

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03639

XXXXXXXXXXXX

COUNSEL: XXXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His general (under honorable conditions) discharge be upgraded to honorable.

APPLICANT'S CONTENTIONS

According to applicant's counsel, on 26 Aug 03, the applicant enlisted in the United States Air Force with no previous mental health issues. For over four years, he served in the Air Force faithfully and meritoriously without incident. Unfortunately, on 22 Mar 08, the applicant unwillingly found himself in a physical altercation with multiple men who were repeatedly striking, surrounding, and threatening him and his civilian roommate. Under the threat of grave bodily harm, the applicant pulled out his firearm and shot outside of his car window, striking a man in the leg. Despite multiple years of service with no history of inciting violence, the applicant's superiors determined he was a man who defaults to using violent means and thus was discharged with a general under honorable conditions characterization. Counsel provided a detailed summary of the applicant's military service in support.

Per applicant's counsel, on 22 Mar 08, the applicant accompanied his roommate to a bar to celebrate their birthday. The applicant was sober and engaged in conversation with other bargoers, when his roommate got into an altercation with a male stranger. The applicant approached, intending to break them up, but the situation escalated when more strangers entered the fight, including one man punching the applicant in the face while the applicant was trying to separate another man from his roommate. The man picked up the applicant by the neck and forced him down on the ground while screaming he was going to "mess him up." The applicant struggled out of the crowd and moved toward his vehicle to escape with his roommate. After the applicant's roommate entered the vehicle, the fighters reached through an open window to drag both men out, and broke open the rear window, creating another opening for attack. The applicant's roommate was dangling outside the vehicle and driving away would only lead him to being dragged outside. With no other viable options to protect both himself and his roommate, the applicant reached for his gun and fired shots out of his window. One of the strangers was shot in the leg and the group ran off.

The XXXXX Police Department arrested the applicant that night and charged him with drive-by shooting and aggravated assault with a deadly weapon. The applicant was released during the weekend, and his chain of command was notified of the events on 25 Mar 08. The reported facts were misleading and painted the applicant in a manner suggesting he was not in a life-threatening situation, and thus, carelessly fired his gun into a crowd. Meanwhile, the prosecution dropped the applicant's charges in Apr 08 due to no likelihood of conviction. According to counsel, the applicant did not shoot his gun on 22 Mar 08 because of a desire to cause harm or being quick to anger. Rather, the applicant shot his gun because there was no viable alternative to save his and his roommate's lives. The applicant had no desire to fight, he just wanted to save his friend from getting into further trouble and pull him away from a deadly fight. Unfortunately, the applicant's efforts were unsuccessful. Overwhelmed by the crowd, facing what could have been his certain death, and with no viable routes of escape for him and his

roommate, the applicant grabbed his gun, shot multiple rounds out of his window with no specific target, and drove off to guarantee the group would not chase them further.

Upon investigation, the applicant's chain of command discovered an unrelated incident on 27 Nov 07, where the applicant allegedly brandished a shotgun during a heated argument with his neighbor. This escalation occurred after the neighbor provoked the applicant several times, including throwing a beer bottle at him and then throwing dog feces inside the applicant's home when he retreated. The neighbor claimed the applicant pointed the gun at him, but the applicant asserts that while he showed the unloaded gun to his neighbor, he did not point the barrel in his direction. The applicant acknowledged in a personal statement that he should have called the police instead of trying to take matters into his own hands, and that he had a lapse in judgement. No other witnesses were present to confirm the neighbor's accusations, and no charges were pursued. The applicant's altercation with his neighbor on 27 Nov 07 was wrongfully used to establish a nonexistent pattern of violence during his discharge investigation.

Despite multiple years of no reported violent conduct before the 27 Nov 07 altercation, the applicant's chain of command decided that both incidents indicated the applicant had a general tendency of resorting to violence and thus must be discharged. With no clear details on the brutality of the fight on 22 Mar 08, or the events leading to the showing of his gun on 27 Nov 07, the applicant's command recommended a general discharge. The prosecution even dropped the charges due to no likelihood of conviction. This context should have been considered when the applicant's command investigated the possibility of discharge. Instead, his command characterized the applicant only as a suspect firing multiple rounds into a crowd of people. Nowhere was legitimate self-defense and defense of others acknowledged. On 9 Jul 08, the applicant was officially discharged with a general (under honorable conditions) characterization and 4 years, 10 months, and 14 days of service.

According to counsel, the applicant discharge characterization should be upgraded on the basis of injustice because his separation was based on an incorrect examination of his character. Additionally, counsel contended the applicant's period of meritorious service and overall good character were not considered in his discharge characterization, stating the applicant demonstrated overall meritorious service during his time in the Air Force and generally had a good reputation until he was attacked on 22 Mar 08. Prior to the attack on 22 Mar 08, every reported instance of less-than-optimal behavior were one-time incidents, demonstrating a desire to improve and be a good soldier [airman]. The applicant had only received two reprimands prior to this incident, one for underage drinking and one for discussing a confidential interview. Neither of these activities were displays of aggressive behavior, and nothing else in the applicant's performance evaluations or past letters of reprimand show outbursts based on aggression or a short temperament. Despite this, the applicant's command, upon his discharge, declared the applicant has "a blatant disregard for the lives of others, authority, and good order and discipline in this unit." Per counsel, this is a blatant mischaracterization of the applicant's behavior during his almost five years of service. Counsel contended it is true the applicant's record is not flawless, but infrequent misconduct does not exclude a veteran from being discharged honorably, and the applicant's honest, faithful, and meritorious service and character over the course of five years outweigh his discharge characterization. Counsel cites Under Secretary of Defense for Personnel and Readiness (USD P&R) memorandum, Subject: Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determination, dated 25 Jul 18 (Wilkie Memo) in support.

Counsel concluded the Board must consider both the applicant's candor and whether the applicant accepts responsibility. In his personal statement, the applicant acknowledged the correct course of action at the time would have been to contact police after the irate neighbor refused to stop throwing dog feces onto his property. He admitted to suffering from a poor lapse

in judgment. Even before his discharge, the applicant admitted to wrongdoing and demonstrated he knew what he did was wrong; however, his command swiftly dismissed the applicant's candor and willingness to accept responsibility. For 15 years, the applicant has had to live with the weight of a less than honorable discharge that was based on a hasty and incomplete judgment of his character. Despite years of honorable service, the applicant's command discarded him from snap judgment of his character after an extremely dangerous and deeply traumatic life-threatening event. According to counsel, the applicant's years of faithful and meritorious service full of volunteer work and excellent performance reviews deserve an honorable discharge.

In support of his request for a discharge upgrade, the applicant provides a personal statement, copies of excerpts from his military records, and a memorandum from his public defender, dated 9 Apr 08.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 28 Dec 05, according to AF Form 3070, *Record of Nonjudicial Punishment Proceedings*, the applicant was issued nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), for:

- Violation of Article 91, UCMJ:

- [The applicant], having received a lawful order from a senior noncommissioned officer, then known by the applicant to be a senior noncommissioned officer, to refrain from discussing his interview with [another airman], or words to that effect, an order which it was his duty to obey, did, at or near Eielson Air Force Base, Alaska, between on or about 17 Nov 05 and on or about 21 Nov 05, willfully disobey the same.

The applicant received a reduction in grade to airman, suspended through 27 Jun 06, after which time it would be remitted without further action, unless sooner vacated, forfeiture of \$250.00 pay per month for two months, suspended through 27 Jun 06, after which time it would be remitted without further action, unless sooner vacated, and a reprimand.

On 29 May 08, the applicant's commander recommended the applicant be discharged from the Air Force, for Misconduct: Commission of a Serious Offense, Other Serious Offense, under the provisions of Air Force Instruction (AFI) 36-3208, *Administrative Separation of Airmen*, paragraph 5.52.3. The specific reasons for the action were:

a. Investigation disclosed that on or about 27 Nov 07, at approximately 1800 hours, at the XXXXX apartment complex located in XXXXX, XXXXX, [the applicant] brandished a shotgun during a heated argument with another tenant of the apartment complex. There were no witnesses present; however, the victim stated [the applicant] pointed the weapon directly at him. [The applicant's] involvement in this conduct is of a nature to bring discredit upon the armed forces. As a result, [the applicant] received a Letter of Reprimand on 7 Apr 08, an Unfavorable Information File was established, and [the applicant] was placed on a control roster.

b. On 22 Mar 08, [the applicant] was arrested by the XXXXX Police Department at approximately 0200 hours for a drive-by shooting and aggravated assault with a deadly weapon; both felony charges. [The applicant] allegedly pulled out a .45 caliber gun and fired into a crowd of people, hitting someone in the leg. [The applicant] was positively identified as the shooter in the incident by witnesses at the scene. [The applicant's] involvement in this incident has brought discredit upon the armed forces. As a result, [the applicant] was administered a Written Order of

Conduct outlining certain conditions of conduct expected of him. A Memorandum for Record was also prepared by the First Sergeant documenting the circumstances surrounding the shooting incident.

c. Investigation disclosed [the applicant] was late for work on two separate occasions. [The applicant] was verbally counseled for the first occasion. The second occasion occurred on 12 Dec 07. [The applicant] had been previously advised to arrive 15 minutes prior to any appointment or shift he was required to work. [The applicant] was also directed to let someone know ahead of time if he was going to be late. As a result, [the applicant] received a Letter of Counseling on 12 Dec 07.

On 5 Jun 08, the Staff Judge Advocate found the discharge action legally sufficient.

On 6 Jun 08, the discharge authority directed the applicant be discharged under the provisions of AFI 36-3208, paragraph 5.52.3, for Misconduct: Commission of a Serious Offense, Other Serious Offense, with a general (under honorable conditions) service characterization. Probation and rehabilitation were considered but not offered.

On 9 Jul 08, the applicant received a general (under honorable conditions) discharge. His narrative reason for separation is "Misconduct" and he was credited with 4 years, 10 months, and 14 days of total active service.

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

POST-SERVICE INFORMATION

On 29 Feb 24, the Board sent the applicant a request for post-service information and advised the applicant he was required to provide a Federal Bureau of Investigation (FBI) Identity History Summary Check, which would indicate whether or not he had an arrest record. In the alternative, the applicant could provide proof of employment in which background checks are part of the hiring process (Exhibit C). The applicant replied on 6 Nov 24 and provided an FBI report. According to the report, the applicant has had no arrests since discharge. The applicant also provided a duplicate copy of his original application and supporting documentation.

The applicant's complete response is at Exhibit D.

APPLICABLE AUTHORITY/GUIDANCE

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 29 Feb 24, the Board staff provided the applicant a copy of the clemency 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.

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 Title 10, United States Code §1552(b).

2. The applicant exhausted all other available administrative remedies 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. In the interest of justice, the Board considered upgrading the discharge based on clemency/fundamental fairness in accordance with the Wilkie Memorandum; however, given the evidence presented, the serious nature of the offense, and in the absence of post-service information provided by the applicant, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's record.

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-2023-03639 in Executive Session on 31 Jul 25:

, 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 26 Oct 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 29 Feb 24.
- Exhibit D: Applicant's Response, w/atchs, dated 26 Oct 23.
- Exhibit D: FBI Report, dated, 6 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.

X

Board Operations Manager, AFBCMR