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

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-02306

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COUNSEL: NONE

HEARING REQUESTED: NO

### APPLICANT'S REQUEST

His bad conduct discharge (BCD) be upgraded to at least a medical separation.

### APPLICANT'S CONTENTIONS

He lost a child early on and went through a mental breakdown to which he is still suffering to this day. His body has slowly broken down, both physically and mentally and he continues to have problems with his leg injury.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

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

On 12 Aug 04, AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, indicates the applicant received nonjudicial punishment (NJP), Article 15 for failing to refrain from possessing alcohol while residing in the dormitory and underage drinking. He received a reduction in grade to airman basic (E-1), suspended until 11 Feb 05, forfeiture of \$596.00 pay, and 30 days of correctional custody.

On 27 Nov 05, the convening authority published Special Court-Martial Order Number [REDACTED]. The Order stated the applicant pled guilty and was found guilty to one charge and one specification of underage drinking (Article 92); one charge and two specifications of drinking under the influence (DUI) (Article 111); one additional charge and one specification of underage drinking (Article 92); and one additional charge and one specification of violating base restriction (Article 134). The applicant was sentenced to confinement for 165 days, reduction to the grade of airman basic, and discharge from the service with a BCD.

On 21 Aug 07, the applicant received a BCD. His narrative reason for separation is "Court-Martial" and he was credited with 2 years, 11 months, and 2 days of total active service.

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

## **POST-SERVICE INFORMATION**

On 22 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, 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 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 22 Nov 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 the desired changes to his record. While the applicant is contending, he was not fit for service from a mental health perspective there is insufficient evidence to suggest the applicant was not fit for military service from a psychological

perspective during his time of service and at discharge. The applicant's single extended evaluation, while referred, shows his performance was at least adequate. His evaluation was referred for his conduct, not his performance. The applicant was promoted twice to the rank of airman and then airman first class. He was consistently evaluated on his physical condition, upper extremities, lower extremities, hearing and ears, vision and eyes, and psychiatric (PULHES) as S-1, indicating he was fit for service from a psychological perspective. There is no evidence the applicant was ever put on a profile or had a duty-limiting condition from a mental health standpoint. He was evaluated for a Medical Evaluation Board (MEB), but this was for a medical condition, Dyspnea-labored breathing and was found fit for service. After considering the entire record and contentions, there is insufficient evidence to suggest the applicant had any psychological condition that impacted his functioning in his ability to perform the duties of his office, grade, rank, or rating.

There is insufficient evidence to suggest the applicant's misconduct that resulted in a BCD is mitigated or excused by any mental health condition. The applicant was not diagnosed with a mental health condition until after he had committed misconduct on several occasions, and then it was after he was arrested, and was undergoing charges and administrative proceedings. His mood disorder appears to be the result of these charges, as well as secondary to medical and sleep problems. There is also indication his heavy drinking not only preceded his military career but also exacerbated his emotional state. While the applicant cites losing a child as the main reason leading to his misconduct, there is no evidence in his medical or military record indicating he had lost a child. The applicant submitted substantial records which the Psychological Advisor thoroughly reviewed; however, there is no mention of the applicant losing a child, and while this may have occurred, no medical record indicated this as the reason for any mental health symptoms, including his alcohol abuse. The Diagnostic and Statistical Manual for Mental Health Disorders (DSM) used a multi-axial approach to diagnosis, with Axis III and IV indicating General Medical Conditions and Psychosocial and Environmental Problems respectively, that factored into a mental health diagnosis. His records indicate his medical condition, occupational issues, and legal issues were the primary factors contributing to his psychological state. The Psychological Advisor does not find sufficient evidence to suggest any mental health condition would mitigate or excuse his misconduct of underage drinking on two occasions, DUI on two occasions, and breaking restriction, which resulted in a BCD.

Liberal consideration is applied to the applicant's request due to the contention of a mental health condition. The following are responses to the four questions in the policy based on 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 went through a total mental breakdown.
2. Did the condition exist or experience occur during military service?  
The applicant was diagnosed with alcohol abuse and depression. There is no evidence he had any mental health diagnosis post-service.
3. Does the condition or experience excuse or mitigate the discharge?

There is insufficient evidence to suggest the applicant's misconduct that resulted in a BCD is mitigated or excused by any mental health condition. The applicant was not diagnosed with a mental health condition until after he had committed misconduct on several occasions, and then it was after he was arrested, and was undergoing charges and administrative proceedings. His mood disorder appears to be the result of these charges, as well as secondary to medical and sleep problems. There is also indication his heavy drinking not only preceded his military career but also exacerbated his emotional state. While the applicant cites losing a child as the main reason leading to his misconduct, there is no evidence in his medical or military record he had lost a child. The applicant submitted substantial records which were thoroughly reviewed; however, there is no mention of the applicant losing a child, and while this may have occurred, no medical record indicated this as the reason for any mental health symptoms, including his alcohol abuse. As noted above, the DSM used a multi-axial approach to diagnosis, with Axis III and IV indicating General Medical Conditions and Psychosocial and Environmental Problems respectively, that factored into a mental health diagnosis. His records indicate his medical condition, occupational issues, and legal issues were the primary factors contributing to his psychological state. The Psychological Advisor does not find sufficient evidence to suggest any mental health condition would mitigate or excuse his misconduct which resulted in a BCD.

4. Does the condition or experience outweigh the discharge?

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

The complete advisory opinion is at Exhibit D.

The AFBCMR Medical Advisor recommends denying the application. His submitted evidence did not reveal any evidentiary degree that either an error or injustice occurred in the setting of a court-martial separation. The court-martial charges voided Disability Evaluation System (DES) processing which in-turn voided a possible medical separation.

The applicant's comment on his application of his leg giving out some mornings and it is too painful to move; clearly denotes his physical condition of concern was his leg and nearly the entire record depicts the gunshot wound to his left leg. Therefore, the focus of this advisory is centered around that condition. Normally, when an injury or illness occurs while on duty and could possibly be considered unfitting for continued service, processing through the DES is most appropriate, which could result in a medical separation or medical retirement; however, this case is different. To receive a medical discharge or retirement, evaluation via the DES is necessary. This case involved a serious injury which occurred under misconduct activities. Therefore, under AFI 36-3212 (2006), *Physical Evaluation for Retention, Retirement, and Separation*, paragraph 1.3, disability evaluation begins only when examination, treatment, hospitalization, or sub-standard performance result in referral to a Medical Evaluation Board (MEB). Members not eligible for disability processing are members under court-martial charges. Those charged with one or more offenses that could result in dismissal or punitive discharge, and those convicted and sentenced to dismissal or punitive discharge, may not undergo disability evaluation, unless the case fits one of the following exceptions: (1) question of mental capacity or responsibility or (2) member whose sentence to dismissal or punitive discharge is suspended. Neither one of the above exceptions

occurred in this case. Therefore, his request for an upgrade to at least a medical discharge is not applicable according to instructional guidance.

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 18 Mar 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 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. 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. Furthermore, the Board concurs with the rationale and recommendation of the AFRBA Psychological Advisor and the AFBCMR Medical Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board notes the applicant's desire for a medical separation; however, per AFI 36-3212, the Board finds he was not eligible for disability processing due to being charged with several offenses which resulted in a punitive discharge and due to the preponderance of evidence indicating he was mentally capable of standing trial. Liberal consideration was applied to the applicant's request due to the contention of a mental health condition; however, since there is no evidence his mental health condition or experience with grief and loss from a child had a direct impact on his behaviors and misconduct of underage drinking on two occasions, DUI on two occasions, and breaking restriction, which resulted in a BCD, his condition or experience does not excuse, mitigate, or outweigh his discharge. In the interest of justice, the Board considered upgrading the discharge based on fundamental fairness; however, given the evidence presented, and in the absence of post-service information and a criminal history report, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's records.

The applicant retains the right to request reconsideration of this decision. The applicant may provide post-service evidence depicting his current moral character, occupational, and social advances, in the consideration for an upgrade of discharge characterization due to clemency based on fundamental fairness.

## 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-2023-02306 in Executive Session on 17 Apr 24 and 19 Apr 24:

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Panel Chair

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Panel Member

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.

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 22 Nov 23.

Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 11 Dec 23.

Exhibit E: Advisory Opinion, AFBCMR Medical Advisor, dated 14 Mar 24.

Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 18 Mar 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

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Board Operations Manager, AFBCMR

Signed by: USAF

**AFBCMR Docket Number BC-2023-02306**