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

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2017-00572

Work-Product

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 caught with about a half an ounce of marijuana and was court-martialed with a bad conduct discharge (BCD) and six months in the stockade. His sentence was to be suspended but instead he was mistakenly placed in the stockade. According to his attorney, he was to be placed at the retraining group; however, the psychologist's erroneous instruction kept him from being transferred. His attorney was not present at the hearing at the stockade in 1977. In 2018 through the Department of Veterans Affairs (DVA), he became aware he had grounds for a discharge upgrade because of his situation. He should be granted clemency based on this and equitable grounds, because he suffered for 40 years with the stigma associated with the discharge for a misdemeanor offense. He used marijuana as a coping mechanism for his mental health condition of Post-Traumatic Stress Disorder (PTSD) and other mental health issues. His alcoholism is a disease in which he used alcohol as a coping mechanism.

In support of his request for clemency and liberal consideration, the applicant provides a personal statement where he explains the circumstances of his various arrests and his drinking problems, articles relating to PTSD, copies of his medical records, certificates of recognition, church documents, attendance records from alcoholics anonymous, parole board character reference letters, achievement and training certificates, financial records, court documents, and DVA and Social Security Administration (SSA) letters.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

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

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Dated 12 Oct 76, a Mental Health Evaluation was conducted on the applicant which determined he had no psychiatric disorder requiring action under the provisions of AFM 35-4, *Physical Evaluation for Retention, Retirement, and Separation*; however, it is noted the applicant did have a character and behavior disorder diagnosed as passive aggressive personality concluding he was eligible for an administrative discharge.

On 11 Jan 77, the convening authority published Special Court-Martial Order Number 2. The Order stated the applicant was found guilty of wrongfully possessing and using marijuana, unlawfully leaving his post, and unlawfully striking another airman, in violation of Articles 92, 113, and 128. The applicant was sentenced to confinement at hard labor for six months, forfeiture of \$200.00 pay per month for 6 months, reduction to the grade of airman basic, and discharge from the service with a bad conduct discharge (BCD).

On 30 Apr 77, AF Form 2098, *Duty Status Change*, indicates the applicant was present for duty and was released from confinement on 29 Apr 77 after serving 151 days.

According to an undated DD Form 293, *Application for Review of Discharge or Dismissal from the Armed Forces of the United States*, the applicant requested his BCD be changed to an UOTHC stating his discharge should be changed on the grounds he was supposed to have gone to the rehabilitation group but instead was placed in corrections.

On 7 Jun 77, DD Form 214, *Report of Separation from Active Duty*, reflects the applicant was discharged with an UOTHC character of service in the grade of airman (E-1) after serving 1 year, 1 month, and 12 days of active duty. He was discharged with a separation code of "JJD" which denotes "Court-Martial (Other)."

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

POST-SERVICE INFORMATION

On 23 Sep 19, 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 15 Nov 22 and provided an FBI report. According to the report, the applicant was arrested on 9 Oct 77, for possession of marijuana and being armed with a wooden club, on 15 Nov 82 for possession of marijuana, on 23 Aug 85 for driving while intoxicated (DWI) on a suspended license and possession of marijuana to which the charge of DWI was dismissed and he was sentenced to 45 days of confinement, on 30 Dec 85 for DUI and was sentenced to two years of confinement, on 25 Jul 86 for possession of marijuana, on 24 Jan 87 for DWI, on 6 Feb 87 for possession of marijuana, on 27 May 87 for DWI and was sentenced to four years of confinement, on 22 Apr 88 for petty larceny, on 24 Apr 89 for escape and was sentenced to four years of confinement, on 17 May 90 for DWI, on 6 Mar 92 for DWI and was sentenced to four years of confinement, on 29 Oct 93 for DWI and was sentenced to four years of confinement,

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on 2 Aug 94 for DWI, on 17 Aug 95 for DWI, on 2 May 96 for DWI, on 11 Feb 97 for DWI, and on 25 Apr 06 and 30 Nov 07 for DWI with convicted time indicating 99 years. The applicant also provided a character statement, pay statements, church documents, and his alcoholics anonymous attendance sheets.

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 (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

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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 12 Sep 23, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit I).

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 applicant's request for a discharge upgrade finding no grounds for clemency based on the applicant's military record. The applicant was found guilty at a court-martial and sentenced accordingly. Additionally, he has been arrested for other misconduct since being discharged from military service. Based on a review of the total record, AF/JAJI finds no grounds to grant clemency in the form of a discharge upgrade. Furthermore, AF/JAJI finds no grounds for clemency based on any alleged mental health issues. The applicant asserts he has a

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mental health diagnosis' which included inpatient and outpatient treatment, but there is no implication or evidence his mental health issues existed during his military service.

As a preliminary matter, AF/JAJI informs the AFBCMR, since this application pertains to a court-martial, Board action can only be on the basis of clemency and not on the basis of 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).

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 7 Sep 23 for comment (Exhibit F) but has received no response.

ADDITIONAL 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. There is no evidence the applicant had PTSD or alcohol issues during service and no evidence he used marijuana and/or alcohol to cope with his mental health condition. In fact, the applicant denied having any mental health conditions or concerns during his separation physical examination with the Primary Care Manager (PCM) near the time of his discharge. There were no records he had any alcohol-related incidents or problems during service. He claimed he had PTSD; however, he did not discuss his traumatic experiences such as when they occurred and whether they were caused or related to his military service. There were no medical records he was diagnosed with PTSD or had alcohol problems after service as well. His submitted post-service treatment records revealed he was diagnosed and treated for Schizoaffective Disorder (SAD). His condition of SAD was reported to have been first observed in 2008, over 30 years after discharge. There was no evidence he had this condition during his military service, and it appeared he had developed this condition after service. His post-service treatment records made no mention of his military service or that he had a mental health condition during service. There was no evidence his mental health condition of PTSD, alcoholism, and/or SAD caused or affected his serious acts of misconduct leading to his special court-martial conviction and subsequent UOTHC discharge.

During service, the applicant was referred to a mental health evaluation by his squadron and the results of the evaluation yielded a diagnosis of Passive-Aggressive Personality. His evaluator cited his behavioral and personality traits of "brooding resentment of authority and experience problems conforming to structured standards of behavior. This resentment may be expressed passively i.e.:

being late for work, or aggressively, by fighting” to support the diagnosis. This diagnosis appeared to be appropriate based on his functioning and in accordance with the Diagnostic and Statistical Manual of Mental Disorders, 2nd Edition (DSM-II) diagnostic criteria at that time. This diagnosis no longer exists in the current version of the DSM and would likely fall under Other Specified Personality or Unspecified Personality Disorder. Regardless of its current official name, the behavioral and personality traits he had displayed during service were pervasive and had endured after his service. This was evident by his recurring legal problems and his placement in numerous stints in correctional facilities after service. He was diagnosed with Borderline Personality Disorder (BPD) decades after discharge, which is another type and similar personality disorder that shares common traits with Passive-Aggressive Personality. It is possible his personality disorder traits had evolved with time. The fact that he had displayed and continued to be diagnosed with a personality disorder decades after service would give credence to his personality disorder diagnosis given during service. Personality disorders are enduring and lifelong patterns of maladaptive behaviors and thoughts which are unhealthy and inflexible, and he had demonstrated this pattern of behavior during and after service. His personality disorder was considered unsuited and disqualifying for military service and a recommendation was made to his commander for administrative discharge action.

The applicant was not discharged from service for his unsuited personality disorder but for serious offenses resulting in his special court-martial conviction. His personality traits of disdainful attitudes toward authority, displaying non-conforming standards of behaviors, and behaving in passive-aggressive or aggressive behaviors were manifested and reflected through his documented acts of misconduct of using and possessing marijuana, leaving his post before being relieved, and striking another airman. This misconduct was the reason for his special court-martial conviction and discharge. He did not address his other misconduct of leaving his post and striking another airman and only addressed his substance use. There was no evidence his other unaddressed misconduct was caused by his mental health condition and no evidence he was in emotional distress at the time of any of his misconduct. His unsuited personality disorder may explain his behaviors and cause his misconduct, but they do not excuse or mitigate his discharge especially since his convicted offenses were rather serious. Therefore, the Psychological Advisor finds no error or injustice with his discharge from service from a mental health perspective. 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 contends he had coped with his mental health condition of PTSD with marijuana and stated his alcoholism was a disease which he used as a coping mechanism. He did not discuss his traumatic experience in detail such as when his traumatic experience occurred and how it was related to his military service.

2. Did the condition exist or experience occur during military service?
There is no evidence the applicant’s mental health conditions of PTSD and alcoholism had existed or occurred during his military service. He received a mental health evaluation during service and the results of the evaluation found he met the diagnostic criteria for Passive-Aggressive

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Personality. He was diagnosed with SAD decades after discharge which was first observed in 2008. There is no evidence his condition of SAD had existed or occurred during service. He was also diagnosed with BPD after discharge and traits of this condition are similar to Passive-Aggressive Personality, which he was diagnosed with during service.

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

There is no evidence the applicant's mental health condition of PTSD, SAD, or alcoholism had a direct impact on his misconduct and discharge. He had an unsuiting mental health condition of a personality disorder and while his personality disorder may cause his maladaptive behavior problems manifesting through his misconduct leading to his discharge, his mental health condition does not excuse or mitigate his discharge. His misconduct was rather serious especially striking another airman and could not be excused or mitigated by his mental health condition.

4. Does the condition or experience outweigh the discharge?

Since there is no evidence his mental health condition may excuse or mitigate his discharge, his condition also does not outweigh his original discharge.

The complete advisory opinion is at Exhibit G.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 12 Sep 23 for comment (Exhibit H) but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed. Given the requirement for passage of time, all clemency and discharge upgrade requests are technically untimely. However, it would be illogical to deny such 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. 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 of the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. Liberal consideration was applied to the applicant's request due to the contention of a mental health condition. The Board finds his unsuiting mental health condition of a personality disorder may have cause his maladaptive behavior problems manifesting through his misconduct leading to his discharge; however, his condition or experience does not excuse, mitigate, or outweigh his discharge. The records available reveal some of his misconduct involved violence toward others and thus is not considered under the intent and

guidance of liberal consideration. In the interest of justice, the Board considered upgrading the discharge based on clemency; however, given the evidence presented and his criminal history post-discharge, the Board finds no basis to do so. Therefore, the Board recommends against correcting the applicant's records.

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-2017-00572 in Executive Session on 25 Oct 23:

- 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 9 Feb 17, 11 Jun 18, and 9 Sep 19.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Non-Viable Letter, SAF/MRBC, w/atchs (Post-Service Request and Clemency Guidance), dated 23 Sep 19.
- Exhibit D: Applicant's Response, w/atchs, dated 15 Nov 22.
- Exhibit E: Advisory Opinion, AF/JAJI, dated 5 Sep 23.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 7 Sep 23.
- Exhibit G: Advisory Opinion, AFRBA Psychological Advisor, dated 11 Sep 23.
- Exhibit H: Notification of Advisory, SAF/MRBC to Applicant, dated 12 Sep 23.
- Exhibit I: Letter, SAF/MRBC, w/atchs (Liberal Consideration Guidance), dated 12 Sep 23.

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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.

3/4/2024

Work-Product

Board Operations Manager, AFBCMR

Signed by: *Work-Product*