

**SUMMARY:** The applicant was discharged on 14 May 2014 in accordance with Air Force Instruction 36-3208, *Administrative Separation of Airmen*, with a General discharge for a Pattern of Misconduct. The applicant appealed for an upgrade of his discharge characterization, a change to the discharge narrative reason and associated separation code, and a change to the reentry code.

The applicant was represented by counsel.

The applicant appeared and testified before the Discharge Review Board (DRB), with counsel, via video teleconference using Zoom on 19 September 2023. One witness was present to testify on the applicant's behalf.

The attached examiner's brief (provided to applicant only), extracted from available service records, contains pertinent data regarding the circumstances and character of the applicant's military service.

**DISCUSSION:** The Discharge Review Board (DRB), under its responsibility to examine the propriety and equity of an applicant's discharge, is authorized to change the characterization of service and the narrative reason for discharge if such changes are warranted. If applicable, the board can also change the applicant's reentry code. In reviewing discharges, the board presumes regularity in the conduct of governmental affairs unless there is substantial credible evidence to rebut the presumption, to include evidence submitted by the applicant. The Board completed a thorough review of the circumstances that led to the discharge and the discharge process to determine if the discharge met the pertinent standards of equity and propriety.

The applicant's record of service included an Article 15 for sexual contact without consent.

The documentary evidence the Board considered as part of the review includes, but is not limited to the DD Form 293, *Application for the Review of Discharge from the Armed Forces of the United States*, and any additional documentation submitted by applicant and/or counsel; the applicant's personnel file from the Automated Records Management System (ARMS); and the DRB Brief detailing the applicant's service information and a summary of the case.

Through counsel, the applicant contended his discharge was improper based on multiple errors. First, the applicant's misconduct was improperly charged based on a change to the Manual for Court-Martial (MCM) regarding Article 120 of the UCMJ. Counsel argued the applicant was charged based on the previous version of the MCM resulting in him being charged for a crime that no longer existed. Counsel claimed the applicant did not commit abusive sexual contact because the applicant did not touch the other Airman's buttocks with intent to abuse, humiliate, or degrade her, or to satisfy his sexual desires. Instead, it was an act of horseplay that the applicant immediately apologized for and at the most could only be considered an assault consummated by battery under Article 128, UCMJ.

Second, the First Sergeant put undue pressure and provided unlawful legal advice by treating the misconduct as a sexual offense, making the First Sergeant a mandatory reporter. Counsel argued the First Sergeant threatened the applicant would be tried at a General Court-Martial, sentenced to a dishonorable discharge, and registered as a sex offender if he didn't accept the Article 15 punishment. Furthermore, the victim was coerced into reporting the incident and felt pressured to participate in the investigation because she didn't want the applicant to get into trouble.

Third, the Separation Authority was mistaken about what misconduct the applicant was wrongfully found

guilty of and being separated for, a critical error in their opinion. Counsel argued the Separation Authority claimed the misconduct was a sexual assault, a charge much more serious than what occurred which in turn affected the discharge determination.

A review of the applicant's records revealed he intentionally grabbed the buttocks of a female Airman in his unit. According to the victim, he grabbed her a second time after she had already shoved him off and told him that it made her uncomfortable. The incident was witnessed by another Airman that was in the duty section at the time and an investigation was initiated. The command punished the applicant under Article 15, UCMJ and administratively discharged him for a Pattern of Misconduct, not sexual assault.

### **LIBERAL CONSIDERATION:**

Due to the applicant's contention he had a mental health condition that affected his behavior, the Board considered the case based on the liberal consideration (LC) standards required by guidance from the Office of the Under Secretary of Defense for Personnel and Readiness and 10 USC §1553. The Board included a member who is a physician, clinical psychologist, or psychiatrist. Specifically, the Board reviewed the four questions the Under Secretary of Defense provided that boards should consider when weighing evidence in requests for modification of discharges due in whole or in part to mental health conditions, including post-traumatic stress disorder (PTSD); Traumatic Brain Injury (TBI); sexual assault, and sexual harassment. The Board considered the following:

1. Did the veteran contend that a condition or experience may have excused or mitigated their misconduct or discharge?

*The applicant, through counsel, contended that the death of his father during his time in service was difficult for him. The applicant also stated during his personal appearance hearing that he felt he had mental health issues during his time in service but believed that asking for help was frowned upon by his unit leadership.*

2. Did that condition exist/experience occur during military service?

*A review of the applicant's available records revealed he received mental health services during his time in service related to anxiety, difficulty adjusting to the military lifestyle, and making suicidal statements after failing multiple PT tests. The applicant's records reflected he voluntarily sought inpatient psychiatric hospitalization, participated in outpatient individual therapy and group therapy, and received the diagnosis of adjustment disorder. The applicant's records reflected he requested to discontinue mental health services and reported to providers that he no longer needed or wanted mental health services.*

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

*Based on a review of the applicant's records, and in consideration of the applicant's personal appearance testimony, the applicant described mental health symptom development in response to the death of his father, and in response to occupational stressors. The applicant provided testimony at his personal appearance hearing about what he perceived to be stressful working conditions and alternating shifts and duty hours. The applicant described the incident of misconduct that led to his discharge to be horseplay in the workplace during shift changeover that he saw others participating in, so he also participated in it and then regretted his decision. Bereavement is not a mitigating mental health condition under the intent of liberal consideration, nor is bereavement likely to explain, excuse or mitigate inappropriate sexual behavior. There is evidence the applicant exhibited and endorsed difficulty adjusting to the military lifestyle and poor coping skills, however, there is no evidence of a nexus between the applicant's reported in service mental health symptoms and the misconduct that led to his discharge. Finally, liberal consideration is generally not applied to pre-mediated misconduct or those involving harm to others.*

4. Does that condition or experience outweigh the discharge?

*Because the applicant's discharge is not mitigated by a mental health condition, the discharge is also not outweighed by a mental health condition.*

Additionally, the Board considered the factors laid out in the attachment to the Under Secretary of Defense memorandum, *Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations*, dated 25 June 2018, known as the "Wilkie Memo." The Board considered the factors listed in paragraphs (6)(a)-(6)(l) and (7)(a)-(7)(r) of this memorandum and found no evidence of inequity or impropriety. Furthermore, the applicant admitted to a post-service arrest and conviction that has now been expunged from his record, although no evidence to support this was provided by the applicant. Despite the fact the conviction may have been expunged does not mean the misconduct did not occur. Therefore, the Board determined there was no grounds to support an upgrade based on clemency.

Finally, the Board considered the applicant had been given a Pattern of Misconduct narrative reason for his separation. The Board determined his misconduct stemmed from basically the same event and found the narrative reason to be inequitable.

**FINDING:** The DRB voted unanimously to *deny* the applicant's request to upgrade his discharge characterization and change his reentry code. The DRB also voted unanimously to *approve* the applicant's request to change his discharge narrative reason and associated separation code.

Should the applicant wish to appeal this decision, the applicant must seek relief before the Air Force Board for Correction of Military Records (AFBCMR) in accordance with DAFI 36-2603, *Air Force Board for Correction of Military Records*.

**CONCLUSION:** After a thorough review of the available evidence, to include the Applicant's issues, summary of service, service/medical record entries, and discharge process, the Board found the discharge was proper and equitable. Therefore, the awarded characterization of service shall remain "General," and the reentry code shall remain "2B." In regard to the narrative reason for separation, based on inequity, it shall change to "Secretarial Authority." The Air Force DRB (AFDRB) results were approved by the board president on 26 September 2023. If desired, the applicant can request a list of the board members and their votes by writing to:

Air Force Review Boards Agency  
Attn: Discharge Review Board  
3351 Celmers Lane  
Joint Base Andrews, NAF Washington, MD 20762-6602  
Instructions on how to appeal an AFDRB decision can be found at  
<https://afrbportal.azurewebsites.us>

Attachment:  
Examiner's Brief (Applicant Only)

