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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-2023-02857

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT’S REQUEST

- 1. His bad conduct discharge (BCD) be upgraded to general (under honorable conditions).
- 2. He be given benefits, disability, and an upgrade of his records.

APPLICANT’S CONTENTIONS

He wants an upgrade to his discharge due to mental abnormality. The military had a great part in influentially impacting the cause of his discharge and failed to offer treatment or acknowledge his abnormality. He had an exceptional career before his court-martial.

The applicant’s complete submission is at Exhibit A.

STATEMENT OF FACTS

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

Dated 25 Feb 87, SF 600, *Chronological Record of Medical Care*, indicates the applicant sustained trauma to the top of his head from hitting his head on the hood of a car.

On 27 Oct 87, AF Form 2098, *Duty Status Change*, indicates the applicant was confined at the Navy Brig for four months in violation of Article 134 on two specifications.

On 6 Feb 88, AF Form 2098, indicates the applicant was released from confinement pending appellate review.

On 12 Jul 88, the convening authority published Special Court-Martial Order (SCMO) Number [Attor...]. The Order stated the sentence promulgated in SCMO Number [Wo...]s pertaining to confinement for four months, reduction in grade to airman basic, forfeiture of pay of \$438.00 for four months, and a BCD was affirmed.

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Controlled by: SAF/MRB
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Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

On 18 Aug 88, the applicant received a BCD. His narrative reason for separation is “Conviction by Court-Martial” and he was credited with 2 years, 5 months, and 21 days of total active service.

For more information, see the excerpt of the applicant’s record at Exhibit B and the advisories at Exhibits E and F.

POST-SERVICE INFORMATION

On 14 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 did reply to the request for post-service information (Exhibit D), his response did not include an FBI background check or other criminal history data. In his response, he contends he received a head injury which was a contributing factor in his behavior. An injustice occurred because he never received help from the Air Force. He is currently in a rehabilitation program receiving help. He takes responsibility for his actions and states his supervisor and peers displayed actions that were inappropriate which influenced his behavior and contributed to his mental abnormality. He submitted documents regarding his mental health diagnosis and treatment.

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 in determining 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)(1) who seeks a correction to their records to reflect eligibility for a medical retirement or separation, the military corrections boards will bifurcate its review.

First, the military corrections boards will apply liberal consideration to the eligible Applicant's assertion that combat- or MST-related PTSD or TBI potentially contributed to the circumstances resulting in their discharge or dismissal to determine whether any discharge relief, such as an upgrade or change to the narrative reason for discharge, is appropriate.

After making that determination, the military corrections boards will then separately assess the individual's claim of medical unfitness for continued service due to that PTSD or TBI condition as a discreet issue, without applying liberal consideration to the unfitness claim or carryover of any of the findings made when applying liberal consideration.

On 14 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's request for the desired changes to his record. Available records do not indicate the specific nature of his misconduct. In typical cases, it would

be difficult to determine mitigation based on mental health issues, as the specific reason for the basis for separation is not known. In this case, however, the applicant does not have any mental health conditions based on available information. Therefore, there are no mental health conditions that would excuse or mitigate his misconduct. The applicant contends he was diagnosed with mental abnormalities. This is not a recognized Diagnostic and Statistical Manual of Mental Disorders (DSM-5) disorder. Additionally, the DVA form the applicant submitted, was completed by himself claiming he has this mental health disorder. It was not completed by a licensed provider, diagnosing him with a mental health disorder. There is further evidence the applicant does not have a mental health condition. A Medical Examination completed on 29 Oct 85 found no psychiatric condition. He was determined to be S-1 on his physical capacity/stamina, upper extremities, lower extremities, hearing and ears, eyes, and psychiatric (PULHES) on 14 Nov 85 indicating he had no psychological issues and was fit for duty. A confinement physical noted the applicant had no complaints of any issues and found him healthy, clearing him for confinement. There is insufficient evidence the applicant has any mental health condition; therefore, his misconduct is not excused or mitigated for mental health reasons, as there is no evidence the applicant is suffering from any mental health condition.

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 was diagnosed with mental abnormalities.

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

There is insufficient evidence the applicant was diagnosed with a mental health condition during his military service or post-service.

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

While the exact nature of his discharge is not known, there is insufficient evidence the applicant was diagnosed with any mental health condition. Therefore, his misconduct is not excused or mitigated for mental health reasons, as there is no evidence that the applicant is suffering from any mental health condition.

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 E.

AF/JAJI recommends denying the application finding no additional evidence has been provided by the applicant to suggest clemency in the form of a discharge upgrade is warranted. Additionally, the limited information provided in the available documents indicates the applicant does not have a diagnosed mental health condition. Even if the applicant had a mental health condition, the available evidence does not support the position it contributed to his misconduct. The misconduct

was willful in that it required deliberation on his part and was therefore premeditated as that term is used in the Kurta Memorandum. A discharge upgrade under liberal consideration is not warranted.

The applicant was convicted at a special court-martial and found guilty on two specifications for taking indecent liberties with females under 16 years of age (ages 9 and 5). The applicant asserts he sustained a head injury while in the military that required sutures and believes it was a contributing factor to his behavior. He also contends peer pressure was overwhelming while he was in the military, and he was easily impressed by his supervisors and peers. He feels his time in the military introduced him to a lifestyle of offending behavior. He further asserts, at the time of his application, he was in a rehabilitation program in South Carolina. The documents provided from the South Carolina Department of Mental Health indicate he has been diagnosed with Pedophilic Disorder and is at risk for sexual reoffending.

The guidance for liberal consideration of mental health issues noted above in the Kurta Memorandum, cuts against the requested correction to the applicant's discharge characterization as that would not be appropriate for his crimes according to the memorandum's standards. According to paragraph 19 of the attachment to the Kurta Memorandum, premeditated misconduct is not generally excused by mental health conditions. Review Boards will exercise caution in assessing the causal relationship between asserted conditions or experiences and premeditated misconduct.

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 28 Jun 24 for comment (Exhibit G), 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 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 and recommendations of the AFRBA Psychological Advisor and AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant's contentions. 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 finds insufficient evidence to support his request for a medical separation based on a mental health condition finding no indication the applicant was diagnosed with a mental health condition during service. The Board applied liberal consideration to the evidence submitted by the applicant for consideration of a discharge upgrade; however, it is not sufficient to grant the applicant’s request. The applicant did not provide any evidence or records to substantiate his claim a mental health condition in service caused his misconduct, thus his condition does not mitigate or excuse his discharge. The burden of proof is placed on the applicant to submit evidence to support his claim. 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. 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 for a discharge upgrade based on fundamental fairness.

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-2023-02857 in Executive Session on 22 Aug 24:

-  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 28 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 14 Mar 24.
- Exhibit D: Applicant’s Response, w/atchs, dated 29 Mar 24.
- Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 16 Apr 24.
- Exhibit F: Advisory Opinion, AF/JAJI, dated 28 Jun 24.
- Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 28 Jun 24.

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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.

9/11/2024

X 

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Board Operations Manager, AFBCMR
Signed by: USAF

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