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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product

DOCKET NUMBER: BC-2023-02304

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His under other than honorable conditions (UOTHC) discharge be upgraded to honorable or general (under honorable conditions).

APPLICANT'S CONTENTIONS

He was initially issued an honorable discharge but months later he received a different discharge. He was told he was being discharged for a physical fitness test failure. During his separation process, he lost his grandmother and was unable to afford to return to stateside for her funeral and got into some trouble off-base in Japan. The two incidents of misconduct were out of character for him and were due to the loss of his grandmother and being young and immature. Since his separation, he worked for the government as a police officer for nearly 10 years and currently works as a physical security specialist. The applicant marked "Other Mental Health" on his application indicating it was related to his request but did not identify a mental health condition or disorder.

In support of his request for clemency, the applicant provided Graduation Certificates from the United States Army Military Police School.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 28 Jul 06, the applicant's commander recommended the applicant be discharged from the Air Force, under the provisions of AFPD 36-32, *Military Retirements and Separations*, and AFI 36-3208, *Administrative Separation of Airmen*, with an UOTHC discharge. The specific reasons for the action were:

- a. On 17 Apr 06, he passed two vehicles in a no-passing zone at a high rate of speed. As a result, he received a Letter of Reprimand.
- b. On or about (o/a) 9 Feb 07, he failed to obey an order by not preparing for a brief. As a result, he received a Letter of Counseling (LOC).
- c. On 26 Feb 07, he failed to show to his mandatory PT test. As a result, he received an LOC.

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- d. On 16 Jun 07, he lost his duty key and then failed to report the lost key. As a result, he received an LOC.
- e. O/a 24 Feb 08, he unlawfully entered a parking building. As a result he received non-judicial punishment (NJP) action pursuant to Article 15, Uniform Code of Military Justice (UCMJ).
- f. On 18 Jun 08 he was convicted at a Summary Court-Marital and received sentence of reduction to the grade of airman basic, forfeiture of \$673.00 pay, and confinement for 15 days. The specific charges were:
 - 1) O/a 3 May 08, he was disrespectful toward a second lieutenant (2nd Lt), a superior commissioned officer, by using expletive language towards this officer.
 - 2) O/a 3 May 08, having knowledge issued by the wing commander to comply with the Misawa Air Base (AB) Liberty Card Order, he failed to obey the order by being in an authorized location during restricted hours.
 - 3) O/a 3 May 08, with intent to deceive he made a false statement to a 2nd Lt.
 - 4) O/a 3 May 08, he was restricted to the limits of Misawa AB and broke this restriction.

On 27 Jul 08 and 21 Aug 08, the Staff Judge Advocate found the discharge action legally sufficient.

On 23 Aug 08, the discharge authority directed the applicant be discharged for Pattern of Misconduct, Conduct Prejudicial to Good Order and Discipline, with an UOTHC service characterization. Probation and rehabilitation was considered, but not offered.

On 29 Aug 08, according to Special Order AB-092566, the applicant was to receive an UOTHC service characterization for misconduct.

On 4 Sep 08, the applicant was issued a DD Form 214, *Certificate of Release or Discharge from Active Duty*, with a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct (Other)" and he was credited with 3 years, 9 months, and 13 days of total active service.

In a previous BCMR case (BC-2008-04504), the applicant requested his orders be corrected to reflect he was issued a general (under honorable conditions) discharge to match the service characterization listed on his DD Form 214. On 18 Jun 09, the Board partially granted his request and directed his DD Form 214 be corrected to reflect he received an UOTHC discharge. The applicant's original DD Form 214 was voided and a new DD Form 214 was accomplished reflecting an UOTHC discharge and narrative reason for separation of "Misconduct".

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 standard request for any additional post-service information he may wish the Board to consider, including a standard criminal history report from

the Federal Bureau of Investigation (FBI) for consideration under fundamental fairness/clemency; however he 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 (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 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 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.

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 of his discharge based on his mental health condition. A review of the available records finds no evidence or records to corroborate the applicant's contentions. There are no records he was being discharged for being unable to pass his physical fitness/physical training (PT) test but one of the reasons he was being discharged was for failing to show to his mandatory PT test. The applicant claims he lost his grandmother while he was in the process of being separated for his fitness test failure and marked "Other Mental Health" on his application. He did not identify an actual mental health condition or disorder he had. While the loss of his grandmother is not disputed, there are no records to substantiate her death occurred during his military service and there is no evidence he developed a mental health condition or disorder from his natural grief and loss of a family member. He did provide explanations for a couple of his misconducts during service and explained he did not know he was not supposed to be in a parking garage and said he had a bad day when he "happen to have a run in with an officer". He did not mention losing a family member in any of his statements submitted during service. He reported getting into trouble off base in Japan because he was not able to go back to stateside to attend her funeral and there are records he had misconduct problems off base indicating a possible nexus. However, giving the applicant the benefit of the doubt that his grief and loss may have affected his behaviors, his off-base misconduct problems do not excuse his behaviors especially since he was convicted at a Summary Court-Martial for serious infractions. He did not clarify when his grandmother passed away but appeared to have occurred during the time he was being discharged. Again, there are no records he was being discharged for failing his PT test so the timeline of his grandmother's death in relation to his documented misconduct could not be clearly deciphered but most likely occurred towards the end of his military career according to his contention. He had misconduct problems starting in 2006 about two years prior to being notified of his discharge action and so it appeared his grief and loss from his

grandmother's death did not have a nexus to his pre-existing misconduct problems. The applicant never received any mental health evaluation, treatment, or mental disorder diagnosis during service and when he met with his PCM for a separation physical examination, he denied having any anxiety or depression. From his available records, there is no evidence or records to support that his mental health condition had a direct impact or was a contributing factor to misconduct and subsequent discharge. He also contends part of his problem was that he was young and immature. There are many service members who were/are the same age as the applicant when he was in the service and they were/are able to abide by the rules so his contention that he was young and immature is not compelling.

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 contends he was being told he was being discharged for a PT test failure and during his separation process, he lost his grandmother and was unable to afford to return to stateside for her funeral and did get into some trouble off-base in Japan. He marked "Other Mental Health" on his application to the BCMR and did not identify the actual mental health condition or disorder he had.

2. Did the condition exist or experience occur during military service? The applicant never mentioned his grandmother's death in any of his personal statements submitted at the time of service. His grandmother's death is not disputed, but there are no records to substantiate that her death had occurred during his military service. According to his service treatment, the applicant did not receive any mental health evaluation, treatment, or mental disorder during service. He denied having any anxiety or depression to his PCM when he was assessed during his separation physical examination. There is no evidence he developed a mental health condition from the natural grief and loss of a loved one during service.

3. Does the condition or experience actually excuse or mitigate the discharge? There is no actual evidence or records that his mental health condition or his grief and loss from his grandmother's death had a direct impact or was a mitigating factor to his discharge based on the available records for review. The timeline of his grandmother's death in relation to his acts of misconduct was not provided but appeared more than not, he had misconduct problems prior to her death. He did report getting into trouble off-base following her death and there are some records he had misconduct problems off-base but these off-base misconduct problems are not excused or mitigated because they were rather serious causing him to be convicted at a Summary Court-Martial. His mental health condition from his grandmother's death does not actually excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge? Since the applicant's mental health condition does not excuse or mitigate his discharge, his mental health condition also does not outweigh his 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 12 Dec 23 for comment (Exhibit E), but has received no response.

FINDINGS AND CONCLUSION

- 1. The application was timely filed.
- 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 the victim of an error or injustice. While the Board finds no error in the original discharge process, the Board recommends relief based on clemency. The Board notes the rationale of the AFRBA Psychological Advisor finding insufficient evidence a mental health condition excused or mitigated his multiple behaviors and misconduct leading to his discharge; however, the Board finds relief is warranted for an upgrade of his discharge under paragraphs 7.d. and 7.n. of the Wilkie memorandum. Specifically, the Board opines the applicant’s almost eight years of service as a law enforcement officer is sufficient to warrant upgrading his discharge to general (under honorable conditions). Therefore, the Board recommends the applicant’s records be corrected as indicated below.
- 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 pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show on 4 Sep 08, he was discharged with service characterized as general (under honorable conditions), and a separation code and corresponding narrative reason for separation of JFF (Secretarial Authority).

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-2023-02304 in Executive Session on 17 Apr 24:

Work-Product	Panel Chair
Work-Product	, Panel Member
Work-Product	Panel Member

All members voted to correct the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 14 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 21 Nov 23.
- Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 11 Dec 23.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 12 Dec 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.

7/30/2024

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Board Operations Manager, AFBCMR
Signed by: USAF