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

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-1991-02108-3

Work-Product

COUNSEL: *Work-Product*

HEARING REQUESTED: NO

APPLICANT'S REQUEST

The Board reconsider his request to upgrade his bad conduct discharge (BCD) to honorable or general (under honorable conditions).

RESUME OF THE CASE

The applicant is a former Air Force airman basic (E-1) who was discharged on 16 Apr 87 with a BCD due to a general court-martial (GCM) conviction.

On 8 Jan 92, the Board considered and denied his request for a discharge upgrade; finding the applicant had provided insufficient evidence of an error or injustice to justify relief. The Board noted the comments from the Office of the Judge Advocate General and agreed with the recommendation finding the applicant was afforded all rights granted by statute and regulation and found there were no legal errors requiring corrective action. Furthermore, the Board reviewed the supporting documentation submitted by the applicant but did not find this evidence compelling enough to grant relief.

On 23 Mar 93 and 5 Nov 14, the applicant submitted reconsideration requests to have his discharge upgraded. The applicant's requests were returned without Board action stating the applicant had not provided newly discovered relevant evidence to meet the criteria for reconsideration.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letters and Record of Proceedings at Exhibits G and J.

On 20 Jul 22, the applicant requested reconsideration of his discharge upgrade to honorable or general based on liberal consideration. He now contends, through counsel, his current discharge was inequitable because he was diagnosed with Post-Traumatic Stress Disorder (PTSD), Bipolar Disorder, Schizoaffective Depressive Disorder, and other conditions that existed prior to, and were exacerbated by his military service. His upbringing resulted in him having an undiagnosed mental health condition prior to joining the military. For the past 35 years he has struggled with these mental health issues. Furthermore, his mental health issues contributed to his misconduct for which he was discharged. His usage of drugs, for which he was discharged, was the result of self-

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CUI Categories: SP-MIL/SP-PRVCY
Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

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medication for mental health reasons. Additionally, he was faced with disparate treatment and was segregated from white soldiers after he complained of pain and was identified as a malingerer. Based on his positive military record and his post-service achievements, the AFBCMR should upgrade his discharge based on the grounds of equity.

In support of his reconsideration request, the applicant submitted the following new evidence: 1) a personal statement/affidavit; 2) character reference letters attesting to his kind, gentle, and helpful nature; 3) a letter regarding his mental health; and 4) Department of Veterans Affairs (DVA) Benefit Letters denying benefits.

The applicant's complete submission is at Exhibit K.

POST-SERVICE INFORMATION

On 17 Mar 23, the Board sent the applicant a request for post-service information, including a standard criminal history report from the Federal Bureau of Investigation (FBI); however, he has not replied.

APPLICABLE AUTHORITY/GUIDANCE

This Board is without authority to reverse, set aside, or otherwise expunge a court-martial conviction. Rather, in accordance with Title 10, United States Code, Section 1552(f), actions by this Board regarding courts-martial are limited to two types: 1) corrections reflecting actions taken by the reviewing officials pursuant to the Uniform Code of Military Justice (UCMJ) (for example, if a convening authority or appellate court took action but that action was not reflected in an Air Force record); and 2) action on only the sentence of the court-martial and solely for the purpose of clemency.

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

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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 (USD P&R) issued supplemental guidance 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 Memorandum.

On 17 Mar 23, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit L).

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.

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- 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 completed a review of all available records and finds insufficient evidence to support the applicant's request for the desired changes to his record. The applicant's legal counsel on behalf of the applicant makes a number of contentions concerning the applicant's mental health during his military service. Counsel contends the applicant's current discharge was inequitable because he was diagnosed with PTSD, Bipolar Disorder, Schizoaffective Depressive Disorder, and other conditions are understood to have existed prior to service, and were exacerbated by, his military service, and these conditions contributed to the misconduct for which he was discharged. However, there is no evidence to support this contention. Based on all available records, the applicant was an exemplary service member, earning awards and high performance evaluations throughout his career. He was evaluated pre-service, during service, and at the time of separation and was consistently evaluated to be fit for duty throughout his time in service. There is no indication of prodromal symptoms in his service or medical records. While the applicant did report to having depression and excessive worry on his separation evaluation, these symptoms began after his misconduct. Although he endorsed depression and excessive worry, there is no evidence he had PTSD, Bipolar Disorder, and Schizoaffective Disorder or symptoms of these conditions at any time during his service.

Counsel contends the applicant's upbringing resulted in him having an undiagnosed mental health condition prior to joining the military. However, the applicant's records do not support this notion. The applicant and his evaluating physicians all denied he had any past mental health conditions or treatment for mental illness during service, as well as any mental illness that was caused or was exacerbated by the military. There was no evidence his prior service mental health condition was exacerbated or aggravated by his military service. The applicant, counsel, and current mental health providers suggest his drug usage was the result of self-medication for mental health reasons. While it is possible the applicant may have used drugs to cope with this mental health condition as co-occurring conditions are not uncommon; there were no mental health issues documented at the time of his drug usage. In counsel's argument for liberal consideration, she mentions drug usage. His documented misconduct of distribution of marijuana is absent from her brief. The applicant was found guilty during a general court-martial for wrongful use of marijuana and cocaine but was also found guilty of distribution of marijuana. As opposed to the argument of using drugs to manage symptoms of mental health conditions, distribution of illegal drugs is a willful, conscious act, perpetrated with forethought and is considered as premeditative behaviors. These behaviors have no nexus to any of his mental health conditions. His premeditative behavior is not excused or mitigated by his mental health condition per liberal consideration guidance.

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Counsel contends the applicant was faced with disparate treatment and was segregated from white soldiers. As an example, after the applicant complained of pain he was identified as a malingerer. There is no evidence in the available records he was a victim of discrimination or inequitable treatment. While it is true he was not diagnosed for a time, he was later given a diagnosis for his back issues and treated, while still in the military. The applicant describes his time in solitary confinement, post court-martial conviction, as “very difficult...both mentally and physically.” He goes on to say he felt like a caged animal suffered from fainting spells and starting talking to himself and people who were not there. Additionally, after his conviction, he was divorced on 23 Jun 86. He described the divorce as not amicable and rarely saw his two kids. While the applicant does not specifically tie his mental health issues to his confinement and subsequent difficult divorce, it is conceivable the origins of his reported depression and excessive worry began after his conviction as a result of his sentence and having nothing to do with his previous drug usage. Thus, his mental health symptoms were developed from this time in confinement. His mental health symptoms resulted from the consequences of his misconduct and conviction based on his records.

After considering the entire record and contentions, there is insufficient evidence to suggest the applicant had any mental health condition during his time in service, nor was it exacerbated by his military service. A review of the available records finds no error or injustice with his discharge and insufficient evidence has been presented to support the applicant’s request. Liberal consideration is applied to the applicant’s request due to the contention of a mental health condition. The following are responses to the four questions in the policy based on the available records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
The applicant through his legal counsel contends he was diagnosed with PTSD, Bipolar Disorder, Schizoaffective Disorder, and other conditions such as depression and anxiety that were understood to have existed prior to and were exacerbated by his military service. His counsel believes these conditions contributed to his misconduct for which he was discharged.
2. Did the condition exist or experience occur during military service?
The applicant’s mental health conditions of PTSD, Bipolar Disorder, Schizoaffective Disorder, other conditions such as depression and anxiety did not exist or occur during military service according to his service treatment records. He was diagnosed with these conditions over 30 years post-discharge by his post-service providers. He was never diagnosed with any mental disorders during service. He did report having depression and excessive worry during his separation physical in 1986 that were related to his legal and personal problems from his court-martial conviction for his misconduct.
3. Does the condition or experience excuse or mitigate the discharge?
There is no evidence the applicant had any mental health conditions to include his prior-service mental health conditions at the time of his misconduct leading to this court-martial conviction and eventual discharge. There is no evidence his military service had exacerbated or aggravated his prior mental health condition as claimed. Evidence from his service treatment records finds he remained fit for duty throughout his career, and even excelled. There is no evidence of any functional limitations caused by his mental health condition. Even with considering liberal

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consideration, distribution of drugs is seen as willful, conscious behaviors, with forethought that has no nexus with his mental health conditions and therefore, his mental health conditions do not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?

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

The complete advisory opinion is at Exhibit M.

AF/JAJI recommends denying the application. As a preliminary matter, AF/JAJI informs the AFBCMR that since this application pertains to a court-martial, board action can only be on the basis of clemency and not on the basis of an error or injustice. The AFBCMR's authority stems from U.S.C., Title 10, Section 1552. Pursuant to Section 1552 (f), the AFBCMR cannot correct court-martial records unless the correction is one of two types of action: 1) correction of a record to reflect an action taken by review authorities under "chapter 47 of this title" (i.e., the UCMJ); or 2) action on the sentence of a court-martial for purposes of clemency. Hence, AFBCMR corrections can merely reflect actions regarding a court-martial that were already taken by review authorities under the UCMJ (such as convening authority clemency, or appellate corrections); or the AFBCMR can take action only on the sentence, but even then only on the basis of clemency (not any alleged error or injustice).

AF/JAJI finds no grounds for clemency based on the applicant's military record. The applicant has a history of misconduct, as evidenced by the nonjudicial punishment (NJP) and GCM. Based on a review of the total record, AF/JAJI finds no grounds to grant clemency in the form of a discharge upgrade. Furthermore, they find no grounds for clemency based on the alleged mental health issues. They note the AFBCMR's Psychological Advisor already provided a mental health advisory and found insufficient evidence to support the applicant's requests. They further note the guidance for liberal consideration of mental health issues – *Memorandum for Secretaries of the Military Departments Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment*, (Kurta, 25 Aug 17), also known as the Kurta Memorandum, cuts against the requested correction as a BCD for the underlying crimes is appropriate under the memorandum's standards. According to paragraph 19 of the attachment to the Kurta Memorandum, "Premeditated misconduct is not generally excused by mental health conditions ... review boards will exercise caution in assessing the causal relationship between asserted conditions or experiences and premeditated misconduct." Accordingly, the applicant's acts of wrongfully using cocaine, and wrongfully using and distributing marijuana were instances of premeditated misconduct. Consequently, any mental health condition, even if true, neither excuses/mitigates nor outweighs the discharge.

The complete advisory opinion is at Exhibit N.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

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The Board sent a copy of the advisory opinion to the applicant on 12 Jun 23 for comment (Exhibit O), and the applicant replied on 14 Aug 23. In his response, the applicant's counsel contends the advisory opinion is flawed because it recites the key clinical findings of the applicant's professional medical care provider to which he suffered during his military career but proceeds to ignore these findings and concludes there is no evidence to support his claim. Furthermore, the mental health advisory ignores the applicant's testimony stating he believed his mental illness had been with him his entire life and was exacerbated by his military service. Additionally, liberal consideration is not applied properly to his case as outlined in the Kurta Memorandum. Moreover, the advisory opinion argues the lapse of time between his military service and his diagnosis, concluding he could not have suffered from mental illness in the service. This assertion directly contradicts he had mental health issues since he was young to which he suffered his entire life. Furthermore, the use of his exemplary service should not be used to excuse a mental health illness.

The advisory goes on to assert the distribution charge shows premeditation. The distribution of marijuana is only one charge at issue. The Kurta Memorandum expressly acknowledge marijuana related offenses should be afforded greater leniency and liberal consideration given it is a substance that is legal in several states. The Kurta Memorandum does not define premediated and it is not clear the applicant's drug use and distribution qualify as premediated. Furthermore, the applicant disputes he distributed marijuana and never used cocaine; he only admitted to a one-time use of marijuana. He paid for his misdeeds and suffered over 35 years with his mental health conditions for which he could not receive Department of Veterans Affairs (DVA) assistance.

The applicant's complete response is at Exhibit P.

FINDINGS AND CONCLUSION

1. The application was timely filed.
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. 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. Furthermore, the Board concurs with the rationale and recommendation of AF/JAJI, to include the rationale of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. Counsel contends the applicant suffers from PTSD, Bipolar Disorder, Schizoaffective Depressive Disorder, and other conditions which existed prior to service and were exacerbated by his military service, and these conditions contributed to the misconduct for which he was discharged. However, the Board finds no evidence the applicant suffered from any mental health conditions to include his prior-service mental health conditions at the time of his misconduct leading to his discharge. The Board applied liberal consideration to the evidence submitted by the applicant; however, it is not sufficient to grant the applicant's request. The available records reveal some of his misconduct involved distribution of illegal drugs and thus is not considered under the intent and guidance of liberal consideration as the Board considers this premediated misconduct. The applicant did not provide any evidence or records to substantiate his claim a mental health

condition in service caused his misconduct, thus his condition does not mitigate or excuse his discharge. In the interest of justice, the Board considered upgrading the discharge due to clemency based on fundamental fairness; however, given the evidence presented, and in the absence of post-service achievements and a criminal history report, the Board finds no basis to do so. Furthermore, the Board acknowledges Counsel's contention the applicant was discriminated against; however, other than the applicant's own assertions, we do not find the evidence presented sufficient to support this claim. Therefore, the Board recommends against correcting the applicant's records. The applicant retains the right to request reconsideration of this decision. The applicant may provide post-service evidence depicting his current moral character, occupational, and social advances, in the consideration for an upgrade of discharge characterization due to clemency based on fundamental fairness.

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 Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-1991-02108-3 in Executive Session on 26 Jul 23 and 6 Sep 23:

<i>Work-Product</i>	Panel Chair
<i>Work-Product</i>	Panel Member
<i>Work-Product</i>	Panel Member

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

- Exhibit G: Record of Proceedings, w/ Exhibits A-F, dated 8 Jan 92.
- Exhibit J: Non-Viable Letters, w/ Exhibits H and I, dated 17 Sep 93 and 15 Jun 15.
- Exhibit K: Application, DD Form 149, w/atchs, dated 20 Jul 22.
- Exhibit L: Letter, SAF/MRBC, w/atchs (Post-Service Request and Liberal Consideration Guidance), dated 17 May 23.
- Exhibit M: Advisory Opinion, AFRBA Psychological Advisor, dated 16 Mar 23.
- Exhibit N: Advisory Opinion, AF/JAJI, dated 8 Jun 23.
- Exhibit O: Notification of Advisory, SAF/MRBC to Applicant, dated 12 Jun 23.
- Exhibit P: Applicant's Response, dated 14 Aug 23.

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.

2/1/2024

Work-Product

Board Operations Manager, AFBCMR

Signed by: *Work-Product*