



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-02570

Work-Product

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His bad conduct discharge (BCD) discharge be upgraded.

APPLICANT'S CONTENTIONS

His current status is an obstacle to him being eligible to access certain benefits. His post-service accomplishments support significant changes and growth in his life since being discharged and his progress is ongoing in light of his recovery from substance use disorder and mental health diagnoses. He provides peer support and mentoring at a state prison in Georgia and is grateful for his recovery and current life perspective.

In support of his request for a discharge upgrade, the applicant provides several certificates for program and/or training completion.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

According to the AF Form 1137, *Unfavorable Information File Summary*, the applicant was issued a Letter of Reprimand (LOR) for wrongful use of cocaine on or about 1 to 8 Dec 88 and was placed in the Drug Rehab Program on 17 Jan 89.

On 4 Apr 89, AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, indicates the applicant received nonjudicial punishment (NJP), Article 15 for being absent without leave (AWOL) and failing to go to appointed place of duty. He received a reduction in grade to sergeant (E-4), with a new date of rank (DOR) of 4 Apr 89.

On 10 May 89, AF Form 418, *Selective Reenlistment/Noncommissioned Officer Status*, indicates the applicant was not recommended for reenlistment and his noncommissioned officer status was vacated due to his substance abuse problem.

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CUI Categories: Work-Product
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POC: SAF.MRBC.Workflow@us.af.mil

On 16 Jun 89, AF Form 3070 indicates the applicant received nonjudicial punishment (NJP), Article 15 for being AWOL from 5 Jun 89 to 7 Jun 89. He received a reduction in grade to airman first class (E-3), with a new DOR of 16 Jun 89, and eight days of extra duty.

On 14 Jul 89, AF Form 3070 indicates the applicant received nonjudicial punishment (NJP), Article 15 for failing to go to his appointed place of duty on three separate occasions. He received a reduction in grade to airman basic (E-1), with a new DOR of 14 Jul 89.

Dated 24 Jul 89, AF Form 2098, *Duty Status Change*, indicates the applicant was AWOL on 22 Jul 89 and did not report to his place of duty until 24 Jul 89.

Dated 17 Aug 89, AF Form 2098 indicates the applicant was AWOL on 16 Aug 89.

Dated 23 Aug 89, AF Form 2098 indicates the applicant was involuntarily returned to military control on 17 Aug 89 and was put into pre-trial confinement.

On 12 Oct 89, the convening authority published General Court-Martial Order (GCMO) Number § The Order stated the applicant pled guilty and was found guilty of one charge and three specifications of wrongful use and distribution of cocaine and wrongful use of marijuana (Article 112a). The fourth specification of wrongful possession of less than 30 grams of marijuana was withdrawn. The applicant was sentenced to confinement for one year, forfeiture of all pay and allowances, and discharge from the service with a BCD.

On 2 Jul 90, the convening authority published GCMO Number Work-... The Order stated the sentence promulgated in GCMO Number § was affirmed and the BCD would be executed.

On 9 Jul 90, DD Form 214, *Certificate of Release or Discharge from Active Duty*, reflects the applicant received a BCD after serving 7 years, 10 months, and 15 days of active duty. He was discharged, with a narrative reason for separation of "Conviction by Court-Martial (Other Than Desertion)."

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

POST-SERVICE INFORMATION

On 28 Mar 24, 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 his case. Although the applicant provided post-service information in his original application, he did not respond to this request, and he did not include an FBI background check or other criminal history data.

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, U.S.C., Section 1552(f), actions by this Board regarding courts-martial are limited to two types: 1) corrections reflecting actions taken by the reviewing officials pursuant to the Uniform Code of Military Justice (UCMJ) (for example, if a convening authority or appellate court took action but that action was not reflected in an Air Force record); and 2) action on only the sentence of the court-martial and solely 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 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 4 Apr 24, the Under Secretary of Defense for Personnel and Readiness issued a memorandum, known as the Vazirani Memo, to military corrections boards considering cases involving both liberal consideration discharge relief requests and fitness determinations. This memorandum provides clarifying guidance regarding the application of liberal consideration in petitions requesting the correction of a military or naval record to establish eligibility for medical retirement or separation benefits pursuant to 10 U.S.C. Section 1552. It is DoD policy the application of liberal consideration does not apply to fitness determinations; this is an entirely separate Military Department determination regarding whether, prior to "severance from military service," the applicant was medically fit for military service (i.e., fitness determination). While the military corrections boards are expected to apply liberal consideration to discharge relief requests seeking a change to the narrative reason for discharge where the applicant alleges combat- or military sexual trauma (MST)-related PTSD or TBI potentially contributed to the circumstances resulting in severance from military service, they should not apply liberal consideration to retroactively assess the applicant's medical fitness for continued service prior to discharge in order to determine how the narrative reason should be revised.

Accordingly, in the case of an applicant described in 10 U.S.C. Section 1552(h)(l) who seeks a correction to their records to reflect eligibility for a medical retirement or separation, the military corrections boards will bifurcate its review.

On 28 Mar 24, 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 had PTSD or a similar condition during service that was a contributing factor to his misconduct and subsequent discharge from service. He submitted a progress note from his primary care physician (PCP), dated over 30 years after his military service, reporting he had a history of depression, had been in recovery for alcohol and drugs since 2008, had anxiety and felt sleepy frequently, and took psychotropic medications for his symptoms. There was no report of the onset and causes for any of these problems and there is no evidence he had depression, anxiety, or sleep problems during service. There is evidence he participated in the Drug Rehab Program during service due to being identified as an experimenter of cocaine. His treatment records from this program are not available or submitted for review to assess the cause(s) of his cocaine use. There is no evidence or records he used cocaine and/or marijuana to cope with his mental health condition including PTSD, anxiety, depression, or sleep problems. Even if it was accepted, he used cocaine and/or marijuana to cope with his mental health condition, his mental health condition does not fully excuse or mitigate his drug use and drug-related offenses for which he had been convicted at a general court-martial. In addition to using cocaine, a controlled II substance and highly potent drug, and marijuana, he was convicted for wrongful distribution of some cocaine. Distribution of a drug is typically considered a premeditated behavior that involves planning and intent and could not be excused by his mental health condition. He knew what he was doing at the time. It appeared the applicant had substance abuse problems during service that continued on after service, and substance abuse problems are unsuiting conditions for military service. In addition to his drug use and distribution, his military records revealed he had numerous misconduct and disciplinary problems, including failing to go and being AWOL numerous times. These are also serious offenses with no evidence they were caused by his mental health condition nor would his mental health condition excuse or mitigate his misconduct. As a result of a review of his available records, the Psychological Advisor finds no error or injustice with his discharge from a mental health perspective.

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 marked "PTSD" and "OTHER MENTAL HEALTH" on his application to the AFBCMR. He submitted a progress note from his primary care physician (PCP) reporting he had a history of depression and complaints of anxiety and sleep problems and certificates of completion

for substance abuse and mental health treatment received after his service. He did not identify how he developed PTSD, depression, anxiety, sleep problems, or drug abuse problems, when they began or occurred, and how his condition may excuse or mitigate his discharge.

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

The applicant's service treatment records are not available or submitted by the applicant for review. From the available records, there is no evidence or records his mental health condition of PTSD, anxiety, depression, sleep problems, etc. had existed or occurred during his military service. There are records he entered the Drug Rehab Program after he had been identified as an experimenter of cocaine during service. He submitted a progress note from his PCP dated over 30 years after service reflecting he had a history of depression and made complaints of anxiety and sleep problems and was treated with psychotropic medication for these problems.

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

The applicant provided no explanation for how his PTSD or mental health condition may excuse or mitigate his discharge. There is no evidence his mental health condition caused his numerous misconduct infractions which led to his general court-martial conviction and subsequent discharge from service. He had substance abuse problems, and this is an unsuiting condition for military service. Thus, his mental health condition does not excuse or mitigate his discharge.

4. Does that condition or experience outweigh the discharge?

Since there was no evidence his mental health condition may excuse or mitigate his discharge, his mental health condition also does not outweigh his original discharge.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 30 May 24 for comment (Exhibit E), 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. § 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 finds a preponderance of the evidence does not substantiate the applicant's contentions. His substance abuse problems made him unsuited for military service. 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 had a direct impact on his behaviors and misconduct or were the cause of his substance abuse problems resulting with his discharge, his condition or experience does not excuse, mitigate, or outweigh his discharge. Furthermore, based on the available evidence of record, it appears the discharge was consistent with the substantive requirements of the discharge regulation and was within the commander's discretion. The applicant has provided no evidence which would lead the Board to believe his service characterization was contrary to the provisions of the governing regulation, unduly harsh, or disproportionate to the offenses committed. Nonetheless, in the interest of justice, the Board considered upgrading the applicant's discharge. In support of his request for an upgrade, the applicant provided several certificates for program and/or training completion regarding his substance use disorder and stated his post-service accomplishments support significant changes and growth in his life since being discharged. The Board contemplated the many principles included in the Wilkie Memo to determine whether to grant relief based on an injustice or fundamental fairness. However, the Board does not find the evidence presented is sufficient to conclude the applicant's post-service activities overcame the misconduct for which he was discharged. This Board very carefully weighs requests to upgrade the character of a discharge and in doing so, considers whether the impact of an applicant's contributions to his or her community since leaving the service are substantial enough for the Board to conclude they overcame the misconduct that precipitated the discharge and whether an upgrade of the discharge would create a larger injustice to those who served honorably and earned the characterization of service the applicant seeks. While the applicant has presented some evidence showing his efforts to overcome his substance abuse problem, the Board does not find the documentation sufficient to conclude they should upgrade the applicant's discharge at this time. He did not provide a criminal history background check, nor did he provide any evidence to show his impact in the community and if the impact is so admirable the Board could conclude an upgrade of his discharge would not constitute an injustice to those who have earned this characterization of service. Given the evidence presented, the Board does not find the applicant's submission sufficient to grant the requested relief and recommends against correcting the applicant's record.

The applicant retains the right to request reconsideration of this decision, which could be in the form of a personal statement, character statements, or testimonials from community leaders/members specifically describing how his efforts in the community have impacted others. Should the applicant provide documentation pertaining to his post-service accomplishments and activities, this Board would be willing to review the materials for possible reconsideration of his request.

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-2023-02570 in Executive Session on 12 Sep 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, w/atchs, dated 21 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 28 Mar 24.
- Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 7 Apr 24.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 30 May 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.

9/19/2024

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Board Operations Manager, AFBCMR
Signed by: USAF