

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-03828

XXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His general (under honorable conditions) discharge be upgraded to honorable, with his Separation Code, Reentry Code, and Narrative Reason for Separation amended accordingly.

APPLICANT'S CONTENTIONS

During his time in service, he was dealing with mental health issues due to being transgender. He was not aware of that at the time and did not realize he was transgender until multiple years after he was discharged. In that time since, he has transitioned and worked on the issues that were his mental health difficulties from his time in the Air Force. The problems of his mental health caused him to receive his discharge, and caused challenges to daily life for him, which then caused the problems for which he was reprimanded. The disciplinary problems he faced were largely being late for work after being suddenly required to make the change from second shift to first shift, forgetting to pay his bills, and not properly cleaning his dormitory room. Through those struggles, he was dealt frequent supervisor changes (he had three different supervisors in the two years at his duty station), the first of which had a major criminal conviction within a year of his arrival, and he did not have a supervisor to guide and correct him from his arrival until 1 Aug 07.

In support of his request for clemency, the applicant provides a personal statement and character references.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force airman first class (E-3).

On 21 Aug 08, according to documentation provided by the applicant, his commander notified him he was recommending the applicant be discharged from the Air Force, under the provisions of Air Force Instruction (AFI) 36-3208, *Administrative Separation of Airmen*, paragraph 5.49. The specific reasons for the action were:

a. On or about 22 Jul 08, [the applicant] was derelict in the performance of his duties by failing to obey a lawful order. For this offense, he received a Letter of Reprimand (LOR), dated 23 Jul 08, and an Unfavorable Information File (UIF), dated 24 Jul 08.

b. On or about 8 Apr 08, [the applicant] failed to go at the time prescribed to his appointed place of duty. On this occasion, he was approximately 40 minutes late. For this offense, he received an LOR, dated 8 Apr 08, and a UIF, dated 8 Apr 08.

c. On or about 8 Apr 08, [the applicant] was derelict in the performance of his duties by failing to maintain the proper dress and appearance standards. For this offense, he received a Letter of Counseling (LOC), dated 8 Apr 08.

d. On or about 18 Jan 08, [the applicant] dishonorably failed to pay his Military Club Card account. For this offense, he received an LOR, dated 25 Jan 08.

e. On or about 27 Aug 07, [the applicant] dishonorably failed to pay his Military Star Account. For this offense, he received an LOR, dated 30 Aug 07.

f. On or about 15 Feb 07, [the applicant] failed to go at the time prescribed to his appointed place of duty, to wit: **Work-Product** (Electrical and Environmental Section). For this offense, he received an LOC, dated 15 Feb 07.

g. On or about 30 Oct 06, [the applicant] failed to maintain the appearance of his dormitory room. For this offense, he received an LOR, dated 30 Oct 06.

h. On or about 23 Aug 06, [the applicant] failed to maintain the appearance of his dormitory room. For this offense, he received an LOC, dated 23 Aug 06.

On 19 Sep 08, the applicant received a general (under honorable conditions) discharge. His Narrative Reason for Separation is "Misconduct (Minor Infractions)" and he was credited with 2 years, 10 months, and 5 days of total active service.

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

POST-SERVICE INFORMATION

On 4 Apr 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 3 May 24 and provided an FBI report. According to the report, the applicant has had no arrests since discharge. The applicant also provided a personal statement and character references.

The applicant's complete response is at Exhibit D.

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 4 Apr 24 and 23 May 24, Board staff provided the applicant a copy of the liberal consideration guidance (Exhibits C and 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

AFRBA Psychological Advisor, after considering the entire record, to include the applicant's submissions and contentions, and all pertinent materials, finds there is insufficient evidence to support the applicant's request for an upgrade in his discharge.

The applicant was not involuntarily separated from the military for being transgender. He contends, "I feel if I had been referred to mental/behavioral health at any point through these difficulties I had faced while I served in the United States Air Force, it would of still likely lead to my separation, but instead of a bunch of mistakes that came from my mental health struggles due to being transgender, it would have been a forced separation due to being transgender." His Narrative Reason for Separation for discharge is Misconduct (Minor Infractions), which are not related to his being transgender, although the applicant contends he was kicked out due to being transgender. The applicant contends his mental health caused his discharge. There is insufficient evidence to suggest the applicant had any mental health issues while in the military or at discharge. There is no evidence he had a mental health diagnosis. He did not seek out mental health treatment. His Periodic Health Assessment, approximately two months before discharge, noted some work stress, but that he was dealing with it okay. The provider noted he had no emotional problems or concerns. A discharge physical completed one month before discharge noted he denied any depressive symptoms and had no acute stress.

The applicant was not diagnosed with any mental health condition until after discharge. He was diagnosed with adjustment disorder post-discharge. The etiology of his adjustment disorder was not due to his military service but rather to issues that began after he was discharged (lack of employment and lack of structure).

This psychological advisor concludes his "mental health issues related to his being transgender" do not have a nexus with his misconduct. Even if the applicant had been diagnosed with any of his post-service diagnoses (adjustment disorder, anxiety, depression, and gender dysphoria) while in service, it would not be a mitigating factor for his misconduct, as they are not part of the sequelae of symptoms associated with these mental health conditions or being transgender. Failure to obey a direct order, failure to go on two occasions, failure to maintain proper dress and appearance standards, failure to pay his Military Club Card account on two occasions, and failure to maintain the appearance of his dormitory room on two occasions, has no nexus with his mental health issues, to include being transgender.

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 his mental health issues, due to being transgender, caused him to receive the discharge.

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

There is insufficient evidence to suggest the applicant had any mental health condition during his military service or at discharge.

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

This psychological advisor concludes his “mental health issues related to his being transgender” do not have a nexus with his misconduct. Even if the applicant had been diagnosed with any of his post-service diagnoses (adjustment disorder, anxiety, depression, and gender dysphoria) while in service, it would not be a mitigating factor for his misconduct, as they are not part of the sequelae of symptoms associated with these mental health conditions or being transgender. Failure to obey a direct order, failure to go on two occasions, failure to maintain proper dress and appearance standards, failure to pay his Military Club Card account on two occasions, and failure to maintain the appearance of his dormitory room on two occasions, has no nexus with his mental health issues, to include being transgender.

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 a copy of the advisory opinion to the applicant on 23 May 24 for comment (Exhibit F), and the applicant replied on 21 Jun 24. In his response, the applicant contends his service treatment records are accurate and as up-to-date as they would have been at that time. The problem comes in that at no time during his service was he given a proper or adequate mental health/behavioral health screen. At most he was asked if he was feeling depressed. At that point and time, the only understanding he had for depression and anxiety were from his mother, who had struggled with major depression and anxiety. He had no idea what other forms of depression could look like. There is plenty of evidence that shows the lack of mental health/behavioral health care access at his base during his time there, and even afterwards.

Some of the symptoms of gender dysphoria, even unrealized gender dysphoria, are relationship difficulties, anxiety, depression, self-harm, eating disorders, and substance misuse. Depression can cause forgetfulness and apathy that led to his struggles in the Air Force, such as cluttered and dirty dorm room, issues with his uniform, being late for work due to oversleeping, forgetting his gym shoes, or forgetting previous conversations about not wearing his boots in his physical training uniform. The applicant provided website links to online sources for his contentions.

Per the applicant, his base had a demonstrable issue with mental/behavioral health. During his time stationed at his base, there were at least three suicides of uniformed Air Force members. In the years since, suicides and other mental health issues have not gotten better, and in some ways they have gotten worse. In 2021, the Army reported 17 suspected suicides. That is not indicative of adequate mental and behavioral healthcare at this joint base.

His only experience with mental/behavioral health issues over the years first became apparent while he was active duty. But he did not realize what the issues were immediately, since he was unfamiliar with the more minor versions of depression and anxiety. The most descriptors he got about depression outside the major cases he witnessed growing up was lack of interest in doing things he once enjoyed or sleeping too much/having a hard time sleeping. Neither of those were relevant to him, since outside of work, if he was not helping with local volunteer projects, he was doing the only other things that kept him going, which was playing video games, reading books, and watching anime. The only other thing he did that he enjoyed was his job, working on

aircraft. Which was something he never neglected, sacrificed, or put less than his whole effort and self into.

The applicant recounted incidents with his First Sergeant, stating he felt unfairly targeted and bullied by him. Around that time, during a dorm inspection, his First Sergeant and supervisor went through his personally purchased footlocker which contained women's clothes and some adult novelty toys. He did not realize he was transgender, but after some childhood cross-dressing, felt the need to do so at that point. He was not aware that happened until after separation and out-processing, when his supervisor was laughing and asked what that stuff was and why he had it. If he knew what they had done before separating, he would have gone to base legal and filed a complaint since they did not have a warrant or permission to go through his personal belongings.

For a few years after separating, he had a hard time processing and dealing with the emotions, moods, and feelings, both from the discharge and also the unrecognized depression and anxiety from the gender dysphoria. He was also dealing with trauma from his high school years of being sexually assaulted and he still has a trauma response to that time.

The applicant's complete response is at Exhibit H.

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 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 of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. There is no evidence the applicant was diagnosed with any mental health condition during service or at separation. Additionally, the applicant's reported "mental health issues related to his being transgender" do not have a nexus with his misconduct. Even if the applicant had been diagnosed with any of his post-service diagnoses (adjustment disorder, anxiety, depression, and gender dysphoria) while in service, it would not be a mitigating factor for his misconduct, as they are not part of the sequelae of symptoms associated with these mental health conditions or being transgender. Liberal consideration was applied; however, the applicant's mental health condition does not excuse or mitigate his discharge.

Additionally, according to the documentation provided by the applicant, 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 significant post-service information, 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-2023-03828 in Executive Session on 12 Sep 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 20 Nov 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 4 Apr 24.
Exhibit D: FBI Report and Character References, dated 3 May 24.
Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 17 May 24.
Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 23 May 24.
Exhibit G: Letter, SAF/MRBC, w/atchs (Updated Liberal Consideration Guidance), dated 23 May 24
Exhibit H: Applicant's Response, w/atch, dated 21 Jun 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