

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03377

XXXXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His under other than honorable conditions (UOTHC) discharge be upgraded to an honorable discharge, or, in the alternative, a general (under honorable conditions) discharge and his Narrative Reason for Separation be changed from "Triable by Court-Martial" to "Secretarial Authority."

APPLICANT'S CONTENTIONS

The applicant through counsel makes the following contentions: Following more than three years of service, including deployments to Saudi Arabia and Bahrain, the applicant decided to leave the Air Force. Just weeks before his terminal leave, he failed a routine drug test and faced court-martial. Despite the low level of cocaine identified in his urinalysis, and his previously unblemished service record, he was discharged in lieu of court-martial.

In the interest of equity, the Board should grant applicant relief for three reasons. First, his otherwise exemplary service record strongly supports a discharge upgrade. The applicant served without incident for 3 years and 10 months. During that time, he was awarded commendations and garnered praise from his supervisors for his dedication, precision, and thoroughness. The applicant's record of service, sacrifice, and achievement should not be overshadowed by his discharge characterization. Second, the applicant's post-separation conduct strongly supports a discharge upgrade. In the years since he was discharged, the applicant has been a model citizen. He has not been involved in any drug-related offenses and has had a clean criminal record for decades. The applicant earned his bachelor's degree and has developed a successful career in the movie industry where his current work helps those who are blind. Third, the offense for which the applicant was discharged was non-violent. Fundamental fairness dictates he should not continue to be punished for a non-violent offense that occurred in 2000.

Counsel provided a detailed account of the applicant's service. Per counsel, in 1998, the applicant reported to the Air Force that he was under a lot of stress at work. He described working 9-14 hours a day, having trouble concentrating, and being unable to sleep. In Sep 99, the applicant reported feeling lonely, self-conscious, and uneasy in crowds. In Mar 00, he was diagnosed with persistent depressive disorder or dysthymia and his healthcare provider prescribed Zoloft.

By the summer of 2000, the applicant was preparing to leave the Air Force at the end of his term of service in Aug 00. On 5 Jun 00, he was informed he had been randomly selected for drug testing and received orders to provide a urine specimen. On 14 Jun 00, the applicant was informed the test revealed a trace amount of cocaine in his urine. There was no other evidence of his drug use, and the applicant was dumbfounded by the positive result. Despite the limited evidence and the applicant's insistence he had not voluntarily taken cocaine; his counsel advised him to accept a deal rather than risk a court-martial. Concerned about the potential impact of a bad conduct discharge for the rest of his life, the applicant agreed. On 2 Aug 00, the applicant's counsel submitted a letter requesting discharge in lieu of trial by court-martial. The applicant was administratively discharged UOTHC on 8 Aug 00, just six days before his full completion of service. To this day, over 20 years later, the applicant denies he ever took cocaine. As a result of

his positive test, the applicant was referred to an Alcohol and Drug Abuse Prevention and Treatment (ADAPT) program where he was diagnosed with alcohol abuse. Following his diagnosis, the applicant attended the two-day education and awareness seminar recommended by his healthcare provider. He also attended group therapy until his discharge.

Counsel details the applicant's post-discharge conduct, to include working to pay his way through college, earning a bachelor's degree, and post-degree, working as a community organizer and children's ski instructor. The applicant later began a career in film, working as a camera technician, production coordinator, and a post-production assistant. The applicant currently works as a project manager where his department writes audio descriptions of television shows and movies for individuals with visual impairments. In addition to his successful career, the applicant supports his family and is a community volunteer. In 2017, he moved to care for his mother and stepfather after his stepfather was diagnosed with cancer. He currently owns a home and is a member in good standing of the Scottish Rite. Despite his successful career, the applicant's discharge characterization has limited his opportunities and causes him shame and embarrassment. He has declined to pursue jobs that require him to disclose his discharge characterization for fear he will be asked to explain the circumstances surrounding his separation. Additionally, despite his desire to continue his service, the applicant was told by a military recruiter his record would prevent him from joining the Navy.

Counsel continues his argument by providing references to his prior application to the Air Force Discharge Review Board (AFDRB) and the Under Secretary of Defense for Personnel and Readiness memorandum, Subject: Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations (also known as the Wilkie Memo). Per counsel, the applicant's discharge status should be upgraded to prevent an injustice as his otherwise exemplary service record strongly supports a discharge upgrade. These years of exemplary service should not be outweighed by a single uncorroborated drug test. Further, the applicant has carried the burden of his discharge characterization for over 20 years. In that time, he has served as a hardworking and successful member of the community. A non-violent offense occurring decades ago should not preclude him from receiving an honorable discharge.

In support of his request for a discharge upgrade, the applicant provided a personal statement and copies of military accomplishments/kudos, medical records, post-service certificates of achievement, bachelor's degree diploma, and other documents related to his request for upgrade.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 5 Jun 00, according to a XX FS/CC memorandum, Subject: Order to Provide Urine Sample – Inspection Testing, provided by the applicant, he was randomly selected and ordered to provide a urine specimen for drug inspection testing purposes.

On 2 Aug 00, according to a Defense Counsel memorandum, Subject: Chapter 4 Request, the applicant requested discharge in lieu of trial by court-martial pursuant to Air Force Instruction (AFI) 36-3208, *Administrative Separation of Airmen*, Chapter 4.

On 8 Aug 00, the applicant received a UOTH discharge. His narrative reason for separation is "Triable by Court-Martial" and he was credited with four years of total active service.

On 5 Aug 03, the applicant submitted a request to the AFDRB for an upgrade to his discharge.

On 13 Jan 04, the AFDRB concluded the discharge was consistent with the procedural and substantive requirements of the discharge regulation and was within the discretion of the discharge authority and the applicant was provided full administrative due process.

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

POST-SERVICE INFORMATION

On 3 Apr 24, the Board sent the applicant a request for post-service information and advised the applicant he could provide comments and/or additional evidence in support of his request (Exhibit C). The applicant provided a Federal Bureau of Investigation (FBI) report, and copies of certificates, commendations, his current resume, and a post-service college diploma with his original application.

APPLICABLE AUTHORITY/GUIDANCE

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 3 Apr 24, the Board staff provided the applicant a copy of the clemency guidance (Exhibit C).

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 23 Oct 24, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit G).

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 finds insufficient evidence has been presented to support the applicant's request for an upgrade of his discharge from a psychological perspective. The applicant's counsel noted the applicant was diagnosed with dysthymia in Mar 00. The applicant's medical records indicate the first instance of a mental health diagnosis of dysthymic disorder was on 28 Sep 00. The onset of his symptoms and mental health diagnosis are significant as they occurred after his random drug screening with a positive result for cocaine (5 Jun 00) and after disciplinary action had begun. His diagnosis and symptoms are likely the direct result of his disciplinary actions. The applicant noted he was terrified and worried about these proceedings. Therefore, any use of substances is not mitigated by his mental health diagnosis, as his mental health diagnosis and worsening of symptoms occurred after his use of cocaine and after disciplinary action. Counsel also noted the applicant was on Zoloft for depressive symptoms. Again, the earliest mention from available medical records of Zoloft use was on 30 Jun 00, after his positive drug screen for cocaine.

While the applicant was diagnosed with adjustment disorder on 30 Sep 99, this diagnosis seems to have gone into remission before he began the ADAPT program after he tested positive for cocaine. He was seen regularly in the ADAPT program and was only diagnosed with alcohol abuse or alcohol dependence. The applicant was not diagnosed with any other mental health condition until 28 Sep 00 (after his discharge from military service). Additionally, his diagnosis of adjustment disorder is not a mitigating factor for his misconduct (drug usage) as it is not part of the sequela of symptoms associated with this mental health condition.

Additionally, it is essential to note the applicant denied ever knowingly using cocaine or any other illegal substances. The applicant gave several possible explanations of why he tested positive for cocaine (without acknowledging intentional usage) but still does not know how he received a positive urinalysis result. He noted:

“I cannot dispute the fact that there was an amount of this drug present in my sample. To this day, I still am not certain as to how there ended up being any amount of drug in this sample. I know that I did not use or take any drugs, and during the AFOSI and the prosecution's investigation, they came up with no other evidence or statements against me. I cannot even begin to explain how much of a shock this entire situation was to me.”

Therefore, while substance use can be a mitigating factor in managing mental health symptoms in some mental health conditions, the applicant makes it clear he was not using cocaine to manage his mental health symptoms. In fact, he is not even sure how he tested positive. Again, as mentioned above, even if the applicant had been using cocaine, it is not a mitigating factor based on his mental health diagnosis during the time of his drug usage.

This Psychological Advisor concludes the applicant does not have any mental health conditions that would excuse or mitigate his misconduct (drug usage).

After considering the entire record and contentions, there is insufficient evidence to suggest the applicant had any mental health condition that would mitigate his misconduct. A review of the available records finds no error or injustice with the applicant's discharge and insufficient evidence has been presented to support the applicant's request. 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? Counsel contends, “In 1998, [the applicant] reported to the United States Air Force that he was under a lot of stress at work. He described working 9-14 hours a day, having trouble concentrating, and being unable to sleep. In Sep 99, [the applicant] reported feeling lonely, self-conscious, and uneasy in crowds. In Mar 00, [the applicant] was diagnosed with persistent depressive disorder or dysthymia. His healthcare provider prescribed Zoloft.”

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

The applicant's counsel noted the applicant was diagnosed with dysthymia in Mar 00. The applicant's medical records indicate the first instance of a mental health diagnosis of dysthymic disorder was on 28 Sep 00. The onset of his symptoms and mental health diagnosis are significant as they occurred after his random drug screening with a positive result for cocaine (5 Jun 00) and after disciplinary action had begun. The applicant's diagnosis and symptoms are likely the direct result of his disciplinary actions (court-martial/dishonorable discharge). The applicant noted he was terrified and worried about these proceedings. Therefore, any use of substances is not mitigated by his mental health diagnosis, as his mental health diagnosis and worsening of symptoms occurred after his use of cocaine and after disciplinary action. Counsel also noted the applicant was on Zoloft for depressive symptoms. Again, the earliest mention from available medical records of Zoloft use was on 30 Jun 00, after his positive drug screen for cocaine.

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

While the applicant was diagnosed with adjustment disorder on 30 Sep 99, this diagnosis seems to have been resolved before he began the ADAPT program after he tested positive for cocaine. He was seen regularly in the ADAPT program and was only diagnosed with alcohol abuse or alcohol dependence. The applicant was not diagnosed with any other mental health condition, until 28 Sep 00 (after his discharge from military service). Additionally, his diagnosis of adjustment disorder is not a mitigating factor for his misconduct (drug usage) as it is not part of the sequela of symptoms associated with this mental health condition.

Additionally, it is essential to note that the applicant denied ever knowingly using cocaine or any other illegal substances. The applicant gave several possible explanations of why he tested positive for cocaine (without acknowledging intentional usage) but still does not know how he received a positive urinalysis result. He noted:

“I cannot dispute the fact that there was an amount of this drug present in my sample. To this day, I still am not certain as to how there ended up being any amount of drug in this sample. I know that I did not use or take any drugs, and during the AFOSI and the prosecution's investigation, they came up with no other evidence or statements against me. I cannot even begin to explain how much of a shock this entire situation was to me.”

Therefore, while substance use can be a mitigating factor in managing mental health symptoms in some mental health conditions, the applicant makes it clear he was not using cocaine to manage his mental health symptoms. In fact, he is not even sure how he tested positive. Again, as mentioned above, even if the applicant had been using cocaine, it is not a mitigating factor based on his mental health diagnosis during the time of his drug usage.

4. Does the condition or experience outweigh the discharge?

Since the applicant's mental health condition does not excuse or mitigate the discharge, the applicant's condition also does not outweigh the 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 23 Oct 24 for comment (Exhibit F), and the applicant replied on 22 Nov 24. In his response, counsel contends the applicant submitted an application to the Board, through counsel, requesting his records be corrected such that his military discharge be changed to honorable and the reason for discharge be changed to Secretarial Authority. Such a characterization would reflect the applicant's honorable service in the Air Force, his successful career, and his extensive community involvement since.

The advisory opinion purports to apply liberal consideration to the applicant's petition due to the contention of a mental health condition. In fact, the advisory opinion does the opposite. It begins noting, “[t]he applicant did not check mark any mental health issues on his application” notwithstanding the clear evidence the applicant reported concerns about his mental health to the Air Force as early as 1998. More fundamentally, the advisory opinion glosses over the evidence the applicant was struggling with his mental health in 1998, 1999, and 2000.

It is undisputed the applicant was diagnosed with adjustment disorder with mixed anxiety and depressed mood on 30 Sep 99. The advisory opinion brushes that diagnosis aside, concluding “this diagnosis seems to have resolved before he began the ADAPT program.” The advisory opinion provides no support whatsoever for the sweeping conclusion that the applicant was suddenly cured.

Similarly, the advisory opinion dismisses evidence that the applicant was diagnosed with Dysthymia in Mar 00 and prescribed Zoloft. The advisory opinion carefully asserts the earliest mention of Zoloft use was in Jun 00, after the positive drug screen for cocaine. But being prescribed a drug is different from actually using the drug. Here, there is substantial evidence that the applicant (i) sought help for his mental health concerns in 1998; (ii) followed up on those concerns in Sep 99 and was diagnosed with adjustment disorder with mixed anxiety and depressed mood, and (iii) received a diagnosis of Dysthymia and was prescribed Zoloft in Mar 00.

It would be manifestly unjust to deny the applicant's petition based on an advisory opinion that downplays, and even attempts to erase, the struggle the applicant experienced with his mental health. As established in the main brief, the applicant served in the Air Force from 1996 until his discharge on 8 Aug 00. During his time in the Air Force, he deployed, where he earned significant praise from his team and won awards for his performance. With the exception of the trace amount of cocaine found in the applicant's system that caused him to fail the drug test that ultimately led to his discharge, he had no blemishes on his record.

The applicant deserves a second chance not only to correct an injustice but to preserve his, and his family's, ability to receive military benefits in the future. The applicant reported multiple years of mental health challenges during his service. Even putting those aside, the applicant should be granted relief based on his service record and exemplary post-discharge conduct.

Per counsel, since the applicant's service, he has continued to live an admirable life, working multiple jobs to put himself through college and has built a successful career in the film industry. The applicant remains heavily involved in his community. As one example, the applicant wishes to rejoin the Civil Air Patrol to mentor the next generation of service members.

The applicant's complete response is at Exhibit H.

FINDINGS AND CONCLUSION

1. The application was timely filed. It would be illogical to deny a discharge upgrade application as untimely because 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 Title 10, United States Code § 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 the victim of an injustice. 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 regarding his mental health condition. Liberal consideration was applied; however, the applicant's mental health condition does not excuse or mitigate his discharge. However, while the Board finds no error in the original discharge process, the Board recommends relief based on fundamental fairness. In particular, the applicant provided evidence of continuing education post-service, and his FBI report reflects no criminal incidents since discharge. In accordance with paragraph 7 of the Wilkie Memo, the Board considered the applicant's age at the time of the misconduct that resulted in his administrative discharge, as well as the severity of the misconduct, length of time since discharge, and evidence of rehabilitation. While the nature of his misconduct was serious, his pursuit of higher education post-service reflects his efforts to leave this misconduct in the past. Finally, the absence of any reported criminal activity since his discharge supports his intent to be a law-abiding member of his community. Therefore, the Board recommends the applicant's records be corrected as indicated below.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show on 8 Aug 00, he was discharged with service characterized as honorable, and a separation code and corresponding narrative reason for separation of JFF (Secretarial Authority).

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-2023-03377 in Executive Session on 12 Nov 24 and 10 Jan 25:

, Panel Chair
, Panel Member
, Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 6 Sep 23.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Letter, SAF/MRBC, w/atchs (Post-Service Request and Clemency Guidance), dated 3 Apr 24.
- Exhibit D: FBI Report, dated, 9 Feb 23.
- Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 23 Oct 24.
- Exhibit F: Notification of Advisory, SAF/MRBC to Counsel, dated 23 Oct 24.
- Exhibit G: Letter, SAF/MRBC, w/atchs, (Liberal Consideration Guidance), dated 23 Oct 24.
- Exhibit H: Counsel's Response, atchs, 11 Nov 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.

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Board Operations Manager, AFBCMR