to another base. He stated he committed crimes but was evasive about whether there was nexus between his condition and criminal offenses. He did not discuss how his mental health condition may excuse or mitigate his discharge. There are no records of his car accident in Italy, no records he received mental health treatment or an evaluation while he was in Italy, and no records the accident affected his mental health and overall functioning. There are no records he developed PTSD, other Trauma- and Stressor-Related Disorders, acute stress reactions, etc. from being involved in an alleged life altering car accident. His anxiety and depression were reported to be related to his occupational, marital, and legal problems and not from an automobile accident. There is no evidence the mental residual effects of his automobile accident in Italy had an effect or caused his numerous misconducts, court-martial conviction, and BCD.

The applicant was referred to the Medical Evaluation Board (MEB) by his first treating psychiatrist and his mental health condition of Mood Disorder associated with Anxiety Disorder and Undifferentiated Somatoform Disorder was found unfitting by the IPEB on 23 Feb 07. The IPEB proposed he receive a 30 percent rating for his unfitting condition. Due to his court-martial proceeding and conviction, he did not receive a medical discharge. His court-martial conviction and BCD superseded his medical discharge and this decision was made by his leadership, legal authority, or other superior authority. A medical discharge is not required to be received especially since it was competing with a court-martial conviction and BCD for serious offenses. The AFRBA Psychological Advisor finds no evidence his unfitting mental health condition of Mood Disorders associated with Anxiety Disorder and Undifferentiated Somatoform Disorder had caused or was a mitigating factor to his criminal behaviors. His personality disorder may have been a factor to his

behaviors but again, this is an unsuiting condition and does not excuse or outweigh his court martial conviction and BCD.

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 contended being affected by a fatal automobile accident while he was stationed in Italy. He claimed his condition worsen after he was transferred. He committed crimes at his new base and did not know his plea deal agreement would take away his medical retirement. He did not clearly discuss how his mental health condition may excuse or mitigate his discharge.

2. Did the condition exist or experience occur during military service? There is evidence the applicant received mental health treatment, individual psychotherapy and medication management services, for anxiety and depression caused by occupational, marital, and legal problems during service. He also received neuropsychological testing for cognitive complaints and the results of the evaluation found he did not have any cognitive disorders and it was strongly suggested he may be malingering or overexaggerating his symptoms for secondary gains. He had been given diagnoses of Major Depressive Disorder, Mood Disorder NOS, Anxiety Disorder NOS, Somatoform Disorder, Somatization Disorder and Personality Disorder NOS during service.

3. Does the condition or experience excuse or mitigate the discharge? The applicant's mental health condition of Mood Disorders associated with Anxiety Disorder and Undifferentiated Somatoform Disorder was found unfitting by the IPEB. There is, however, no evidence his unfitting mental condition caused, excused, or mitigated his discharge. His behaviors may be caused by his Personality Disorder/traits based on his treatment records. His Personality Disorder is an unsuiting condition and does not excuse or mitigate his discharge and does not exempt him from assuming criminal responsibility. The applicant was discharged from service for serious offenses resulting with his court-martial conviction and BCD which outweighed his medical discharge. His repeated serious offenses/misconducts are not excused or mitigated by his mental health condition. There is no error or injustice identified with his discharge.

4. Does the condition or experience outweigh the discharge? Since the applicant's unfitting and unsuiting mental health conditions do not excuse or mitigate his discharge, his mental health conditions also do not outweigh his original discharge.

The complete advisory opinion is at Exhibit E.

APPLICANT'S REVIEW OF EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 8 Aug 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 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 10 U.S.C. 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 injustice. The Board finds no evidence that the sentence of the military court was improper or that it exceeded the limitations set forth in the Uniform Code of Military Justice. 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. The Board applied liberal consideration due to a mental health condition and finds insufficient evidence his condition mitigated or excused his behaviors and numerous misconduct infractions resulting with his BCD. Furthermore, the applicant's personality disorders are considered to be unsuiting mental health conditions and unsuiting for military service. In the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the evidence presented, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's record.

4. The applicant has not shown that 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 Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2023-02291 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, w/atchs, dated 13 Jul 23 and 20 Jul 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 2 Aug 23.
- Exhibit D: Applicant's Response, w/atchs, dated 5 Aug 23.
- Exhibit D: FBI Report, dated, 4 Aug 23.
- Exhibit E: Advisory opinion, AFRBA Psychological Advisor, dated 7 Aug 23.
- Exhibit F: Notification of advisory, SAF/MRBC to applicant, dated 8 Aug 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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