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

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-01191

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COUNSEL: NONE

HEARING REQUESTED: NO

### APPLICANT'S REQUEST

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

### APPLICANT'S CONTENTIONS

He was incarcerated in a foreign country at the time of his court-martial and had no attorney or contact from the military other than what he instigated. He had his uniform on and identification on his person when he was arrested. If an attorney had been provided, there would not have been a conviction. Absent without leave (AWOL) is applicable, but not desertion. There are obvious mental problems due to his arrest records and no help from the military. He is not looking for benefits. He is currently incarcerated until death, but this will enable him as a prisoner to receive better housing conditions.

In support of his request for clemency, the applicant provides copies of college diplomas awarding Bachelor of Theology, Master of Theology, and Doctor of Theology degrees.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The applicant is a former Air Force airman (E-2).

On 17 Jul 70, according to Special Court-Martial Order **Att...** dated 31 Jul 70, the applicant was arraigned and tried for:

- Charge: Violation of the Uniform Code of Military Justice, Article 121
- Specification: In that [the applicant] did, at Offutt Air Force Base, Nebraska, on or about 15 Jun 70, steal a billfold of some value containing \$9.00 cash, lawful currency of the United States, both of a total value of less than \$50.00, the property of [another airman]. Pleas: Guilty, Findings: Guilty

The applicant was sentenced to be confined at hard labor for a period of 45 days; to forfeit \$40.00 per month for a period of two months; and to be reduced to the grade of airman basic (E-1). The sentenced was adjudged on 24 Jul 70.

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Controlled by: SAF/MRB

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Limited Dissemination Control: N/A

POC: [SAF.MRBC.Workflow@us.af.mil](mailto:SAF.MRBC.Workflow@us.af.mil)

On 24 Jul 70, according to AF Form 1098, *Personnel Action Request*, the applicant's duty status changed from Duty to Confinement.

On 30 Aug 70, according to AF Form 1098, the applicant's duty status changed from Confinement to Duty.

On 5 Feb 71, according to Ehrling Bergquist USAF Regional Hospital/SGHMM memorandum, dated 19 Feb 71, the applicant appeared in the Mental Health Clinic for evaluation.

On 11 Nov 71, according to AF Form 1098, the applicant's duty status changed from Present for Duty to AWOL.

On 17 Nov 71, according to AF Form 1098, the applicant's duty status changed from AWOL to Civil Confinement, Location: Edmonton, Alberta, Canada.

On 9 Sep 74, according to AF Form 2098, *Duty Status Change*, the applicant's duty status changed from Civil Confinement to Dropped from Roll, Location: Edmonton, Canada.

On 17 Mar 75, according to AF Form 2098, the applicant's duty status changed from Dropped from Roll to Discharge in Absentia. On this same date, according to DD Form 214, *Report of Separation from Active Duty*, the applicant received an UOTHC discharge, and was credited with 1 year, 9 months, and 15 days active service, with 1,250 days lost time for the periods 24 Jul 70 – 30 Aug 70, 11 Nov 71 – 16 Nov 71, 17 Nov 71 – 8 Sep 74, and 9 Sep 74 – 17 Mar 75.

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

## **POST-SERVICE INFORMATION**

On 30 Nov 23, the Board sent the applicant a standard request for post-service information. This letter informed the applicant a Federal Bureau of Investigation (FBI) background check would assist the Board in evaluating his case. Although the applicant did not reply to the request, he did provide post-service information with his original application. He did not provide an FBI background check or other criminal history data beyond his contention that he was incarcerated at the time of his application to the Air Force Board for Correction of Military Records.

## **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 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 30 Nov 23, 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

AF/JAJI recommends denying the application. The advisor found insufficient evidence of an error or injustice in the applicant's UOTHC discharge that would warrant a discharge upgrade. Additionally, the advisor found insufficient grounds for upgrading the discharge based on clemency.

The applicant enlisted in the Air Force on 19 Dec 69 and was administratively separated with an UOTHC service characterization on 17 Mar 75. During his active duty service, he lost 1,250 days of service time due to AWOL, military confinement pursuant to a special court-martial conviction for larceny, and civilian confinement pursuant to a civilian conviction for armed robbery.

At an unknown time after his discharge, the applicant was convicted in civilian court for a different crime, and according to his application, he is "currently incarcerated until death." Due to the age of the records, there are no specific details of his military or civilian misconduct.

The complete advisory opinion is at Exhibit D.

ARFBA Psychological Advisor finds insufficient evidence to support the applicant's request to upgrade his discharge.

While the applicant contends to have a mental health condition ("mental health problems due to arrest records"), there is no evidence of this in any of his available records. He is noted as having some anxiety, but this seems to be documented after he had gotten into legal problems (theft of a wallet and an automobile), which may account for an increase in his anxiety level. An evaluation completed by a psychiatric social worker did not note any anxiety during the examination. The psychiatric social worker did note a lack of guilt for his actions and thought he exhibited a sociopathic personality, antisocial reaction, but did not diagnose the applicant with any mental health condition.

There is insufficient evidence the applicant had any mental health condition during his service or at discharge. Therefore, his misconduct of theft of a wallet, failure to report, AWOL, armed robbery, and civil confinement, are not excused or mitigated by liberal consideration.

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?  
 The applicant contends he has obvious mental problems due to arrest records.

2. Did the condition exist, or experience occur, during military service?  
 While the applicant contends to have a mental health condition ("mental health problems due to arrest records"), there is no evidence of this in any of his available records. He is noted as having

some anxiety, but this seems to be documented after he had gotten into legal problems (theft of a wallet and an automobile), which may account for an increase in his anxiety level. An evaluation completed by a psychiatric social worker did not note any anxiety during the examination. The psychiatric social worker did note a lack of guilt for his actions and thought he exhibited a sociopathic personality, antisocial reaction, but did not diagnose the applicant with any mental health condition.

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

There is insufficient evidence the applicant had any mental health condition during his service or at discharge. Therefore, his misconduct of theft of a wallet, failure to report, AWOL, armed robbery, and civil confinement, are not excused or mitigated by liberal consideration.

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.

## **APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent copies of the advisory opinions to the applicant on 1 Feb 24 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 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 AF/JAJI and the rationale of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. During his service, the applicant was convicted by special court-martial and received a civilian conviction, both of which resulted in 1,250 days lost time. Additionally, he received a mental health evaluation, and although the psychiatric social worker noted a lack of guilt for his actions, and thought the applicant exhibited a sociopathic personality, antisocial reaction, he did not diagnose him with any mental health condition. Liberal consideration was applied; however, there was insufficient evidence the applicant had a mental health condition during his service or at discharge; therefore, does not excuse or mitigate his discharge.

Further, 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; however, given the evidence presented, and in the absence of criminal history provided by the applicant, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's record.

## 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-2023-01191 in Executive Session on 23 May 24 and 30 May 24:

Work-Product Panel Chair  
Work-Product, Panel Member  
Work-Product, Panel Member

All members voted against correcting the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 20 Feb 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 30 Nov 23.
- Exhibit D: Advisory Opinion, AF/JAJI, dated 6 Dec 23.
- Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 30 Jan 24.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 1 Feb 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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