



Work-Product

UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-01800

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His under other than honorable conditions (UOTHC) discharge be upgraded to honorable, and his Narrative Reason for Separation, Separation Code, and Reentry Code be amended to reflect Secretarial Authority.

APPLICANT'S CONTENTIONS

Per counsel, the applicant previously petitioned the Air Force Discharge Review Board (AFDRB) for relief, and his original application was provided. Counsel is re-alleging and reincorporating all of the arguments and evidence of that filing in conjunction with this request for relief.

There is one material error substantially prejudicial to the applicant's rights – equity. The applicant earned the Combat Action Ribbon and had a Post-Traumatic Stress Disorder (PTSD) diagnosis that contributed to the underlying misconduct. The applicant was separated from service on 4 Mar 03. He was an Aircraft Armament Systems Journeyman with four years and one month of service. He was separated with a Chapter 4 [Air Force Instruction (AFI) 36-3208, *Administrative Separation of Airmen*, Chapter 4].

On 20 Feb 03, an Article 32 investigation was held in the applicant's case. The case involved a single specification that he wrongfully distributed ecstasy. The basic allegation was the applicant was working as a disc jockey at several nightclubs. The clubs were known in law enforcement circles for possible drug use. The applicant; however, had never been connected to any previous allegations or investigations. The Air Force Office of Special Investigation (AFOSI) investigation targeted the applicant because another airman claimed the applicant had stated he used ecstasy at a party.

On 15 Mar 02, AFOSI attempted a controlled buy of ecstasy from the applicant. At the Article 32 investigation, the name of the buyer was unidentified under Military Rule of Evidence 507. The alleged purchase occurred inside of a building and not in view of the AFOSI. In other words, the AFOSI did not actually observe the purchase or record the purchase. There was no evidence, other than the word of the unidentified source, that the applicant took part in a controlled purchase. The undercover buyer claimed she purchased the ecstasy from the applicant. There was no statement to the AFOSI. There were no other confessions or admissions. There was no evidence the applicant was involved in any drug-related activities other than the word of the unidentified buyer. The only statement from the applicant was the testimony from another airman who testified the applicant had denied the allegation and believed he was set up. The applicant accepted a Chapter 4 on the advice of counsel.

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Controlled by: SAF/MRB

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Limited Dissemination Control: N/A

POC: SAF.MRBC.Workflow@us.af.mil

In terms of propriety, counsel's view is the decision to accept a Chapter 4 was not done knowingly and voluntarily. The identity of the undercover informant was never released. An investigation into her credibility was never conducted. The investigation uses the female pronoun to describe the informant. There was no audio recording of the purchase. There were no security cameras. There was no evidence the applicant was even present at the location. There were no text messages indicating any intent to sell drugs. The Area Defense Counsel (ADC) literally conducted no investigation despite the fact the applicant had professed his innocence to the other airman. Counsel referenced Department of Defense Instruction 1332.28, *Discharge Review Board (DRB) Procedures and Standards*, E.4.3, as providing a number of equitable factors for the Board to consider. Given the lack of evidence and the applicant's unblemished record, relief is requested.

Per counsel, the requisite information required for consideration of this application for relief was provided. The applicant's Federal Bureau of Investigation (FBI) Identity History Summary Check (IdHSC) in this case does reflect he was charged with drug-related offenses arising out of a single incident on/about 30 Jun 09. It is critical this Board review the entire FBI IdHSC which shows all these offenses were ultimately dismissed by the court. Given the dismissal of these charges by a judge, there is nothing in the FBI IdHSC that should cause this Board to deny the applicant the requested relief.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force senior airman (E-4).

On 28 Feb 03, the applicant requested discharge in lieu of court-martial, in accordance with AFI 36-3208, Chapter 4. He acknowledged understanding of the elements of the offense with which he was charged. The applicant also acknowledged understanding that he may be discharged UOTHC, and it may deprive him of veterans' benefits. On that same date, according to Defense Counsel memorandum, the applicant's ADC supported the applicant's request for discharge in lieu of court-martial.

On 28 Feb 03, the applicant's commander recommended the applicant be discharged from the Air Force, in lieu of trial by Court-Martial, under the provisions of AFI 36-3208, Chapter 4. The specific reason for the action was:

- The only direct evidence of criminal misconduct against [the applicant] is a controlled buy of two ecstasy pills from a confidential informant. [The applicant] provided a consensual urinalysis on 28 May 02, which tested negative for controlled/illegal substances.

On 3 Mar 03, the Staff Judge Advocate found the discharge action legally sufficient.

On 3 Mar 03, the discharge authority granted the applicant's request for discharge in lieu of trial by court-martial under the provisions of AFI 36-3208, Chapter 4, and directed the characterization of his discharge be UOTHC.

On 4 Mar 03, the applicant received a UOTHC discharge. His Narrative Reason for Separation is Chapter 4, Separation Code is KFS [In lieu of trial by court-martial], and Reentry Code is 2B [Separated with a general or UOTHC discharge]. He was credited with 4 years, 1 month, and 13 days of total active service.

On 1 May 20, the applicant submitted a request to the AFDRB for an upgrade to his discharge.

On 11 Feb 21, the AFDRB returned his application without action. The AFDRB did not have the authority to act on his request as the applicant's discharge was more than 15 years prior.

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

POST-SERVICE INFORMATION

On 25 Jul 24, the Board sent the applicant a request for post-service information; however, he has not replied. A standard criminal history report from the FBI was provided with the original application to the Board.

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 25 Jul 24, Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit C).

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.

Manual for Courts-Martial United States, 2002 Edition, Part III – *Military Rules of Evidence*, Section I – *General Provisions*:

Rule 507. *Identity of Informant*

(a) *Rule of privilege.* The United States or a State or subdivision thereof has a privilege to refuse to disclose the identity of an informant. An "informant" is a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a person whose official duties include the discovery, investigation, or prosecution of crime. Unless otherwise privileged under these rules, the communications of an informant are not privileged except to the extent necessary to prevent the disclosure of the informant's identity

AIR FORCE EVALUATION

The AFRBA Psychological Advisor finds insufficient evidence to support the applicant's request for an upgrade of his discharge and change of Narrative Reason for Separation, Separation Code, and Reentry Code based on his mental health condition.

This advisory is limited to the applicant's mental health condition. Contentions regarding errors made with his AFOSI investigation should be addressed by a legal subject matter expert as deemed appropriate by the Board. A review of the available records finds no evidence or records the applicant's mental health condition had a direct impact or was a contributing factor to his discharge. His service treatment records are not available or submitted by the applicant for review, and the existing records find no records he received a mental health evaluation, treatment, or mental disorder diagnosis during service. There was a statement in the Investigation Hearing report stating, "Mental Status of the Accused: Both parties stated they had no reason to challenge the mental status of the accused." This report indicated there were no issues with his mental health status, he did not have a mental health condition, his mental health condition did not cause his misconduct, and/or his mental health condition did not impede his ability to participate in his own defense. The applicant's legal counsel claimed he had PTSD and provided no additional information about his condition such as his actual traumatic experience(s) during service, when his traumatic experience(s) occurred, the trauma or PTSD symptoms he had during service, and when he was diagnosed with PTSD. It was alluded the applicant's traumatic experience(s) may have been combat-related due to references made that he received a Combat Action Ribbon. The applicant's combat experiences were not clarified. There are no records the applicant was ever diagnosed with PTSD or any mental health condition by a duly qualified mental health professional in his lifetime. His legal counsel alleged there is no evidence the applicant was present at the location of the drug purchase or distribution and a statement made by his flight chief/master sergeant (and a senior airman) reported the applicant professed his innocence and believed he was being set up. If this information were true, then it is not possible his mental health condition, including PTSD, caused his misconduct since his involvement in the distribution of ecstasy was denied. Hypothetically, if he had a mental health condition, and did distribute drugs, the applicant's mental health condition would not excuse or mitigate his misconduct. Distributing a controlled substance involves planning, is considered a premeditative behavior, and would suggest he was aware of his actions. This is also a serious offense and could not be excused or mitigated by his mental health condition. There is no evidence or records the applicant had any mental health conditions, including PTSD, impairing his judgment at the time he may have possibly distributed drugs or when he submitted a request for discharge in lieu of a court-martial as contended. Thus, there is no error or injustice identified with the applicant's discharge from a mental health perspective, and his request for an upgrade of his discharge based on his mental health condition is not supported.

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

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
The applicant's legal counsel contended he earned a Combat Action Ribbon, and his PTSD diagnosis contributed to the underlying misconduct, and his decision to accept a Chapter 4 was not done knowingly or voluntarily. No additional information about his condition was provided such as his actual traumatic experience(s) during service, when his traumatic experience(s) occurred, the trauma or PTSD symptoms he had during service, and when he was diagnosed with PTSD.
2. Did the condition exist, or experience occur, during military service?
There is no evidence or records the applicant's mental health condition of PTSD had existed or occurred during his military service. There are no records he received any mental health treatment, evaluation, or mental disorder diagnosis during service or in his lifetime. The Investigation Hearing report briefly discussed his mental status, "Mental Status of the Accused: Both parties

stated they had no reason to challenge the mental status of the accused” indicating there were no issues with the applicant’s mental health status, he did not have a mental health condition, his mental health condition did not cause his misconduct, and/or his mental health condition did not impede his ability to participate in his own defense.

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

There is no evidence or records the applicant had any mental health conditions, including PTSD, impairing his judgment at the time he may have possibly distributed drugs or when he submitted a request for discharge in lieu of a court-martial resulting in his discharge from service. There is no evidence or records the applicant’s mental health condition had a direct impact or was a contributing factor to his discharge. Therefore, his 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.

AF/JAJI recommends denying the application. There is insufficient evidence to demonstrate a legal error or injustice.

In Mar 02, AFOSI was investigating several active duty members for drug use and distribution. On 15 Mar 02, AFOSI set up a controlled buy with a confidential undercover informant. This informant purchased two pills of ecstasy from the applicant, and when tested, those two pills were confirmed as ecstasy. On 5 Feb 03, one charge and specification of wrongful distribution of ecstasy was preferred against the applicant. On 20 Feb 03, an Article 32 investigation was held, and the preliminary hearing officer concluded there was sufficient evidence to make a prima facie case the applicant wrongfully distributed ecstasy and recommended the charge and specification be referred to a general court-martial. The applicant was present at this hearing and was represented by an ADC and a circuit defense counsel. On 28 Feb 03, the applicant submitted a request to be administratively discharged in lieu of trial by general court-martial (also known as a Chapter 4 request). This request was submitted through his military defense counsel. His Chapter 4 request for discharge in lieu of trial by court-martial was granted by the discharge authority on 3 Mar 04¹. The applicant was discharged with a UOTHC discharge characterization.

In support of his current request to the Board, the applicant, through counsel, argues the evidence supporting the distribution of ecstasy charge was insufficient as the AFOSI did not view the distribution, and the informant did not wear a recording device. In addition, counsel states there was no confession or admission to support this allegation. Lastly, counsel argues the applicant submitted and accepted the Chapter 4 request unknowingly and involuntarily. The FBI IdHSC reflects the applicant was charged with drug-related offenses arising out of a single incident in Jun 09, but these charges were all dismissed by the court.

Because “[t]he applicant has the burden of providing evidence in support of their allegation(s) of an error or injustice,” DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, 4 Oct 22, paragraph 3.4.4, the AFBCMR is bound to draw every reasonable inference from the evidence in favor of the principals who resolved questions of fact and took the actions at issue. Deference is not blind as the AFBCMR can reverse an arbitrary or capricious decision for an abuse of discretion. *Roberts v. United States*, 741 F.3d 152, 158 (D.C. Cir. 2014) (reviewing

¹ Typographical error. The discharge authority granted the applicant’s request on 3 Mar 03.

decision of a military corrections board under an “unusually deferential application of the ‘arbitrary or capricious’ standard”).

Every reasonable inference from the evidence supports the decisions of the principals who resolved questions of fact and took the actions at issue. There is no new evidence or facts presented by the applicant and the applicant was afforded due process in all actions.

The complete advisory opinion is at Exhibit E.

APPLICANT’S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant on 29 Aug 24 for comment (Exhibit F), and the applicant replied on 23 Sep 24. In his response, counsel contends despite acknowledging the applicant has argued the evidence generated during the AFOSI investigation was insufficient to support the conclusion he had engaged in wrongdoing and his Chapter 4 request was an unknowing and involuntary act, the AF/JAJI advisory opinion nevertheless asserts the applicant has failed to demonstrate the existence of an error and/or an injustice. This advisory opinion recommends denial of the applicant’s request for relief. The applicant has indeed provided evidence and argument in support of his application for relief. Nothing in the advisory opinion adds anything to understanding this case and it amounts to nothing more than a biased opinion based on a singular conclusory statement without any factual analysis or discussion of the legal issues raised in the applicant’s legal brief to this Board. This advisory should therefore be disregarded.

The second advisory opinion, which was provided by an unnamed Psychological Advisor, also recommends denying relief. This second advisory opinion also asserts the application of liberal consideration should not attach. It should be self-evident, but we note this psychological advisory opinion must be limited to the field and issue on which this Psychological Advisor was asked to comment. This advisory opinion was presumably sought with respect to the question of whether the applicant suffered from a mental health condition at the time of discharge that may have mitigated his discharge pursuant to the Hagel, Kurta, and Wilkie memorandums. The applicant’s original petition does indeed make the argument he suffered from such a condition, and it did indeed mitigate his discharge. Counsel has no additional evidence to offer on this issue.

Finally, counsel provided a declaration issued by the applicant, in which he provides additional facts and details, all of which lend additional evidentiary basis in support of his request for relief. Specifically, the applicant provides new facts and context with respect to the manner in which the command and AFOSI approached his case. The applicant highlights the AFOSI was biased and accusatory towards him from the outset and used a confidential informant to frame the applicant. The applicant details he was never permitted to confront or examine the supposed confidential informant, nor was the alleged evidence generated by the confidential informant ever provided to the applicant or his counsel. The applicant also details the superior nature of his military service and his commendable post-service conduct.

Counsel respectfully reminds this Board it has the responsibility to independently discuss and assess whether the applicant’s arguments to this Board, including his mental health condition, mitigate the discharge, and requests the Board ignore the erroneous assertions of the advisory opinions and come to their own decision on these issues. The applicant has indeed demonstrated the result in his case constitutes both an error and an injustice and he is therefore entitled to relief for all of the reasons outlined in the original filing and as supplemented in this response.

The applicant’s complete response is at Exhibit G.

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, to include the applicant's response, 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 the rationale and recommendation of AF/JAJI and finds a preponderance of the evidence does not substantiate the applicant's contentions. There is no evidence or records the applicant's mental health condition of PTSD had existed or occurred during his military service. There are no records he received any mental health treatment, evaluation, or mental disorder diagnosis during service or in his lifetime. Further, the DD Form 457, *Investigating Officer's Report*, provided by the applicant, noted, "Mental Status of the Accused: Both parties stated they had no reason to challenge the mental status of the accused" indicating there were no issues with the applicant's mental health status, he did not have a mental health condition, his mental health condition did not cause his misconduct, and/or his mental health condition did not impede his ability to participate in his own defense. Liberal consideration was applied; however, the applicant's mental health condition does not excuse or mitigate his discharge.

Additionally, the Board finds every reasonable inference from the evidence supports the decisions of the principals who resolved questions of fact and took the actions at issue. There is no new evidence or facts presented by the applicant and the applicant was afforded due process in all actions.

Finally, 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 post-service information and the criminal history provided by the applicant (he was arrested on 30 Jun 09 for multiple charges including marijuana possession/use, drug paraphernalia possession/use, narcotic drug possessions/use, dangerous drug possession/use, narcotic drug violation, and marijuana violation, but no complaint was filed resulting in a court dismissal), 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-2021-01800 in Executive Session on 18 Dec 24:

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 1 Feb 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 25 Jul 24.
- Exhibit D: Advisory Opinion, AFRBA Psychological Advisor, dated 17 Jul 24.
- Exhibit E: Advisory Opinion, AF/JAJI, dated 28 Aug 24.
- Exhibit F: Notification of Advisory, SAF/MRBC to Counsel, dated 29 Aug 24.
- Exhibit G: Counsel's Response, w/atchs, dated 23 Sep 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.

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Board Operations Manager, AFBCMR
Signed by: USAF