

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-01960

XXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

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

APPLICANT'S CONTENTIONS

Another soldier had an affair with the applicant's wife. They got into a fight when the applicant confronted him. The applicant hit him one time.

The applicant had a car accident and was in a coma in 1997. His airbags did not go off. He suffered a Traumatic Brain Injury and lost some of his memory and had to regain some abilities. The applicant cannot remember if he applied for an upgrade before.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

On 21 Sep 95, according to AF Form 910, *Enlisted Performance Report (AB thru TSgt)*, the applicant received a referral report in accordance with Air Force Instruction (AFI) 36-2403, *Enlisted Evaluation System*.

On 28 Nov 95, the applicant received an UOTHC discharge. His narrative reason for separation is "Misconduct" and he was credited with 2 years, 10 months, and 16 days of total active service.

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

POST-SERVICE INFORMATION

On 2 Aug 24, the Board sent the applicant a request for post-service information, including a standard criminal history report from the Federal Bureau of Investigation; however, he has not replied.

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 2 Aug 24 and 26 Nov 24, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibits C and F).

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 to support the applicant's request for the desired change to his records based on his mental health condition.

A review of the available records finds no evidence or reports to corroborate the applicant's contentions. His discharge paperwork is not available or submitted by the applicant for review so the detailed reasons for his discharge for misconduct are not known at this time. There are no records the applicant physically assaulted another service member after confronting him about having an affair with his wife or that he was discharged for this reason. There are also no records of any disciplinary actions in the applicant's limited available records. He did receive a referral Enlisted Performance Report (EPR) for the rating period from 12 Sep 94 to 11 Sep 95, and this EPR did document some of his misconducts or behavioral issues such as failing to maintain acceptable conduct on- and off-duty, failing to maintain his financial obligations, reporting to work late on numerous occasions, and not wearing a seat belt while operating a government vehicle. Any, some, or all of these acts of misconduct could have been reasons for his discharge. It is possible his failure to maintain acceptable conduct on- and off-duty may be related to his altercation with another airman, but this could not be verified at this time. The applicant's service treatment records are also not available or submitted for review so there is no evidence he had any mental health conditions during service and no evidence his mental health condition had a direct impact or was a contributing factor to his misconduct resulting in his discharge. There are no records confirming he had marital problems and developed a mental health condition from this situation during service. Having marital problems and being distressed from this situation does not confirm or constitute him having a mental health condition. Returning to the most important issue at hand is the absence of his discharge paperwork. Since this vital record is unavailable, the presumption of regularity is applied and there is no error or injustice with his discharge from service from a mental health perspective. The burden of proof is placed on the applicant to submit the necessary records to support his contention and request. The applicant's contention or statement is determined to not be sufficient or compelling enough to support his request for an upgrade of his discharge.

Liberal consideration is applied to the applicant's petition due to his contention of having a mental health condition. It is reminded liberal consideration does not mandate an upgrade or a change to the records per policy guidance. The following are responses to the four questions from the Kurta Memorandum from the information presented in the available records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
The applicant marked "OTHER MENTAL HEALTH" on his application to the Board and contended another service member had an affair with his wife, and they got into a fight when the

applicant confronted him. The applicant claimed he hit the service member one time. He did not identify his other mental health condition and did not discuss how his mental health condition may excuse or mitigate discharge.

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

The applicant's service treatment records are not available or submitted by the applicant for review. There are no records he received any mental health evaluation, treatment, or mental disorder diagnosis during service. There are also no records confirming the applicant had marital problems and developed a mental health condition from this situation causing him to engage in a physical altercation with another service member leading to his discharge during service.

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

The applicant's discharge paperwork and service treatment records are not available for review, so the presumption of regularity is applied, and there is no error or injustice with discharge. From his limited available records, there is no evidence the applicant's mental health condition had a direct impact or was a contributing factor to his misconduct resulting in his discharge from service. Thus, the applicant's mental health condition does not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

Since the applicant's mental health condition does not excuse or mitigate his discharge, his condition also does not outweigh his original discharge.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 26 Nov 24 for comment (Exhibit E) 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 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. The applicant's service treatment records are not available or submitted for review. Consequently, there is no evidence he had any mental health conditions during service and there is no evidence his mental health condition had a direct impact or was a contributing factor to his misconduct resulting in his discharge. Additionally, the applicant did not identify his mental health condition and did not discuss how his mental health condition may excuse or mitigate his discharge. The burden of proof is placed on the applicant to submit the necessary records to support his contentions and request. Liberal consideration was applied; however, the applicant's mental health condition does not excuse or mitigate his discharge.

The applicant's discharge documentation was also not available for review and was not provided by the applicant; therefore, the presumption of regularity is applied, and no error or injustice is

found. In the interest of justice, the Board considered upgrading the discharge based on fundamental fairness/clemency; however, given the evidence presented, and in the absence of post-service information/criminal history 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-2024-01960 in Executive Session on 21 May 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, dated 29 May 24.
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 2 Aug 24.
Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 25 Nov 24.
Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 26 Nov 24.
Exhibit F: Letter, SAF/MRBC, w/atchs, (Liberal Consideration & Clemency Guidance), dated 26 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